

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

GILBERT GONZALES OLIVAS,
Petitioner.

No. 2 CA-CR 2022-0078-PR
Filed August 4, 2022

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NOT FOR PUBLICATION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 Pima County
No. CR20102517002
The Honorable Christopher C. Browning, Judge

REVIEW GRANTED; RELIEF DENIED

Gilbert Olivas, Florence
In Propria Persona

STATE v. OLIVAS
Decision of the Court

MEMORANDUM DECISION

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

ECKERSTROM, Presiding Judge:

¶1 Gilbert Gonzales Olivas 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., and granting partial relief on his motion for reconsideration.¹ We will not disturb that order unless the court abused its discretion. *See State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). We find no such abuse here.

¶2 A summary of the procedural history of this case is helpful to understand our decision on review. Olivas was convicted after a jury trial of two counts of aggravated assault with a deadly weapon (counts one and two) and one count each of vehicle theft (count seven), armed robbery (count eight), and aggravated robbery (count nine). In 2012, the trial court imposed a combination of concurrent and consecutive prison terms totaling thirty-five years.² In 2014, the court granted partial relief in Olivas’s first post-conviction proceeding, resentencing him on count nine.³ Olivas filed

¹As explained in greater detail below and as acknowledged by the trial court in its ruling, Olivas’s motion for reconsideration arises from his third Rule 32 petition, rather than his fourth petition, the one now before us on review. However, in the single ruling before us on review, the court addressed an issue raised in the motion for reconsideration, amending its 2019 resentencing order to correct “either a typographical error or an illegal sentence,” as explained below. We do not disturb that ruling on review. Additionally, we note that Rule 32 permits a motion for rehearing from the court’s final decision on a Rule 32 petition, rather than a motion for reconsideration. *See generally* Ariz. R. Crim. P. 32.14.

²The trial court ordered that counts seven, eight, and nine be served concurrently with count one, and that count two was to run consecutively to count one.

³The 2014 resentencing did not affect the length of Olivas’s aggregate sentence.

STATE v. OLIVAS
Decision of the Court

a successive Rule 32 petition in 2015, raising claims of ineffective assistance of counsel, as he had in his first petition.

¶3 Olivas subsequently filed a petition for writ of habeas corpus in the United States District Court, asserting, in part, that the trial court had improperly enhanced some of his sentences and that counsel had been ineffective for failing to raise this claim. The district court granted habeas relief and remanded for resentencing on counts one, two, and eight, “in accordance with the parties’ stipulation that . . . Olivas has one historical prior dangerous felony conviction for sentence enhancement purposes.” In 2019, the trial court resentenced Olivas on those counts, expressly noting it had the authority only “to alter appropriately the sentencing ranges as to Counts 1, 2 and 8, and . . . not to change the original determination as to which of those counts were concurrent and consecutive.” The court specifically noted it intended to “abide the earlier sentencing determination as to concurrent and consecutive” sentences as set forth in its original 2012 sentencing minute entry.⁴ On appeal, we affirmed Olivas’s sentences, rejecting his argument that, on resentencing, the court had erroneously concluded it “did not have discretion to reconsider making the sentence for count two concurrent” with his remaining counts. *State v. Olivas*, No. 2 CA-CR 2019-0254, ¶¶ 7, 12 (Ariz. App. June 11, 2020) (mem. decision).

¶4 In August 2020, Olivas filed his third Rule 32 petition, asserting that his attorney at the 2019 resentencing hearing should have challenged the conduct of his sentencing attorney at his original sentencing in 2012 and objected to the trial court’s failure to properly designate whether some of his sentences were concurrent or consecutive at that resentencing. The court summarily dismissed that petition in July 2021. In September 2021, Olivas filed a motion for reconsideration of the court’s dismissal of his August 2020 petition.

¶5 In October 2021, Olivas filed his fourth Rule 32 petition, the dismissal of which is now before us on review. He asserted a claim under

⁴However, at the 2019 resentencing hearing, after some confusion regarding the original sentence the trial court had imposed in 2012, the court ordered that “Counts 1 [11.25 years] and 8 [fourteen years] be concurrent with one another, and Count 2 [ten years] be consecutive to Counts 1 and 8.” This conflicted with the original 2012 sentencing order, which provided that count two was consecutive only to count one and that all other sentences were concurrent with count one. As the court explained in its ruling below, it “made an error [at] resentencing when it designated that count two would run consecutive to counts one and eight resulting in a twenty-four-year (24) total sentence,” instead of a 21.25-year sentence.

