

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

AUG 19 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2010-0147-PR
)	DEPARTMENT B
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
JASON RAY TYLER,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20061380

Honorable Nanette Warner, Judge

REVIEW GRANTED; RELIEF DENIED

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ECKERSTROM, Judge.

¶1 In February 2007, petitioner Jason Tyler pled guilty to conspiracy to commit fraudulent schemes and artifices in exchange for the dismissal of twenty-two

counts of forgery. The trial court sentenced Tyler to an aggravated prison term and ordered him to pay restitution. Tyler sought post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., and the court denied relief. This court denied relief on review of the court's decision in that cause and the consolidated petition for post-conviction relief in four other causes related to charges brought in 2005. *State v. Tyler*, Nos. 2 CA-CR 2008-0139, 2 CA-CR 2008-0333-PR (consolidated) (memorandum decision filed Feb. 4, 2009). Tyler now seeks review of the court's denial of his second petition for post-conviction relief in this cause. Absent a clear abuse of discretion, we will not disturb the court's ruling. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 Without referring to a specific statute, Paragraph E of Tyler's plea agreement provides that he is required to pay restitution. Paragraph F, which relates to fines and assessments, states as follows: "Pursuant to A.R.S. §§ 13-808 and 31-254(D) and (E), if the Defendant . . . is incarcerated at the Arizona Department of Corrections, thirty percent (30%) of the Defendant's prison compensation while incarcerated will be paid to the Clerk of the Superior Court as payment for restitution or fine." Tyler contended in his Rule 32 petition that on July 15, 2008, the Arizona Department of Corrections (ADOC) had issued a new procedure with respect to inmates' accounts and payment of restitution based on amendments to A.R.S. §§ 31-230 and 31-254. Tyler asserted that the new policy violates his plea agreement because ADOC was withholding fifty percent of the monies in his spendable account each month for payment of restitution in accordance with the 2007 amendment of A.R.S. § 31-230, *see* 2007 Ariz. Sess. Laws, ch. 140, § 1. He also argued that A.R.S. § 13-603 and, consequently, § 31-

230(C), were erroneously being applied to his case, even though the trial court had not ordered him to pay restitution pursuant to § 13-603 but pursuant to A.R.S. §§ 13-808 and 31-254(D) and (E).

¶3 We question at the outset whether this claim, which relates to ADOC's application of statutes affecting its management of inmates, their compensation, and their spendable accounts, was even cognizable under Rule 32. In his petition for post-conviction relief, Tyler did not identify any ground found in Rule 32.1 that applies to this claim. But even assuming the claim was appropriately asserted under the rule, because of Tyler's contentions that ADOC's new policy had resulted in the state's violation of the plea agreement and his constitutional rights, Tyler has not established on review that the trial court abused its discretion by denying relief.

¶4 In rejecting this claim, the trial court correctly noted the distinction between an inmate's compensation and an inmate's spendable account; the account may consist of funds derived from compensation as well as other sources. The court noted that in 2007, the legislature had removed subsection (E)(2) from § 31-254; that subsection had authorized ADOC to apply thirty percent of an inmate's compensation to payment of court-ordered restitution and was apparently the source of Paragraph F of the plea agreement. *See* 2007 Ariz. Sess. Laws, ch. 140, § 2. The court further noted that, also in 2007, the legislature had added subsection (C) to § 31-230; that subsection now requires a minimum of twenty percent and permits a maximum of fifty percent of the funds in an inmate's spendable account to be withdrawn from the account monthly and applied to the payment of restitution. *See* 2007 Ariz. Sess. Laws, ch. 140, § 1.

¶5 In its thorough, well-reasoned minute entry, the trial court concluded correctly that the amended provisions of these statutes apply to Tyler. The court did not err when it rejected his claim that he was entitled to relief on this ground, and we adopt its ruling. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993). Tyler has not sustained his burden on review of establishing the court abused its discretion. In that regard, we expressly reject his claim that the court's reliance upon *State v. Moore*, 156 Ariz. 566, 754 P.2d 293 (1988), was misplaced.

¶6 Similarly, Tyler has not established the trial court abused its discretion when it denied relief on his claim of prosecutorial vindictiveness. Again, we adopt the court's ruling. *Whipple*, 177 Ariz. at 274, 866 P.2d at 1360.

¶7 First, the trial court may have been correct that this claim was precluded pursuant to Rule 32.2. The claim is either essentially the same double jeopardy claim Tyler previously raised in his first petition for post-conviction relief or appears to be a claim that could have been raised in that proceeding. But the court did not abuse its discretion by correctly resolving the merits of the claim as well, in light of Tyler's argument that his claim was based, in part, on testimony elicited at the December 17, 2007, evidentiary hearing in his first post-conviction proceeding. *See Ariz. R. Crim. P. 32.2(b)* (claim based on newly discovered evidence, pursuant to Rule 32.1(e), not subject to preclusion).

¶8 In sum, Tyler has not established the trial court abused its discretion when it found he had failed to raise a colorable claim of prosecutorial vindictiveness entitling him to relief.

¶9

The petition for review is granted but relief is denied.

PETER J. ECKERSTROM, Judge

CONCURRING:

GARYE L. VÁSQUEZ, Presiding Judge

VIRGINIA C. KELLY, Judge