

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

WILBUR YUNUEN OSORIO-VASQUEZ,
Petitioner.

No. 2 CA-CR 2017-0075-PR
Filed June 7, 2017

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Pima County
No. CR20111954002
The Honorable Jane L. Eikleberry, Judge

REVIEW GRANTED; RELIEF GRANTED IN PART; REMANDED

Wilbur Yunuen Osorio-Vasquez, Eloy
In Propria Persona

STATE v. OSORIO-VASQUEZ
Decision of the Court

MEMORANDUM DECISION

Presiding Judge Vásquez authored the decision of the Court, in which Judge Miller and Judge Howard¹ concurred.

V Á S Q U E Z, Presiding Judge:

¶1 Wilbur Osorio-Vasquez seeks review of the trial court’s order summarily dismissing his second, untimely petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. For the following reasons, we grant review, grant relief in part, and remand the case to the trial court for further proceedings consistent with this decision.

¶2 Pursuant to a plea agreement, Osorio-Vasquez was convicted of attempted first-degree burglary and aggravated robbery, both dangerous offenses, and theft of a means of transportation. The trial court sentenced him to somewhat aggravated, ten-year prison terms for each of the dangerous offenses, to be served consecutively, followed by a five-year term of intensive probation for the theft conviction.

¶3 In January 2013, Osorio-Vasquez’s trial attorney filed a timely, of-right notice of post-conviction relief. The court appointed counsel for the post-conviction proceedings, directing her to file a petition within 120 days of her appointment. At the attorney’s request, the court granted an extension of time, until May 28, 2013, for filing the petition. On July 3, 2013, the court denied post-conviction relief, noting that, as of that date, “neither a Petition for Post-Conviction Relief nor a request for an extension of time within which to file a petition ha[d] been filed.” Osorio-Vasquez’s Rule 32 counsel was listed as a recipient of the order denying relief.

¹The Hon. Joseph W. Howard, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and our supreme court.

STATE v. OSORIO-VASQUEZ
Decision of the Court

¶4 Three years later, in July 2016, Osorio-Vasquez filed a second, pro se notice of post-conviction relief.² By checking a box on the notice form, he claimed his failure to file a timely, of-right notice of post-conviction relief was without fault on his part. *See* Ariz. R. Crim. P. 32.1(f). With respect to this claim, he wrote that he “thought that [his] attorney would do the filing but [she] did not” and, further, she did not “notify” him.

¶5 The trial court denied Osorio-Vasquez’s request for appointed counsel, and he filed a pro se petition in which he alleged the trial court (1) erred in sentencing him to aggravated terms of imprisonment, (2) violated due process and exhibited bias at sentencing by considering statements made by victims who testified at his co-defendant’s trial, (3) imposed sentences and terms of intensive probation that were cruel and excessive, and (4) failed to award pre-sentence incarceration credits against both of his consecutive prison terms. He also claimed trial counsel was ineffective in failing to raise these claims, and he asserted both trial and Rule 32 counsel failed “to protect and preserve” his Sixth Amendment rights.

¶6 Noting that these claims were untimely and “would normally be precluded,” but that the state had failed to “plead and prove” preclusion, Ariz. R. Crim. P. 32.2(c), the trial court exercised its discretion to consider the merits of Osorio-Vasquez’s claims, *see id.* After considering Osorio-Vasquez’s arguments, the court found he failed to state any colorable claim for relief under Rule 32. The court first found none of Osorio-Vasquez’s claims of sentencing error were colorable, reasoning that his sentences were consistent with his plea agreement, were within the sentencing court’s discretion, and were

² In his notice, Osorio-Vasquez maintained he had not previously sought post-conviction relief, and he left blank the space provided for the name of any previous Rule 32 counsel. The only attorney he listed as having represented him in this matter was his trial attorney.

STATE v. OSORIO-VASQUEZ
Decision of the Court

not based on improper considerations.³ For related reasons, the court found no colorable merit to Osorio-Vasquez's claim that trial counsel had been ineffective in failing to raise these issues at sentencing, because doing so would have been futile; thus, the court concluded Osorio-Vasquez had failed to state a colorable claim of either deficient performance or prejudice with respect to his trial attorney.

¶7 In contrast, the trial court found Osorio-Vasquez's Rule 32 counsel had clearly performed deficiently by failing "to submit a petition or request an extension of time to submit a timely petition," without even "explain[ing] the reason for this failure." But the court found Osorio-Vasquez had failed to state a colorable claim of prejudice, reasoning that, even had Rule 32 counsel "filed a petition asserting specific claims, it is not guaranteed" she would have stated a colorable claim on Osorio-Vasquez's behalf. This petition for review followed the court's dismissal of Osorio-Vasquez's pro-se petition.

¶8 We review a summary denial of post-conviction relief for an abuse of discretion. *State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006). Based on the information available to the trial court when it entered its dismissal order, we cannot say it abused its discretion. As explained below, however, we nonetheless remand the case for further consideration of Osorio-Vasquez's claim of ineffective assistance of Rule 32 counsel, in light of that attorney's notice to the court, filed shortly after Osorio-Vasquez's pro se petition was dismissed.