STATE v. OLIVAS
Decision of the Court

Rule 32.1(h), arguing that no reasonable jury could find him guilty beyond a reasonable doubt of each of the counts of aggravated assault as charged in the indictment because the jury instructions did not include an essential element of those offenses, specifically, aggravated assault of a peace officer.⁵ See A.R.S. § 13-1204(A), (C). The state responded to both Olivas's motion for reconsideration of the dismissal of the third petition and to the fourth petition, and, on March 4, 2022, Olivas filed two separate pleadings replying to each of the state's responses. In its ruling, the trial court stated while it would not specifically address the issue of ineffective assistance of resentencing counsel, which Olivas had raised in his motion for reconsideration, it would nonetheless "rectif[y] the issue" in its ruling. The court then amended its 2019 resentencing order "to reflect that count two run[s] consecutive **only** to count one," as it intended when it originally sentenced Olivas in 2012, thus making his current sentence 21.25 years. The court further noted that, "[r]egardless of any other issues being precluded or waived, this issue is not." The court then denied Olivas's other claims, concluding they were either precluded or waived, and were, in any event, without merit. This petition for review followed.

¶6 On review, Olivas asserts that "the trial court's modification of [its] mistake to remove the armed robbery [count eight] from running consecutive to count two did not cure the heart of the error resulting in the miscalculation of his sentence," a claim he raised under the umbrella of ineffective assistance of resentencing counsel. He also reasserts his claim that the court had the authority to revisit the imposition of concurrent rather than consecutive sentences for counts one and two. Additionally, Olivas restates his claim based on Rule 32.1(h), explained above.

¶7 In regard to Olivas's claim that his sentence for count eight was "miscalculated" and that resentencing counsel should have raised this claim, the trial court addressed the core of that claim when it amended its 2019 resentencing order in its ruling below. To the extent we understand Olivas's argument to be that resentencing counsel should have raised other issues related to count eight, including the conduct of counsel at the original

⁵The relevant counts in the indictment (counts one and two) refer to both subsections (A) and (C) of the aggravated assault statute, A.R.S. § 13-1204. Notably, neither the sentences imposed nor the record on appeal suggest that Olivas was convicted of or sentenced for aggravated assault of a peace officer, a conclusion the trial court confirmed in its ruling below. See § 13-1204(C), (F). Similarly, in its response to Olivas's Rule 32 petition below, the state asserted, and the record seems to support, that Olivas was found guilty of two counts of aggravated assault under § 13-1204(A)(2), and not under subsection (C).

STATE v. OLIVAS
Decision of the Court

2012 sentencing hearing, the court correctly made clear that it was limited at resentencing to address only the issue specified by the federal district court in the habeas proceeding. Thus, counsel could not be faulted for failing to raise additional arguments the court would not have been able to address.

¶8 Similarly, insofar as Olivas also argues resentencing counsel should have objected to the trial court's failure to revisit the imposition of consecutive sentences for counts one and two, the court correctly noted that "[a]ny arguments to reconsider the sentencing structure have already been ruled upon and remain firm on binding legal precedent under *State v. Healer*, 246 Ariz. 441 (App. 2019)." And, as noted above, this court found that the trial court "did not abuse its discretion in ruling [at resentencing] that it was not permitted to reconsider whether Olivas's sentence for count two should run concurrently with his other terms of imprisonment." *Olivas*, No. 2 CA-CR 2019-0254, ¶ 12. Again, we conclude the court did not abuse its discretion by declining to address a claim of ineffective assistance based on counsel's failure to raise an argument the court did not have the authority to address.

¶9 Finally, Olivas does not meaningfully address the issue of preclusion, other than obliquely asserting that his fourth petition is based on different "grounds" than those he relied upon in earlier petitions. Notably, Olivas did not present sufficient reasons why he had not raised his claim based on Rule 32.1(h) in a previous notice or petition or in a timely manner. *See* Ariz. R. Crim. P. 32.2(b) (when defendant raises claim under Rule 32.1(b)-(h) "in a successive or untimely post-conviction notice, the defendant must explain the reasons for not raising the claim in a previous notice or petition, or for not raising the claim in a timely manner"). "If the notice does not provide sufficient reasons why the defendant did not raise the claim in a previous notice or petition, or in a timely manner, the court may summarily dismiss the notice." *Id.*; *see also* Ariz. R. Crim. P. 32.4(b)(3)(B) (defendant must file notice for claim under Rule 32.1(b)-(h) within reasonable time after discovering basis for claim). Based on this record, we conclude the trial court did not abuse its discretion in finding that Olivas's claim based on Rule 32.1(h) was precluded. *See Roseberry*, 237 Ariz. 507, ¶ 7 (we will affirm if trial court's ruling is legally correct for any reason).

¶10 Accordingly, we grant review but deny relief.