

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

PETER WILLIAM ROSS III,
Petitioner.

No. 2 CA-CR 2017-0268-PR
Filed December 13, 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NOT FOR PUBLICATION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. CR041642
The Honorable D. Douglas Metcalf, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Joel Feinman, Pima County Public Defender
By David Euchner, Assistant Public Defender, Tucson
Counsel for Petitioner

STATE v. ROSS
Decision of the Court

MEMORANDUM DECISION

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

BREARCLIFFE, Judge:

¶1 Peter Ross seeks review of the trial court's orders summarily dismissing his notice of post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P., and his subsequent motion for rehearing. We will not disturb the court's order unless the court clearly abused its discretion.¹ See *State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). Ross has not met his burden of demonstrating such abuse here.

¶2 After a 1994 jury trial, Ross was convicted of two counts of aggravated assault and sentenced to concurrent life terms without the possibility of parole for twenty-five years. We affirmed his convictions and sentences on appeal and denied relief on his petition for review of the trial court's denial of post-conviction relief. *State v. Ross*, No. 2 CA-CR 94-0077, 96-0597-PR, 96-0598-PR (Ariz. App. Jul. 23, 1998) (mem. decision). Ross was again denied post-conviction relief in 2010, and this court denied relief on review. *State v. Ross*, No. 2 CA-CR 2010-0205-PR (Ariz. App. Nov. 15, 2010) (mem. decision).

¹Ross contends that our review is de novo because "the trial court performs no discretionary act when reviewing" a notice of post-conviction relief or when determining whether a defendant has presented a colorable claim. Our supreme court has stated on numerous occasions that we review for an abuse of discretion a trial court's decision whether a claim is colorable. *State v. Amaral*, 239 Ariz. 217, ¶ 9 (2016); see *State v. Bennett*, 213 Ariz. 562, ¶ 17 (2006); *State v. Krum*, 183 Ariz. 288, 294 (1995). And, the court has broadly stated that we should "review a trial court's denial of post-conviction relief for [an] abuse of discretion." *State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). We have no authority to adopt a different standard. See *State v. McPherson*, 228 Ariz. 557, ¶ 13 (App. 2012). In any event, we need not address whether some different standard should apply to the trial court's evaluation of a notice of post-conviction relief. As we explain, Ross's claim is facially invalid in view of the record.

STATE v. ROSS
Decision of the Court

¶3 In 2017, Ross filed a notice of post-conviction relief asserting he was improperly being denied his right to a parole hearing because the Arizona Department of Corrections incorrectly claimed his sentences were to run consecutively. He also stated his sentence began on June 15, 1992, the date of his arrest. The trial court summarily dismissed the notice, concluding Ross had not yet served twenty-five years and, thus, was not eligible for parole.

¶4 Ross filed a motion for rehearing. He argued the trial court, in dismissing the petition, had erred by calculating the twenty-five-year term until he became eligible for parole from the date of sentencing, rather than the date of his arrest. He asserted, because his sentences were ordered to run concurrently to “any other sentences he was serving” at the time, he was entitled to 610 days of presentence incarceration credit from the date of his arrest in June 1992. Ross attached to that motion a partial sentencing transcript which shows defense counsel argued to the sentencing court that, because a petition to revoke Ross’s probation was pending at the time of Ross’s arrest, the sentencing court could run the new sentence “concurrent with the time that he is currently doing because he was not revoked for . . . these offenses.” The state did not object, and the court ordered “that these sentences run concurrent with any sentence the defendant is presently serving at the Department of Corrections.”

¶5 The state objected to the motion for rehearing, attaching the sentencing minute entry showing the sentencing court had awarded only seven days of presentence incarceration credit, the new terms would run concurrently with “any pending sentences at the Department of Corrections,” and the sentence was to begin on February 15, 1994. Ross responded that the seven days of credit was inconsistent with the sentencing court’s oral pronouncement of sentence. He also argued his “allegation that he was entitled to 610 days time credit on this case is sufficient to survive a dismissal of his notice” and he was entitled to file a petition for post-conviction relief.

