IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

MICHAEL RENNIE CARTER,
Petitioner.

No. 2 CA-CR 2017-0082-PR
Filed June 20, 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NOT FOR PUBLICATION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 Pinal County
No. S1100CR201401550
The Honorable Joseph R. Georgini, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Kent P. Volkmer, Pinal County Attorney
By Rodney States, Deputy County Attorney, Florence
Counsel for Respondent

Michael R. Carter, Eloy
In Propria Persona

MEMORANDUM DECISION

Judge Miller authored the decision of the Court, in which Presiding Judge Staring and Judge Espinosa concurred.

M I L L E R, Judge:

¶1 Michael Carter seeks review of the trial court's order summarily denying his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. We grant review but, for the following reasons, we deny relief.

¶2 Pursuant to a plea agreement, Carter was convicted of theft of a credit card after pleading no contest to that charge. The trial court found he had one historical prior felony conviction and sentenced him to an enhanced, presumptive, 2.25-year term of imprisonment.[1] Carter filed a timely notice of post-conviction relief and, after appointed counsel notified the court she could find no claims that could be raised under Rule 32, filed a pro se Rule 32 petition. In it, he alleged his trial attorney had been ineffective in failing to file a motion to suppress evidence of the credit card found on his person or a motion to dismiss the charge "for insufficient evidence." Although the court had denied Carter's request to include claims related to his conviction in Pinal County Superior Court No. S1100CR201500671, which was not identified in his Rule 32 notice, Carter also argued his attorney had been ineffective in that case by failing to retain an independent expert to examine the substance recovered from a syringe found on his person.

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[1]The sentence is consecutive to those imposed the same day for Carter's convictions for possession of dangerous drugs in Pinal County Superior Court Nos. S1100CR201402375 and S1100CR201500671.

¶3 The trial court summarily denied relief in the instant cause number, stating all of Carter's claims "are precluded as having been previously ruled upon or untimely filed or the petition lacks sufficient basis in law and fact to warrant further proceedings herein and no useful purpose would be served by further proceedings." *See* Ariz. R. Crim. P. 32.6(c) (petition subject to summary dismissal upon finding that no non-precluded claim "presents a material issue of fact or law which would entitle the defendant to relief under this rule and that no purpose would be served by any further proceedings").

¶4 On review, Carter argues his claims are neither untimely nor successive under Rule 32.2(a), as this is his first, timely Rule 32 proceeding as a pleading defendant. He maintains he was entitled to an evidentiary hearing to provide "full and fair litigation on his 4th Amendment and ineffective assistance of counsel" claims.[2]

¶5 We review a trial court's denial of post-conviction relief for an abuse of discretion and will affirm that ruling if it is legally correct for any reason. *State v. Roseberry*, 237 Ariz. 507, ¶ 7, 353 P.3d 847, 848 (2015). We will not disturb the court's ruling here.[3]

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[2] Carter also reasserts an ineffective assistance claim with respect to Pinal County No. S1100CR201500671, although he acknowledges the trial court denied his request to consolidate that claim in this proceeding. He develops no argument to challenge that ruling by the court; therefore, we regard this issue as waived on review and do not address it. *See* Ariz. R. Crim. P. 32.9 (petition for review shall contain "issues which were decided by the trial court and which the defendant wishes to present to the appellate court for review" and "[t]he reasons why the petition should be granted"; failure to raise any issue "shall constitute waiver of appellate review of that issue"); *State v. Rodriguez*, 227 Ariz. 58, n.4, 251 P.3d 1045, 1048 n.4 (App. 2010) (declining to address argument not raised in petition for review); c*f. State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (insufficient argument waives claim on appeal).

