

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

ARMANDO ANDRES ORTIZ,
Petitioner.

No. 2 CA-CR 2017-0121-PR
Filed October 19, 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NOT FOR PUBLICATION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. CR20114276001
The Honorable Jane L. Eikleberry, Judge

REVIEW GRANTED; RELIEF DENIED

Armando Andres Ortiz, Florence
In Propria Persona

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MEMORANDUM DECISION

Chief Judge Eckerstrom authored the decision of the Court, in which Judge Eppich and Judge Staring concurred.

ECKERSTROM, Chief Judge:

¶1 Petitioner Armando Ortiz seeks review of the trial court's order, entered after remand from this court, vacating his conviction and sentence for burglary and, on the state's motion, dismissing the burglary charge.¹ For the following reasons, we grant review, but we deny relief.

¶2 After a jury trial, Ortiz was convicted of burglary and two counts each of aggravated assault and attempted second-degree murder, all dangerous offenses. He was sentenced to concurrent, maximum prison terms of twenty years for the burglary and aggravated assaults and twenty-eight years for the attempted-murder convictions. On appeal, this court vacated his convictions and sentences for attempted murder, as well as a criminal restitution order entered at sentencing, and affirmed his other convictions and sentences. *State v. Ortiz*, No. 2 CA-CR 2013-0157, ¶ 19 (Ariz. App. May 16, 2014) (mem. decision).

¶3 Ortiz then filed a notice of post-conviction relief and, after appointed counsel notified the trial court that she could find no claim to raise, he filed a pro se petition alleging several ways in which his attorney had rendered constitutionally ineffective assistance. The

¹In vacating Ortiz's sentence for burglary and dismissing the charge, the trial court implicitly vacated his conviction for burglary as well, and we construe its order accordingly. *Cf.* Ariz. R. Crim. P. 32.8 ("If the court finds in favor of the defendant, it shall enter an appropriate order with respect to the conviction, sentence or detention, any further proceedings, including a new trial and conditions of release, and other matters that may be necessary and proper.").

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trial court addressed these claims in a ruling summarily denying relief. On review, we granted limited relief and remanded the case, directing the court “to appoint counsel for Ortiz and to conduct an evidentiary hearing, limited to his claim that counsel rendered ineffective assistance at trial with respect to the charge of burglary.” *State v. Ortiz*, No. 2 CA-CR 2015-0286, ¶ 26 (Ariz. App. Dec. 2, 2015) (mem. decision). We then stated, “We deny relief for Ortiz’s other claims of ineffective assistance of counsel.” *Id.*

¶4 At the evidentiary hearing on remand, the state moved to dismiss the burglary charge, apparently conceding Ortiz was entitled to relief from that conviction and sentence.² Noting that this court had limited the inquiry on remand to Ortiz’s allegations about his attorney’s representation on the burglary charge, the court concluded dismissal of the burglary charge “resolve[d] the issue,” obviating the need for further proceedings. This petition for review followed.

¶5 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). We find none here.

¶6 On review, Ortiz argues he was entitled to an evidentiary hearing to “expand the record” to “show the full extent of [his] trial counsel[']s ineffectiveness and his role in assisting the state [in] obtain[ing] illegal conviction(s),” as well as related discovery “to further substantiate” those claims.³ He reasserts claims of ineffective

²Ortiz had successfully argued his attorney was ineffective in failing to object to a jury instruction on the burglary charge that omitted a statutory exception relevant to his defense. *Ortiz*, No. 2 CA-CR 2015-0286, ¶¶ 11-15.

³To the extent Ortiz suggests the trial court abused its discretion in denying his requests for discovery, we cannot agree. The scope of the evidentiary hearing to be held on remand was expressly limited to allegations related to the burglary charge, and, because that charge was dismissed, neither the evidentiary hearing nor additional discovery was needed. To the extent Ortiz faults his appointed counsel for failing to assist him in the proceedings on remand, such

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assistance that have been denied and argues that “just dismissing the burglary charge does not alleviate the fact that [his] counsel at trial was ineffective . . . [and t]he result of [his] proceeding is thus rendered unreliable.”⁴ The trial court correctly understood the limited nature of our directions on remand, and Ortiz has had the opportunity to

allegations, even if brought in a subsequent proceeding, would not support a cognizable claim under Rule 32. *See State v. Escareno-Meraz*, 232 Ariz. 586, ¶ 4, 307 P.3d 1013, 1014 (App. 2013) (non-pleading defendant’s claim of ineffective assistance of Rule 32 counsel not cognizable under Rule 32).

⁴As in his previous petition for review, Ortiz maintains the alleged errors or omissions he identified in his petition for post-conviction relief established that his attorney “breach[ed] his duty of loyalty,” “assisted the state in obtaining an illegal conviction(s),” and “was complicit with prosecutorial misconduct” “due to his conflict of interest with the state.” But these arguments were related to Ortiz’s specific allegations that counsel failed to object to an erroneous jury instruction for the burglary charge, failed to investigate or request alternative instructions for a justification defense, and suggested, during closing argument, that the state had proven elements of burglary and aggravated assault but not the more serious charges of robbery and attempted murder. To the extent Ortiz now argues his attorney was also ineffective in “telling [him] not to testify” or in failing to admit pictures of injuries Ortiz had suffered, those issues were not raised in Ortiz’s petition for post-conviction relief or his previous petition for review and are now waived. *See Strickland v. Washington*, 466 U.S. 668, 690 (1984) (“A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment.”); *see also* Ariz. R. Crim. P. 32.9(c)(1) (petition for review to contain issues “decided by the trial court . . . which the defendant wishes to present to the appellate court for review”; issues that could be, but are not, raised in petition for review are deemed waived); *State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (appellate court does not consider issues in petition for review that “have obviously never been presented to the trial court for its consideration”).

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challenge our decision, and the limited relief afforded therein, in the Arizona Supreme Court, which denied his petition for review. The trial court's order vacating Ortiz's conviction and sentence for burglary, based on the state's motion to dismiss, affords him with greater relief than the remedy of a new trial – limited to the burglary charge – had he prevailed after an evidentiary hearing.⁵

¶7 The court did not abuse its discretion in resolving Ortiz's single remaining claim of ineffective assistance in this manner. Accordingly, we deny relief.

⁵In our previous memorandum decision, we concluded the trial court did not abuse its discretion in finding counsel's allegedly deficient conduct had not prejudiced Ortiz with respect to the jury's guilty verdicts on the aggravated assault charges. *Ortiz*, No. 2 CA-CR 2015-0286, ¶¶ 21-22.