¶6 The trial court denied the motion for rehearing, noting Ross’s claim was not “colorable.” It concluded Ross was not entitled to 610 days of presentence incarceration credit because his prison terms from other matters overlapped with the twenty-five year term, but the terms did not begin on the same date. It also determined Ross’s claim that the sentencing court had erred in awarding only seven days of presentence incarceration credit was precluded because he could have raised it on appeal. This petition for review followed.

STATE v. ROSS
Decision of the Court

¶7 On review, Ross argues his notice is not subject to summary dismissal because he has stated a viable claim pursuant to Rule 32.1(d) that he has served twenty-five years but is being denied a parole hearing. He asserts, as he did below, that the sentencing minute entry's statement that he was entitled to seven days presentence incarceration credit appears inconsistent with the sentencing transcript, which would control. *See State v. Ovante*, 231 Ariz. 180, ¶ 38 (2013) ("When a discrepancy between the trial court's oral pronouncement of a sentence and the written minute entry can be clearly resolved by looking at the record, the '[o]ral pronouncement in open court controls over the minute entry."), quoting *State v. Whitney*, 159 Ariz. 476, 487 (1989) (alteration in *Ovante*). Thus, he concludes, he is entitled to "the opportunity to develop the record" and to file a petition for post-conviction relief.

¶8 Ross characterizes his claim that he has been improperly denied a parole hearing as falling under Rule 32.1(d).² A claim under Rule 32.1(d) may be raised in an untimely proceeding like this one. Ariz. R. Crim. P. 32.4(a). However, to avoid summary dismissal, the notice must include "meritorious reasons . . . substantiating the claim." Ariz. R. Crim. P. 32.2(b).

¶9 Here, Ross claimed in his notice that the Department of Corrections incorrectly treated his sentences as consecutive and thus deprived him of his parole hearing upon completion of twenty-five years. He has cited no authority and we find none, however, suggesting a trial court or this court is required to ignore the record when considering a notice of post-conviction relief. *Cf. In re Sabino R.*, 198 Ariz. 424, ¶ 4 (App. 2000) (appellate court may "take judicial notice of anything of which the trial court could take notice," including the superior court's "own records or those of another action tried in the same court"). The record

²Ross cites *State v. Davis*, 148 Ariz. 62 (App. 1985), in support of his proposition that this claim falls within Rule 32.1(d). There, this court concluded that a defendant could raise a claim under Rule 32.1(d) that his "good time" credit had been incorrectly calculated by the Department of Corrections only if the miscalculation "result[ed] in the defendant remaining in custody when he should otherwise be free." *Id.* at 64. We did not conclude that a claim like Ross's fell within Rule 32.1(d). But, for the purposes of this decision, we will assume without deciding that a claim that parole eligibility has been improperly calculated is cognizable under Rule 32.1(d).

STATE v. ROSS
Decision of the Court

unambiguously demonstrates Ross has not yet served twenty-five years and he thus is not entitled to the relief requested. *Cf. State v. Jenkins*, 193 Ariz. 115, ¶ 15 (App. 1998) (claim not colorable when “directly contradicted by the record”).

¶10 The sentencing minute entry shows that Ross’s sentence was to begin February 15, 1994, and he was entitled to seven days presentence incarceration credit. The sentencing transcript is entirely consistent with that minute entry – Ross agreed at sentencing that he was entitled to seven days of presentence incarceration credit. As Ross acknowledges, any claim that calculation was incorrect should have been raised long ago and cannot be raised in this untimely proceeding. *See* Ariz. R. Crim. P. 32.1(c), 32.4(a). In light of the record, Ross’s claim under Rule 32.1(d) is facially invalid and the trial court did not err in summarily dismissing his notice of post-conviction relief.

¶11 We grant review but deny relief.