

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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THE STATE OF ARIZONA,  
*Respondent,*

*v.*

AALBERT F. WIJERS,  
*Petitioner.*

No. 2 CA-CR 2022-0014-PR  
Filed June 9, 2022

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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NOT FOR PUBLICATION  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).*

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Petition for Review from the Superior Court in Pima County  
No. CR20162693001  
The Honorable Gus Aragon, Judge  
The Honorable Laurie B. San Angelo, Judge

**REVIEW GRANTED; RELIEF DENIED**

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Aalbert F. Wijers, Yuma  
*In Propria Persona*

STATE v. WIJERS  
Decision of the Court

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**MEMORANDUM DECISION**

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

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V Á S Q U E Z, Chief Judge:

¶1 Petitioner Aalbert Wijers seeks review of the trial court’s order dismissing all but one of his claims in his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. “We will not disturb a trial court’s ruling on a petition for post-conviction relief absent a clear abuse of discretion.” *State v. Swoopes*, 216 Ariz. 390, ¶ 4 (App. 2007). Wijers has not sustained his burden of establishing such abuse here.

¶2 After a jury trial, Wijers was convicted of two counts of aggravated driving under the influence of an intoxicant (DUI), specifically: DUI with two or more DUI violations in the preceding eighty-four months and driving with a blood alcohol concentration of .08 or greater having two or more DUI violations in the previous eighty-four months. In July 2018, the trial court sentenced him to concurrent, ten-year prison terms and imposed various fines, fees, and assessments for each offense. This court affirmed his convictions and sentences on appeal. *State v. Wijers*, No. 2 CA-CR 2018-0221 (Ariz. App. July 17, 2019) (mem. decision).

¶3 In June 2020, Wijers filed a notice of post-conviction relief, in which he indicated he was raising a claim of ineffective assistance of counsel and that he was not at fault for the failure to timely file the notice. He also filed a pro se petition for post-conviction relief, raising various claims of ineffective assistance of counsel<sup>1</sup> and a “fundamentally manifest injustice.” The trial court appointed counsel.

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<sup>1</sup>Wijers argued trial counsel had been ineffective in failing to file a motion to dismiss the indictment against him, to argue two prior DUI offenses would not support his conviction under A.R.S. § 28-1383(A)(2), or to object to the trial court finding that probation was not appropriate. And he claimed appellate counsel had been ineffective in filing a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), in failing to provide him records needed to prepare his supplemental brief, and in abandoning him on appeal.

STATE v. WIJERS  
Decision of the Court

¶4 In a petition filed by appointed counsel, Wijers argued that the trial court had illegally imposed certain assessments and fees because they were not orally pronounced at sentencing. He also asserted that appellate counsel had been ineffective in failing to raise that issue on appeal. After Wijers filed a motion to dismiss counsel and represent himself, the court granted his motion and determined that it would consider both the petition Wijers had filed in June 2020 and the petition filed by counsel, and set the matter for an evidentiary hearing. Before the hearing, upon Wijers’s request, the court appointed new counsel.

¶5 After the hearing, the trial court granted Wijers relief in part. The court found that Wijers had not been at fault for the untimely filing of his notice, but otherwise rejected the claims raised in his June pro se petition. It determined, however, that Wijers was entitled to relief on his sentencing claims, concluding that his “sentence was illegal as the trial court failed to orally pronounce all statutory fees and/or assessments” and that he was therefore “entitled to re-sentencing.”

¶6 At the resentencing hearing in November 2021, Wijers requested that the court “vacate[]” the fines and fees, but that if it were to resentence him that it “be a full resentencing regarding the sentence.” The trial court noted that it had been “clear that the resentencing was on fines, fees and assessments only as they were not pronounced in open court at the time of the original sentencing.” The court therefore affirmed Wijers’s previous sentence, and orally pronounced his sentence as to the fines, fees, and assessments.<sup>2</sup>

¶7 In his petition for review, Wijers argues the trial court abused its discretion in dismissing the claims raised in his pro se petition, in “ordering resentencing to impose fines and fees NOT imposed by the sentencing court,” and by failing to rule on his Sixth Amendment claim that the court had improperly released the jury “without [his] permission.”

¶8 Wijers’s arguments related to his pro se petition focus on his claims of ineffective assistance of appellate counsel. The trial court agreed with Wijers that “appellate counsel’s conduct fell below the objective standard of reasonableness.” The court, however, concluded Wijers had not been prejudiced by appellate counsel’s failures. It found that this court had considered Wijers’s pro se brief on appeal and determined no arguable

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<sup>2</sup>Wijers’s separate appeal of this sentence is currently pending before this court.

STATE v. WIJERS  
Decision of the Court

issues were presented. The trial court also explained that it had excused Wijers's untimely notice of post-conviction relief based on Rule 32.1(f), Ariz. R. Crim. P., and had found no merit in the remaining claims raised in his pro se petition for post-conviction relief.

¶9 Wijers argues on review, however, that he was prejudiced because counsel's failures "prevented [him] from raising arguable appellate issues in his brief." Insofar as we understand his argument, he suggests he could have raised a Sixth Amendment claim related to the lack of a jury finding as to his prior convictions, either to prove the current charges or to aggravate his sentences. Wijers did not include the Sixth Amendment claim in his pro se petition for post-conviction relief.<sup>3</sup> Even were the claim not waived by his failure to present it to the trial court as a ground for prejudice, however, it is without merit.

¶10 To the extent Wijers suggests there was no jury finding as to his guilt, evidence in support of his prior convictions was presented to the jury at trial. Thus, the jury's verdict of guilt encompassed a finding beyond a reasonable doubt that Wijers had been previously convicted as required by § 28-1383(A)(2). As to any claim of error relating to consideration of aggravating factors at sentencing, Wijers received presumptive terms of imprisonment on both of his convictions, and therefore no jury finding as to any aggravating factors was required. *See State v. Johnson*, 210 Ariz. 438, ¶¶ 12-13 (App. 2005) (jury findings only required for sentence greater than presumptive to be imposed).

¶11 Finally, Wijers raises claims related to the trial court's imposition of sentence at his resentencing. These claims are precluded under Rule 32.2(a)(1), Ariz. R. Crim. P., as they are "raiseable on direct appeal."

¶12 We grant the petition for review, but deny relief.

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<sup>3</sup>Wijers filed motions to amend his pro se petition to include a Sixth Amendment argument after counsel had been appointed, but those motions were denied. Wijers cites no authority to suggest the trial court abused its discretion in denying the motions. *See* Ariz. R. Crim. P. 32.16(c)(2)(D).