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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STATE OF ARIZONA, Respondent, v. RENA ARLIEN BREWER, Petitioner.	2 CA-CR 2008-0350-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR95020491

Honorable Boyd T. Johnson, Judge

REVIEW GRANTED; RELIEF DENIED

Harriette P. Levitt — Tucson
Attorney for Petitioner

P E L A N D E R, Chief Judge.

¶1 Pursuant to a plea agreement, petitioner Rena Brewer was convicted of aggravated robbery, a class three felony. The trial court suspended the imposition of sentence and imposed a five-year term of probation to begin in April 1998. As a condition

of her probation, the court ordered Brewer to serve ninety days in jail and pay $5,266.12 in restitution. In March 2003, one month before Brewer's term of probation was to expire, the probation department filed a motion to modify her probation because she still owed "a balance of $4,806.12" of the original $5,266.12 restitution award. The distribution list on the order setting the modification hearing did not include Brewer or her most recent attorney of record, Michael Bresnehan, and neither Brewer nor Bresnehan attended the hearing.[1] Finding that Brewer had paid less than $500 of the restitution award in nearly five years, the court ordered her probation extended for three years pursuant to A.R.S. § 13-902(C)(1) and sent a copy of that modification order to Bresnehan.

¶2 The state subsequently filed a petition to revoke Brewer's probation in 2005. At a 2006 hearing related to that petition, Brewer, who was represented by attorney William Shostak,[2] admitted she had failed to report to her probation officer as required. Brewer did not challenge the 2003 extension of her probation at the 2006 hearing. Although the trial court stated it was revoking Brewer's probation, it instead reinstated her to a one-year probationary term and increased the amount of her monthly restitution. The state filed another petition to revoke probation in August 2007. At a contested hearing held in February

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[1]At the modification hearing, the probation officer who appeared on behalf of probation officer Deborah Gaines informed the judge that Brewer had called Gaines to inform her that she could not arrange transportation to attend the hearing because she was homeless.

[2]Attorney James Lachemann appeared on behalf of Shostak at one of the hearings in that matter.

2008, Pinal County Superior Court Judge Boyd Johnson found Brewer had violated the terms of her probation by failing to report to her probation officer. At a March 2008 disposition hearing, Judge Pro Tempore Bradley Soos revoked Brewer's probation and imposed a mitigated, 2.5-year term of imprisonment.

¶3 In April 2008, Brewer filed a notice of appeal from the 2008 revocation of her probation and the sentence imposed. She initiated the underlying post-conviction proceeding the following month. While her appeal was pending in this court, the trial court summarily denied relief on Brewer's petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. Brewer then filed a petition for review from that denial, which is the matter now before us. One week after Brewer filed her petition for review, we affirmed the revocation of Brewer's probation and the sentence imposed on appeal. *State v. Brewer*, No. 2 CA-CR 2008-0107 (memorandum decision filed Oct. 31, 2008). We review the trial court's denial of post-conviction relief for a clear abuse of discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). We find no abuse here.

¶4 In her petition for post-conviction relief, Brewer argued that, because the trial court had violated her right to due process at the March 2003 hearing by extending her probation without giving her notice or an opportunity to be heard, she was not legally on probation when probation was revoked, and the sentence imposed in 2008 should therefore be vacated. *State v. Korzuch*, 186 Ariz. 190, 193-94, 920 P.2d 312, 315-16 (1996) (due process guarantees probationer notice and opportunity to be heard before probation may be

extended). Brewer also raised two claims of ineffective assistance of counsel below: attorneys Lachemann and Shostak, who represented her in the 2005 and 2007 revocation proceedings, were ineffective for having failed to challenge the 2003 due process violation "after the fact," and Shostak should have objected when Judge Soos, a former county attorney who had "an inherent conflict of interest," presided over her sentencing in 2008. Brewer also claimed she was entitled to an evidentiary hearing on these claims.

¶5 The trial court denied Brewer's due process claim, reasoning "the transcript of the March 24, 2003, hearing at which the initial term of probation was extended three year[s] clearly indicates the Defendant was aware of the hearing (according to Probation Officers . . .) and was not appearing due to a lack of transportation." The court further found the "notice of the request to extend the Defendant's probation, although not properly certified in the record, was provided to the Defendant through her probation officer at the time . . . ." Although we conclude the trial court correctly denied relief on the due process claim, we do so for different reasons. *See State v. Saiers*, 196 Ariz. 20, ¶ 15, 992 P.2d 612, 616 (App. 1999).