[3] We cannot agree with the state's argument that Carter's petition for review, filed in this court on February 27, 2017, "is time-barred under Rule 32.9(c)" because it was not filed within thirty days

¶6 Although Carter may not have waived his claims "on appeal, or in any previous collateral proceeding," Ariz. R. Crim. P. 32.2(a)(3), his claims of an illegal search and insufficient evidence were waived by his change of plea. *See State v. Canaday*, 116 Ariz. 296, 296, 569 P.2d 238, 238 (1977). "Like a guilty plea a plea of no contest 'is an admission of guilt for the purposes of the case,'" because a defendant who enters a no-contest plea "'waives his right to a trial and authorizes the court for purposes of the case to treat him as if he were guilty.'" *State v. Anderson*, 147 Ariz. 346, 350, 710 P.2d 456, 460 (1985) (finding "no significant difference between a plea of guilty with a protestation of innocence and a plea of no contest"), *quoting Hudson v. United States*, 272 U.S. 451, 455 (1926). Thus, a defendant who pleads "no contest" to a charge waives all non-jurisdictional defenses. *Canaday*, 116 Ariz. at 296, 569 P.2d at 238; *cf. State v. Murphy*, 97 Ariz. 14, 15, 396 P.2d 250, 250-51 (1964) (knowing and voluntary guilty plea "foreclose[s] any inquiry into the matter of [an] alleged illegal search and seizure"). [4]

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after the trial court's January 20, 2017, order denying relief. Although the state correctly points out that "[t]he thirtieth day from January 20, 2017 was February 19, 2017," February 19 fell on a Sunday, and was followed by President's Day, a national holiday. Thus, pursuant to Rule 1.3(a), Ariz. R. Crim. P., the due date for Carter's petition for review was February 21, 2017. According to Carter's signed certificate of notice, he "mailed" his petition to this court on that date. It thus appears Carter's petition for review was timely filed. *See State v. Goracke*, 210 Ariz. 20, ¶¶ 5, 10, n.3, 106 P.3d 1035, 1037-38 n.3 (App. 2005) (applying, to Rule 32 petitions for review, "prisoner mailbox rule . . . 'that a *pro se* prisoner is deemed to have filed his [petition for review] at the time it is delivered, properly addressed, to the proper prison authorities to be forwarded to the clerk of the . . . court'"), *quoting Mayer v. State*, 184 Ariz. 242, 245, 908 P.2d 56, 59 (App. 1995).

[4] In addition to waiver by operation of law, Carter's plea agreement expressly provides that "the Defendant hereby waives and gives up any and all motions, defenses, objections, or requests which Defendant has made or raised, or could assert hereafter, to the court's entry of judgment against Defendant and imposition of a sentence upon Defendant consistent with this agreement."

¶7 A defendant is entitled to "reasonably effective assistance of counsel in deciding" to change his plea, *Anderson*, 147 Ariz. at 350, 710 P.2d at 460. But, a pleading defendant who claims ineffective assistance "may only attack the voluntary and intelligent character" of his plea. *Tollett v. Henderson*, 411 U.S. 258, 267 (1973); s*ee also Anderson*, 147 Ariz. at 351, 710 P.2d at 461 (inquiring whether "advice defendant received from his trial counsel" with respect to no-contest plea "is tantamount to ineffectiveness of counsel"); *cf. State v. Quick*, 177 Ariz. 314, 316, 868 P.2d 327, 329 (App. 1993*)* (pleading defendant waives all claims of ineffective assistance except those "directly relating" to entry of his plea). To state such a claim, a defendant must show that counsel performed deficiently with respect to the decision to change his plea, *see Henderson*, 411 U.S. at 267, as well as a reasonable probability that, but for counsel's errors, he would not have entered the plea and would have insisted on going to trial, *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). Carter has never alleged in the trial court or on review that his attorney's omissions had any effect on his decision to accept the plea agreement offered by the state. *See id.* at 60 (petition insufficient to state claim of ineffective assistance where pleading defendant did not allege "he would have pleaded not guilty and insisted on going to trial" but for counsel's erroneous advice); *see also Premo v. Moore*, 562 U.S. 115, 125-26 (2011) (counsel not necessarily ineffective in advising defendant to plead guilty before filing motion to suppress).

¶8 The trial court did not abuse its discretion in summarily dismissing Carter's pro se petition upon finding it lacked a "sufficient basis in law and fact" to warrant an evidentiary hearing. *See* Ariz. R. Crim. P. 32.6(c). Accordingly, although we grant review, we deny relief.