

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

BRANDON M. FRYE,
Petitioner.

No. 2 CA-CR 2017-0088-PR
Filed June 14, 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NOT FOR PUBLICATION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. CR20154023001
The Honorable Howard Fell, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Law Offices of Henry Jacobs, PLLC, Tucson
By Henry Jacobs
Counsel for Petitioner

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MEMORANDUM DECISION

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

ESPINOSA, Judge:

¶1 Brandon Frye seeks review of the trial court's summary dismissal of his of-right petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. We grant review, but for the reasons stated below, we deny relief.

¶2 Pursuant to a plea agreement, Frye was convicted in February 2016 of aggravated assault on a corrections employee. The trial court sentenced him to a maximum, two-year prison term, consecutive to prison terms he was already serving. In June 2016, Frye filed an untimely notice of post-conviction relief in which he alleged, without further explanation, that his failure to timely file his of-right notice was without fault on his part. *See* Ariz. R. Crim. P. 32.1(f). The court appointed counsel, and, in the petition that followed, Frye alleged the factual basis for his guilty plea was insufficient to support his conviction for aggravated assault. Specifically, Frye argued there was no factual basis for finding he had caused physical injury to the corrections officer he had "head-butted" after breaking free from another officer's grasp, *see* A.R.S. § 12-1203(A)(1); that he "*intentionally* placed [the victim] in reasonable apprehension of imminent physical injury," *see* § 12-1203(A)(2); or that he "*knowingly* touched another person *with the intent to injure, insult or provoke such person,*" *see* § 12-1203(A)(3).

¶3 The trial court dismissed Frye's petition for failure to state a colorable claim, finding the factual basis at the change-of-plea hearing and testimony before the grand jury "were strong enough to support each element of the crime." Citing a dictionary's definition of the term, the court concluded, "the phrase head-butt communicates an aggressive touching." This petition for review followed.

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¶4 We review a summary denial of post-conviction relief based on the lack of a colorable claim for an abuse of discretion. *State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006). We find none here. Without citation to legal authority, Frye contends the trial court abused its discretion by relying on the definition of “head-butt” to find the factual basis sufficient to support his conviction. He argues he “never acknowledged that he intentionally hit the corrections officer with his head,” and he further states, “That term was not used during the change of plea,” but by the detective who testified before the grand jury. But Frye’s plea agreement provided that, “[i]n addition to the factual basis and *mens rea* provided by the defendant, the Grand Jury . . . Transcript is hereby expressly incorporated within the factual basis required by this Agreement,” and, at Frye’s change-of-plea hearing, the court also incorporated that transcript for the purpose of establishing a factual basis.

¶5 The factual basis for a guilty plea does not require a finding of guilt beyond a reasonable doubt, but only strong evidence of guilt. *State v. Salinas*, 181 Ariz. 104, 106, 887 P.2d 985, 987 (1994). And in ascertaining that basis “[i]t is well established in this state that a judge is not limited to a defendant’s statement at the plea hearing.” *Id.* at 107, 887 P.2d at 988, quoting *State v. Brooks*, 120 Ariz. 458, 461, 586 P.2d 1270, 1273 (1978). The grand jury heard evidence that two corrections officers were escorting Frye when he “broke free” from the grasp of one officer and “head-butted” the other, hitting him under his chin. “Criminal intent, being a state of mind, is shown by circumstantial evidence,” including a defendant’s conduct, *State v. Routhier*, 137 Ariz. 90, 99, 669 P.2d 68, 77 (1983), and such evidence is relevant in determining the factual basis for a guilty plea, see *State v. Ovante*, 231 Ariz. 180, ¶ 16, 291 P.3d 974, 979 (2013). Importantly, in pleading guilty, Frye never gave the trial court reason to question the grand jury testimony; he never asserted he was innocent or told the court he lacked the requisite intent to commit assault. See *Salinas*, 181 Ariz. at 107-08, 887 P.2d at 988-89 (absent “protestation of innocence,” court not required to conduct more searching inquiry of factual basis).

¶6 In its thorough ruling, the trial court clearly identified, addressed, and correctly resolved Frye’s claim in a manner sufficient

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to permit this or any other court to conduct a meaningful review. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993). Accordingly, no purpose would be served by repeating the court's analysis here; instead, we adopt it. *See id.* We add only that dismissal of this proceeding was appropriate for the additional reason that Frye failed to set forth, in his notice of post-conviction relief, "the reasons for not raising the claim . . . in a timely manner," despite his assertion that he was entitled, pursuant to Rule 32.1(f), to initiate an untimely of-right proceeding. *See* Ariz. R. Crim. P. 32.2(b) (untimely notice of post-conviction relief subject to summary dismissal absent "meritorious reasons" supporting claimed exception to preclusion and "indicating why the claim was not stated . . . in a timely manner").

¶7 For the foregoing reasons, although we grant review, relief is denied.