IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. THOMAS ALEC KIDWELL, Petitioner.	2 CA-CR 2010-0166-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court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. CR20043372

Honorable Hector E. Campoy, Judge

REVIEW GRANTED; RELIEF DENIED

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

Thomas Kidwell — Florence
In Propria Persona

E S P I N O S A, Judge.

¶1 After a jury trial, petitioner Thomas Kidwell was convicted of eight counts of sexual exploitation of a minor. The trial court sentenced him to a combination of consecutive and concurrent, mitigated and presumptive terms of imprisonment totaling

sixty years. We affirmed his convictions and sentences on appeal. *State v. Kidwell*, No. 2 CA-CR 2005-0292 (memorandum decision filed Nov. 22, 2006). Kidwell now seeks review of the trial court's summary dismissal of his pro se petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P.

¶2 Evidence at Kidwell's trial included compact discs that contained photographic images of minors engaged in exploitive exhibition or other sexual conduct. These compact discs were discovered in Kidwell's residence after Tucson police detective Mary Marquez obtained a search warrant for all computers and computer accessories found there. In his petition below, Kidwell claimed the state had failed to prove the photographs depicted actual minors and his convictions therefore violated his First Amendment rights. He also alleged all evidence obtained through execution of the search warrant should be suppressed because (1) a subsequent forensics report contained an error in Kidwell's address, and (2) forensic analysis of Kidwell's computer and computer accessories had been conducted more than five days after the search warrant's return date. He claimed trial and appellate counsel had been ineffective in failing to raise these claims and in failing to challenge the adequacy of the court's jury instructions. He also alleged trial counsel had been ineffective in failing to argue, in Kidwell's defense, that others may have had access to the computer equipment found at his residence.

¶3 In addition to these claims, which encompassed allegations of trial error and ineffective assistance of counsel, Kidwell claimed: (1) the wording of his indictment had rendered it defective; (2) no "computer search warrant" had been issued or,

alternatively, the search warrant issued was overbroad and lacked sufficient particularity; and (3) his sentence violated the Eighth Amendment of the United States Constitution.

¶4 In a well-reasoned ruling, the trial court found Kidwell's numerous claims of trial error precluded pursuant to Rule 32.2(a)(3) because he had failed to raise them on appeal. As the court explained, such claims were only cognizable under Rule 32 when raised in the context of ineffective assistance of counsel and, "to the extent that they are not based on ineffective assistance, they are precluded from consideration . . . ." The court then addressed Kidwell's non-precluded claims of ineffective assistance of trial and appellate counsel, as well as his claim, pursuant to Rule 32.1(h), that no reasonable fact-finder could have found him guilty. Finding Kidwell had failed to state any colorable, non-precluded claim, the court dismissed his petition. *See* Ariz. R. Crim. P. 32.6(c) (court shall dismiss petition if "no [non-precluded] claim presents a material issue of fact or law which would entitle the defendant to relief under this rule and . . . no purpose would be served by any further proceedings").

¶5 On review, Kidwell maintains the trial court's order failed to address his claims that (1) compact disks used as evidence at trial had been taken from his home without a search warrant "for computers or accessories"; (2) the search warrant authorizing police to search and take custody of all computers and computer accessories in Kidwell's home was overbroad and did not "meet the particularity requirements of the Fourth Amendment" of the United States Constitution;[1] and (3) the jury could not have

[1]These first two claims appear contradictory. Kidwell's assertion that "no computer or child pornography [search] warrant was issued" is based entirely on his

found him guilty of the charged offenses and also find, as it had, that the state had failed to prove the aggravating factors it had alleged.[2]

¶6 We will not disturb a trial court's summary denial of post-conviction relief absent an abuse of the court's discretion. *See State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006). We find no abuse of discretion and no need to repeat the court's correct analysis here; instead, we adopt the court's ruling. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993).

¶7 Although Kidwell contends the trial court failed to address his claims that no computer search warrant was issued or that it lacked sufficient particularity, these were among the claims of trial error the court implicitly found precluded by Kidwell's failure to raise them on appeal. The court did address Kidwell's claims that counsel had performed deficiently by failing to raise other objections to the evidence obtained by warrant, but those claims of ineffective assistance of counsel were alleged clearly in

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interpretation of remarks Marquez made during an interview. But our review of the transcript excerpt Kidwell filed below suggests, instead, that Marquez reported she had been having a discussion with the prosecutor "about issuing [charges against Kidwell on] a molest case" when a decision was made to obtain a warrant to search Kidwell's computers and computer accessories for evidence of child pornography. She then obtained a telephonic search warrant that authorized police to "take custody of and forensically analyze . . . electronic data processing and storage devices" found at Kidwell's residence, including "computers and computer system; . . . central processing units; internal and peripheral storage devices such as disks, external hard disks, floppy disk drive, tape drive and tape optical storage devices, drives and optical disks . . . ."

[2]After rendering its verdict, the jury had been asked to consider, as aggravating factors for each count, whether the victim "was of a young age" and whether Kidwell had "possessed the visual image in close proximity to his own children." The jury found the state had proven the first factor on one count only and had not proven the second factor on any of the counts.

Kidwell's petition for post-conviction relief. In contrast, his petition below contained no claim that counsel had been deficient in failing to challenge the search warrant's existence or its specificity. As emphasized in the court's ruling, it had considered only claims of trial error raised "in connection with [Kidwell's] claim of ineffective assistance of counsel." The court did not abuse its discretion in finding Kidwell had waived his claims that no search warrant had been issued or, alternatively, that the search warrant was unconstitutionally broad, by failing to raise these claims on appeal. *See* Ariz. R. Crim. P. 32.2(a)(3).

¶8 Similarly, Kidwell's petition for post-conviction relief did not include a claim that appellate counsel was ineffective in failing to argue that jury findings on two aggravating factors were inconsistent with guilty verdicts. This claim was first raised in Kidwell's reply, and then only with respect to the jury's findings on one of the queries posed. On review, Kidwell contends the jury's findings on both aggravating factors were inconsistent with its verdicts. He also asserts, generally, that he is entitled to relief because his trial and appellate counsel failed to argue the points he raises in his petition for review.

¶9 We have held a trial court need not consider claims raised for the first time in a defendant's Rule 32 reply. *State v. Lopez*, 223 Ariz. 238, ¶ 7, 221 P.3d 1052, 1054 (App. 2009). Nor will this court consider claims first raised on review. *See* Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review to contain issues "decided by the trial court . . . which the defendant wishes to present to the appellate court for review"); *State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (appellate court does not

consider issues in petition for review that "have obviously never been presented to the trial court for its consideration").

¶10 In accordance with Rule 32.6(c), the trial court first identified those claims in Kidwell's petition for post-conviction relief that were precluded; after further review, the court determined no remaining claim was colorable. Kidwell has not shown the court abused its discretion in summarily dismissing his petition for post-conviction relief. Therefore, although we grant review, we deny relief.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge