FILED BY CLERK
DEC -1 2009
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. ERVIN ALAN MOORE, Petitioner.	2 CA-CR 2009-0244-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20051868

Honorable Richard Nichols, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines
Tucson
Attorneys for Respondent

Ervin Alan Moore
Hinton, Oklahoma
In Propria Persona

H O W A R D, Chief Judge.

¶1 A jury found Ervin Moore guilty of attempted theft of a means of transportation, third-degree burglary, and resisting arrest. He appealed these convictions,

and this court affirmed. *State v. Moore*, No. 2 CA-CR 2007-0219 (memorandum decision filed June 4, 2008). Moore subsequently sought relief pursuant to Rule 32, Ariz. R. Crim. P., raising claims of ineffective assistance of counsel. Moore's attorney filed a motion stating that he found "no tenable issue for review" and requested that the court allow Moore to file a pro se supplemental petition, which request the trial court granted.[1] After Moore filed his petition, the trial court dismissed it, denying relief; Moore then filed this petition for review.

Discussion

¶2 In his petition for review, Moore raises two claims of ineffective assistance of counsel and alleges that his "right to a fair trial, and fair appeal, [was] denied due to the state's discovery violations." But as Moore concedes, the latter claim was not raised in the Rule 32 petition filed below. Accordingly, we do not address it. *See* Ariz. R. Crim. P. 32.9(c)(1)(ii) (petitioner may raise on review issues denied by trial court); *see also State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (appellate court does not consider issues first presented in petition for review that "have obviously never been presented to the trial court for its consideration").

¶3 In reviewing Moore's two ineffective assistance claims, we will not disturb the trial court's ruling absent a clear abuse of the court's discretion to determine whether post-conviction relief is warranted. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Moore has not sustained his burden of establishing the court abused its discretion.

[1]We question the propriety of the trial court's decision to grant this motion because Moore is not an of-right petitioner. *See* Ariz. R. Crim. P. 32.1, 32.4(e)(2). Nevertheless, because the court permitted Moore to file his own petition and addressed the merits of his claims, we will review it.

¶4 To establish a claim of ineffective assistance of counsel, the defendant must prove that counsel's performance was both deficient, based on "prevailing professional norms," and prejudicial to the defense. *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985) (fully adopting the two-prong test from *Strickland v. Washington*, 466 U.S. 668 (1984)). In *Strickland*, the United States Supreme Court stated that "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694. If a defendant fails to sustain his burden on one prong of the test, we need not address the second. *State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985).

¶5 Moore first contends that his attorney performed deficiently by failing to request a video surveillance tape, which he alleges would have contained exculpatory evidence. He admits, however, that he does not know that such a tape exists; he simply states that "it would be preposterous to believe, in a post 9/11 world, that the video doesn't exist." He further asserts that the videotape must exist because without it, the charges against him would not have been initially dismissed. However, mere speculation about the existence of a videotape does not amount to a "probability sufficient to undermine confidence in the outcome" of his case. *Strickland*, 466 U.S. at 694. Thus, Moore's claim is wholly speculative, and he has failed to show how counsel performed deficiently and in a manner that prejudiced the defense.

¶6 Moore also asserts that his attorney should have moved to dismiss his case because the applicable limitations period had elapsed. Moore argues A.R.S. § 13-107(G) required the state to bring new charges within six months of the dismissal of the initial charges. However, Moore was charged with four felonies, and the period of limitations

for all of these charges is seven years. § 13-107(B)(1). And that seven-year limitations period still has not lapsed.

¶7 Furthermore, Moore's reliance on subsection G of this statute is erroneous. It is a saving statute and does not shorten the statute of limitations. Instead, it allows the state to re-file within six months of a dismissal even if the period of limitations has already lapsed. *Uhlig v. Lindberg*, 189 Ariz. 480, 481, 943 P.2d 840, 841 (App. 1997) (saving statute, then numbered § 13-107(F) and since renumbered § 13-107(G) by 1997 Ariz. Sess. Laws, ch. 135, § 1, did not require new charges to be filed within six months if statute of limitations had not yet run). Moore has not proven that he suffered any prejudice.

Conclusion

¶8 Because Moore has not sustained his burden of proof, we cannot find that the trial court abused its discretion in dismissing his petition for post-conviction relief and denying relief. Although we grant the petition for review, we, too, deny relief.

JOSEPH W. HOWARD, Chief Judge

CONCURRING:

PHILIP G. ESPINOSA, Presiding Judge

GARYE L. VÁSQUEZ, Judge