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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. VICTOR ANTONIO PARSONS, Petitioner.	2 CA-CR 2010-0220-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court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. CR20003625

Honorable Javier Chon-Lopez, Judge

REVIEW GRANTED; RELIEF DENIED

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

Victor A. Parsons
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In Propria Persona

H O W A R D, Chief Judge.

¶1 Petitioner Victor Parsons seeks review of the trial court's order summarily denying his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. Parsons was tried by a jury and convicted of two counts of dangerous-nature, aggravated

assault, one count for having committed the offenses with a deadly weapon and one for having caused serious physical injury. The convictions were based on evidence that he had stabbed his girlfriend's neighbor five times with a nine-inch hunting knife, causing injuries that included a collapsed lung. On appeal, Parsons had alleged sentencing error, including a claim that the court erroneously had considered his use of a weapon and the victim's serious physical injury to aggravate his sentences because, he claimed, the same circumstances were essential elements of the dangerous-nature finding used for sentence enhancement. Finding no fundamental error, we affirmed his convictions and sentences on appeal. *State v. Parsons*, No. 2 CA-CR 2005-0198 (memorandum decision filed Aug. 18, 2006).

¶2 Parsons filed his first notice of post-conviction relief in May 2007. After appointed counsel filed a notice pursuant to Rule 32.4(c)(2) stating she had reviewed the record and could find no claims for relief cognizable under Rule 32, the trial court granted Parsons until December 28, 2007, to file a pro se petition for post-conviction relief. In July 2008, the state moved to dismiss the proceeding on the ground that Parsons had not filed a pro se petition and the deadline for doing so had "long since passed." The court granted the state's motion and dismissed Parsons's first Rule 32 proceeding on August 19, 2008.

¶3 On December 29, 2009, Parsons simultaneously filed a successive notice and petition for post-conviction relief in which he alleged (1) trial counsel had been ineffective in failing to challenge "the double use of an aggravating circumstance" to impose sentences that were both enhanced and aggravated, and (2) his trial by an eight-

person jury was structural error entitling him to a new trial. The trial court denied relief on the ground that Parsons's claims were precluded under Rule 32.2(a). This petition for review followed.

¶4 On review, Parsons restates the claims he raised in his petition for post-conviction relief and maintains the trial court abused its discretion in denying relief. He argues his claims are not precluded because "[b]oth issues presented are raised for the first time," because a claim of ineffective assistance of counsel may be raised only in a Rule 32 proceeding, and because his trial by an eight-person jury "constitute[d] a structural error which requires an automatic reversal." We will not disturb a trial court's summary denial of post-conviction relief unless the court has abused its discretion. *State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006). We find no abuse of discretion here.

¶5 Although Parsons is correct that he could not have raised his claim of ineffective assistance of counsel on appeal, the court correctly found that claim precluded because it could have been raised in Parsons's first post-conviction relief proceeding but was not, and therefore had been waived. *See* Ariz. R. Crim. P. 32.2(a)(3) (claim precluded if "waived at trial, on appeal, or in any previous collateral proceeding"); *see also State v. Shrum*, 220 Ariz. 115, ¶¶ 5-6, 203 P.3d 1175, 1177 (2009) (noting "preclusive effect of the dismissal of [defendant]'s first PCR proceeding" on claim of illegal sentence). *Cf. State v. Swoopes*, 216 Ariz. 390, ¶ 28, 166 P.3d 945, 954 (App. 2007) ("An alleged violation of the general due process right of every defendant to a fair trial, without more, does not save that belated claim from preclusion.").

¶6 As for Parsons's claim that he had been denied his right to a twelve-person jury, he is correct that the trial court erred in finding he had raised this claim on appeal, and that it therefore was precluded pursuant to Rule 32.2(a)(2). *See* Ariz. R. Crim. P. 32(a)(2) (defendant precluded from relief based on any ground "[f]inally adjudicated on the merits on appeal or in any previous collateral proceeding"). Nonetheless, the court did not abuse its discretion in summarily denying post-conviction relief because, as a matter of law, Parsons has failed to state a colorable claim.

¶7 Article II, § 23 of the Arizona Constitution requires a twelve-member jury only in "criminal cases in which a sentence of death or imprisonment for thirty years or more is authorized by law." *See also* A.R.S. § 21-102(B) (in cases where authorized sentence less than thirty years imprisonment, jury "shall consist of eight persons"). Parsons contends he was potentially subject to thirty-years' imprisonment because each of his convictions carried a maximum penalty of fifteen years. But this argument is unavailing. Because Parsons was convicted of two offenses based on the same act, Arizona law required that he be sentenced to concurrent terms. *See* A.R.S. § 13-116 ("An act or omission which is made punishable in different ways by different sections of the laws may be punished under both, but in no event may sentences be other than concurrent.") Accordingly, the maximum term "authorized by law" for both convictions was fifteen years, served concurrently, and Parsons was not entitled to a twelve-member jury. *See* Ariz. Const. art. II, § 23.

¶8 Moreover, our supreme court recently has held that, even when a sentence of thirty years or more is authorized by law, there is no error, structural or otherwise,

when "the case proceeds to verdict with a jury of less than twelve people without objection, and the resulting sentence is less than thirty years." *State v. Soliz*, 223 Ariz. 116, ¶¶ 1, 18, 219 P.3d 1045, 1046, 1049 (2009), *abrogating State v. Henley*, 141 Ariz. 465, 469, 687 P.2d 1220, 1224 (1984), *State v. Pope*, 192 Ariz. 119, ¶ 10, 961 P.2d 1067, 1069 (App. 1998), *State v. Smith*, 197 Ariz. 333, ¶ 21, 4 P.3d 388, 395 (App. 1999), and *State v. Luque*, 171 Ariz. 198, 201, 829 P.2d 1244, 1247 (App. 1992). Here, Parsons never was subject to sentences totaling thirty years or more, he did not object at trial to an eight-member jury, and he was sentenced to concurrent, ten-year terms. His trial by a jury of eight was not error. *See Soliz*, 223 Ariz. 116, ¶ 18, 219 P.3d at 1049.

¶9 For the foregoing reasons, we grant review but deny relief.

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

CONCURRING:

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

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