³For example, in addressing Osorio-Vasquez's claim that an aggravated term of imprisonment had been erroneously imposed, because it was based on factors not found by a jury, the trial court pointed out that Osorio-Vasquez had expressly waived this claim in his plea agreement, which provided for the imposition of "no less than 8 years" for each dangerous offense, based on the parties' agreement that "one or more aggravating factors exist to warrant" that sentence. In the same agreement, Osorio-Vasquez waived his right to "any jury determination of aggravating factors" and agreed "that the Court, using a standard of preponderance of the evidence, may find the existence of aggravating . . . factors."

STATE v. OSORIO-VASQUEZ
Decision of the Court

¶9 To a large extent, Osorio-Vasquez restates the same arguments made in his petition below, most of which relate to alleged errors at sentencing. Other than the trial court’s analysis of Osorio-Vasquez’s claim regarding presentence incarceration credits, which we conclude it correctly rejected for reasons other than those enumerated,⁴ the court clearly identified, thoroughly addressed, and correctly resolved all other claims of sentencing error. With respect to those claims of sentencing error, and trial counsel’s omissions with respect to those alleged errors, we need not repeat the court’s correct analysis; instead, we adopt it. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993).

¶10 With respect to his claim of ineffective assistance of Rule 32 counsel, however, Osorio-Vasquez has brought a matter to our attention that we believe appropriately should be addressed, in the first instance, by the trial court. Two weeks after Osorio-Vasquez’s pro se petition was dismissed, the attorney appointed in his first Rule 32 proceeding notified the court that, although she had drafted a petition for post-conviction relief before the deadline of May 29, 2013, she had never filed it, and she was thus “at fault for not filing the Petition.”⁵ She then informed the court that her drafted petition had

⁴In addressing Osorio-Vasquez’s claim that he was entitled to 565 days of presentence incarceration credit against each of his consecutive prison terms, the trial court noted that its sentencing minute entry provided for application of the credit against both sentences. We affirm the denial of this claim on the alternate ground that “[w]hen consecutive sentences are imposed, a defendant is not entitled to presentence incarceration credit on more than one of those sentences.” *State v. McClure*, 189 Ariz. 55, 57, 938 P.2d 104, 106 (App. 1997); *see also State v. Roseberry*, 237 Ariz. 507, ¶ 7, 353 P.3d 847, 848 (2015) (appellate court will affirm denial of post-conviction relief “if it is legally correct for any reason”).

⁵ According to counsel’s notice, she had not realized this circumstance until she received a copy of the court’s order dismissing the instant proceeding. She did not explain why she failed to

STATE v. OSORIO-VASQUEZ
Decision of the Court

“focused on the issue of ineffective assistance of trial counsel, an issue which has since been addressed by the Court.” However, because she did not attach the petition she drafted in 2013 to her notice, the record does not show the issues raised in the petition.

¶11 Although the trial court found Osorio-Vasquez had failed to state a colorable claim of ineffective assistance of trial counsel in his pro se petition for post-conviction relief, he argues that “doing it himself . . . is not the same as [having] an attorney who is educated in the law and has the resources to properly file a Petition” on his behalf. We believe Osorio-Vasquez has a point. This is not a case in which a defendant was required to proceed pro se in an of-right proceeding because his attorney had notified the court that, after review of the record, she found no colorable claims to raise on his behalf. See Ariz. R. Crim. P. 32.4(c)(2); *Montgomery v. Sheldon*, 181 Ariz. 256, 260, 889 P.2d 614, 618 (1995). Rather, Rule 32 counsel prepared a petition addressing what she believed to be colorable claims of ineffective assistance of counsel, and, but for counsel’s unprofessional errors, claims raised in that petition would have been considered by the court. Review of that petition would therefore be highly probative in the court’s determination of whether Osorio-Vasquez could state a colorable claim of prejudice, as defined by *Strickland v. Washington*, 466 U.S. 668, 694 (1984), resulting from Rule 32 counsel’s deficient performance.⁶ In these unusual circumstances, we conclude remand is appropriate. Cf. *State v. Diaz*, 236 Ariz. 361, ¶¶ 10, 14, 340 P.3d 1069, 1071 (2014) (remanding case in “unusual

recognize this problem in July 2013 when the court dismissed the original proceedings.

⁶In its order dismissing Osorio-Vasquez’s pro se petition, the trial court correctly identified the two-part standard for ineffective assistance claims. See *Bennett*, 213 Ariz. 562, ¶¶ 21, 25, 146 P.3d at 68-69 (colorable claim of ineffective assistance requires some showing “that counsel’s performance fell below objectively reasonable standards” and of “a ‘reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different’”), quoting *Strickland*, 466 U.S. at 694.

STATE v. OSORIO-VASQUEZ
Decision of the Court

circumstances” of counsels’ failure to file petition for post-conviction relief on defendant’s behalf).

¶12 For the foregoing reasons, we grant relief limited to the trial court’s reconsideration of Osorio-Vasquez’s claim of ineffective assistance of Rule 32 counsel, in light of that attorney’s recent revelation that a petition for post-conviction relief was prepared, but never filed. We remand the case for the court to conduct any proceedings necessary to incorporate the missing petition in its analysis of this claim. In all other respects, we grant review, but we deny relief.