IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

ROBERT SHAWN HAWK,
Petitioner.

No. 2 CA-CR 2020-0197-PR
Filed November 16, 2020

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NOT FOR PUBLICATION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. 31.19(e).

Petition for Review from the Superior Court in Maricopa County
No. CR1996007956
The Honorable George H. Foster Jr., Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Mark Brnovich, Arizona Attorney General
By Michael E. Gottfried, Assistant Attorney General, Phoenix
Counsel for Respondent

Robert Hawk, San Luis
In Propria Persona

MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Eppich and Judge Eckerstrom concurred.

E S P I N O S A, Judge:

¶1 Robert Hawk seeks review of the trial court's ruling summarily dismissing his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P.[1] We will not disturb that order unless the court abused its discretion. *See State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). Hawk has not shown such abuse here.

¶2 Hawk was convicted of murder in California and sentenced to a prison term of twenty-six years to life. In Arizona, he was convicted after a bench trial of fraudulent schemes and artifices and sentenced to a five-year prison term to run consecutively to his California sentence. We affirmed his conviction and sentence on appeal. *State v. Hawk*, No. 1 CA-CR 97-0844 (Ariz. App. May 6, 1999) (mem. decision).

¶3 In March 2018, Hawk filed a motion seeking "discharge" of his sentence, asserting that he had been held in custody in California for eight years past "total period of confinement due" based on his purported parole date and that he was entitled to credit for that time under Arizona law. He asked the trial court to order that his five-year prison term had "now been fully served and satisfied." The court denied that motion in April 2018. Hawk did not seek review of that ruling, instead filing in this court a petition for writ of habeas corpus, which we dismissed for lack of jurisdiction, noting Hawk "may wish to file a petition for post-conviction relief in the superior court."

[1] Our supreme court amended the post-conviction relief rules, effective January 1, 2020. Ariz. Sup. Ct. Order R-19-0012 (Aug. 29, 2019). "The amendments apply to all cases pending on the effective date unless a court determines that 'applying the rule or amendment would be infeasible or work an injustice.'" *State v. Mendoza*, 249 Ariz. 180, n.1 (App. 2020) (quoting Ariz. Sup. Ct. Order R-19-0012). "Because it is neither infeasible nor works an injustice here, we cite to and apply the current version of the rules." *Id.*

¶4 About five months later, Hawk filed another petition for writ of habeas corpus, this time in the trial court.[2] He stated he had been released from custody in California in January 2019 and transferred to Arizona to begin his prison term for fraudulent schemes and artifices. Like in his earlier motion, he argued he had been "released to parole" in August 2013 and was entitled to credit against his Arizona sentence for the time between that date and his transfer to Arizona custody in 2019. He attached to that petition several documents, including one titled "Notice and Conditions of Parole" indicating he had been "released to parole supervision, effective 8/15/2013." Hawk had signed that document in January 2019.

¶5 In its response, the state asserted the 2013 date on the parole document was a typographical error and that Hawk had not been released to parole in California until January 22, 2019. In support, it attached a declaration by the administrator of the Arizona Department of Corrections Time Computation Unit stating he had contacted the California Board of Parole Hearings and it had confirmed that the August 2013 date was inadvertently placed on the notice Hawk relied on, and is instead "the date that [Hawk] was first eligible for parole in California." Additionally, the declaration stated the administrator had confirmed the parole board had not granted Hawk parole until September 2018 and that he became eligible for release to parole in January 2019 after the board was notified the governor would take no action in the case regarding parole. The state also included a memorandum confirming the dates of Hawk's parole eligibility and later grant of parole. The trial court summarily dismissed the proceeding, and this petition for review followed.

¶6 On review, Hawk repeats his claim that he was actually released to parole in August 2013 and is thus entitled to credit against his Arizona sentence. If Hawk is correct, his claim falls under Rule 32.1(d), which permits relief when a "defendant continues to be or will continue to be in custody after his or her sentence expired." Such a claim may be raised in an untimely proceeding like this one. *See* Ariz. R. Crim. P. 32.2(b), 32.4(b)(3)(B). However, the claim may still be subject to preclusion under Rule 32.2(a)(2) if it was "finally adjudicated on the merits in an appeal or in any previous post-conviction proceeding." *See* Ariz. R. Crim. P. 32.2(b). As

[2]The trial court treated this filing as a petition for post-conviction relief. *See* Ariz. R. Crim. P. 32.3(b).

noted above, Hawk raised this claim in 2018 and was denied relief. Thus, the claim is precluded.

¶7 But even disregarding Hawk's earlier proceeding, his petition nonetheless warranted summary dismissal. He asserts, essentially, that he was improperly held past the expiration of his sentence in California. He has cited no authority, however, suggesting Arizona has authority to resolve the propriety of his detention in California. *See State v. Stefanovich*, 232 Ariz. 154, ¶ 16 (App. 2013) (failure to develop argument waives claim on review). And, even were that detention improper, he has cited no relevant authority suggesting Arizona would be required to give him credit for that time against his Arizona sentence. *See id.* His reliance on *State v. Johnson*, 105 Ariz. 21 (1969), is misplaced. There, our supreme court determined only that it violated double jeopardy principles to deny a defendant credit for time already served when a sentence is imposed after a new trial "upon a new conviction for the same offense." *Id.* at 22. Double jeopardy is not implicated here.

¶8 We do not address Hawk's claims that his equal protection rights or Eighth Amendment rights have been violated because he did not raise them below. *See State v. Ramirez*, 126 Ariz. 464, 468 (App. 1980); *see also* Ariz. R. Crim. P. 32.16(c)(2)(B) (petition for review must contain "issues the trial court decided that the defendant is presenting for appellate review"). And, insofar as he argues in reply that the state confessed error because it did not timely file its response to his petition for review, the state's petition was timely. *See* Ariz. R. Crim. P. 1.3(a)(5), 31.3(d), 32.16(f)(1)(A). In any event, we have discretion to disregard a purported confession of error. *See State v. Healer*, 246 Ariz. 441, n.5 (App. 2019).

¶9 Although we grant review, relief is denied.