

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

MICHAEL THOMAS AKINS,
Petitioner.

No. 2 CA-CR 2020-0204-PR
Filed December 3, 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NOT FOR PUBLICATION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 Yavapai County
Nos. P1300CR201501035 and P1300CR201700085
The Honorable Tina R. Ainley, Judge

REVIEW GRANTED; RELIEF DENIED

Michael T. Akins, Florence
In Propria Persona

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MEMORANDUM DECISION

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

V Á S Q U E Z, Chief Judge:

¶1 Michael Akins seeks review of the trial court’s ruling 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). Akins has not shown such abuse here.

¶2 After a jury trial, Akins was convicted of theft of a means of transportation and fleeing from law enforcement; based on that conviction, the trial court revoked a probation term Akins was serving for a shoplifting conviction. The court sentenced Akins to consecutive and concurrent prison terms totaling 12.75 years. We affirmed his convictions and sentences on appeal. *State v. Akins*, Nos. 1 CA-CR 17-0556, 1 CA-CR 17-0565 (Ariz. App. Mar. 1, 2018) (consol. mem. decision).

¶3 Akins sought post-conviction relief, and appointed counsel filed a notice stating he had reviewed the record but found no “colorable claims for relief to raise.” Akins filed a pro se petition arguing his trial counsel had been ineffective, identifying various instances of purported trial error, and asserting he is innocent. The trial court summarily dismissed the proceeding, concluding that Akins’s various claims of trial error were precluded and that he had not made a colorable claim of ineffective assistance. The court also denied Akins’s request to strike the

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.*

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state's response as untimely. Akins filed a motion for rehearing, which the court denied; this petition for review followed.²

¶4 On review,³ Akins first argues the trial court erred by denying his motion to strike the state's response to his petition for post-conviction relief. He asserts that, because he mailed his petition on August 12, 2019, it was deemed filed that day under Rule 1.7(b)(4), Ariz. R. Crim. P., rather than on August 14, the day it was received and filed by the clerk of the court. Thus, he concludes, because the state's time to respond under Rule 32.9(a)(1) begins to run from the filing of the petition, the state's response was due September 26—one day before it was filed.

¶5 Under Akins's interpretation, the time for the state to file a response would begin to run before the court received a defendant's petition—effectively shortening the state's time to respond. Even if we believed our supreme court intended that result under Rule 1.7(b)(4), the state's response was nonetheless timely pursuant to Rule 1.3(a)(5), Ariz. R. Crim. P., which adds five days to the response period when service is made by mail, as it was here. The trial court did not err in denying Akins's motion to strike.⁴

²The state did not file a response to Akins's petition for review, instead filing a notice stating it would "defer[] to its factual recitation and legal arguments" made in its response in the trial court. Akins argues in his reply that the state has thus "admit[ted] all claims." In our discretion, we decline to treat the state's decision not to file a response as a confession of error. *See State v. Healer*, 246 Ariz. 441, n.5 (App. 2019).

³Akins appears to have abandoned his claim of ineffective assistance of counsel. To the extent he mentions the claim on review, he has not developed any meaningful argument that the trial court erred by summarily rejecting it. Thus, we do not address it further. *See State v. Stefanovich*, 232 Ariz. 154, ¶ 16 (App. 2013) (failure to develop argument waives claim on review). Additionally, we reject his request to "to review the whole of this matter for fundamental error." We conducted that review on appeal and found no error. *Akins*, Nos. 1 CA-CR 17-0556 & 1 CA-CR 17-0565, ¶ 7.

⁴We thus need not address Akins's related argument that, as we understand it, he was entitled to an evidentiary hearing on his claims because the state's response was untimely.

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¶6 Akins next contends he was convicted based on “perjurious inadmissible testimony” and that the “physical evidence [and] truthful testimony exonerates [him].” This argument appears to mirror his claim of actual innocence raised below.⁵ To prevail, Akins was required to demonstrate, by clear and convincing evidence, “that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would find the defendant guilty of the offense beyond a reasonable doubt.” Ariz. R. Crim. P. 32.1(h). Akins has not met this standard.

¶7 Akins’s claim centers largely on a police officer’s testimony that he had recognized Akins from a photograph that he kept with him because he was seeking Akins in another matter. Akins argues that, because that photograph was not admitted into evidence, “it cannot be valid” and violated his confrontation rights. First, Akins misunderstands the significance of the photograph—the officer testified he had seen Akins on the victim’s stolen motorcycle. The photograph merely aided in his later attempt to locate Akins. Nor was Akins deprived of the opportunity to cross-examine the officer about the photograph or his investigation. And no authority supports his claim the photograph had to be admitted into evidence before the officer could testify about it. *See* Ariz. R. Evid. 602 (witness testimony limited to matters about which “the witness has personal knowledge”).

¶8 Akins also contends that footprints found where the motorcycle was discovered could not have been his, pointing to the officer’s testimony that the footprints were likely from a size 8.5 shoe and claiming he, in contrast, wears a size 9.5+ shoe. But the officer acknowledged he was not a footprint expert and testified he had merely estimated the shoe size based on an internet search. The officer’s equivocal testimony simply does not rule out Akins. The trial court did not err in rejecting his claim of innocence.

¶9 We grant review but deny relief.

⁵To the extent Akins raises claims of trial error, including his claim of prosecutorial misconduct, the trial court correctly concluded those claims are precluded as waived. Ariz. R. Crim. P. 32.2(a)(3).