¶6 On review, Brewer raises the identical due process argument she raised on direct appeal. She presented it in her opening brief and then again in her petition for post-conviction relief, which she filed twelve days after filing her opening brief. Having already raised this issue on appeal, Brewer was precluded from again raising it in a post-conviction proceeding. *See* Ariz. R. Crim. P. 32.2(a)(1), (2) (defendant precluded from relief on ground

raisable on direct appeal or finally adjudicated on merits on appeal); *State v. Curtis*, 185 Ariz. 112, 113, 912 P.2d 1341, 1342 (App. 1995), *disapproved on other grounds by Stewart v. Smith*, 202 Ariz. 446, ¶ 10, 46 P.3d 1067, 1071 (2002). Nor has Brewer argued that this claim falls within any of the exceptions to preclusion under Rule 32.1(d), (e), (f), (g), or (h), as set forth in Rule 32.2(b). It is, therefore, precluded.

¶7 Even if not precluded, Brewer's claim is, in any event, untimely.[3] Rule 32.4(a) provides that, in a Rule 32 of-right proceeding, the notice of post-conviction relief "must be filed within ninety days after the entry of judgment and sentence or within thirty days after the issuance of the final order or mandate by the appellate court in the petitioner's first petition for post-conviction relief proceeding" and that in all other noncapital cases, the notice of post-conviction relief "must be filed within ninety days after the entry of judgment and sentence or within thirty days after the issuance of the order and mandate in the direct appeal, whichever is the later." The term "sentence" is defined in Rule 26.1(b), Ariz. R. Crim. P., as "the pronouncement by the court of the penalty imposed upon the defendant after a judgment of guilty." The comment to that rule states: "The term sentence as used in this rule does include probation even though in most cases . . . imposition of sentence must be suspended in order to place a person on probation." Ariz. R. Crim. P. 26.1 cmt. For purposes of Rule 32.4(a), therefore, the trial court imposed the "sentence" Brewer now challenges when it extended her probation in 2003, and the notice of post-conviction relief,

[3]We rejected Brewer's due process claim on appeal on the ground that, because it was untimely, we did not have jurisdiction over it.

filed more than five years later, was thus untimely. Moreover, as we have already noted, Brewer has not asserted a claim pursuant to Rule 32.1(d), (e), (f), (g), or (h). Therefore, none of the exceptions to the timeliness requirement set out in Rule 32.4(a) apply.

¶8 Brewer also claimed below that Lachemann and Shostak had been ineffective for having failed to challenge the 2003 proceedings when they represented her in connection with the 2005 and 2007 petitions to revoke probation. Because she has not raised this claim on review, we do not address it. However, Brewer does claim on review, as she did below, that Shostak was ineffective for failing to argue that Judge Soos, "who was a member of the County Attorney's Office during the entire time Petitioner's case was pending, had a conflict of interest and should not have sentenced [Brewer] in the first place."

¶9 In order to state a colorable claim of ineffective assistance of counsel, a defendant must establish both that counsel's performance fell below an objectively reasonable professional standard and that the deficient performance caused prejudice to the defense. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). Notably, Brewer has not explained how she was prejudiced as a result of Judge Soos's having presided over her disposition hearing, nor is any prejudice apparent in the record before us. We thus conclude the trial court did not abuse its discretion by denying this claim. Moreover, in a related argument on appeal, Brewer claimed she was denied due process because she was sentenced to a prison term by Judge Soos, who had not conducted the violation hearing and was unfamiliar with her case. In our

memorandum decision, we noted that Rule 27.8(e), Ariz. R. Crim. P., permits a judge other than the one who placed the person on probation to conduct the probation revocation and disposition proceedings and that, in any event, there was no evidence that Brewer's due process rights had been violated. *Brewer*, No. 2 CA-CR 2008-0107, ¶¶ 13-15.

¶10 Brewer also seems to contend, for the first time on review, that she was denied the assistance of counsel at the 2003 hearing and that she is "entitled to an evidentiary hearing to establish that she never consulted with Michael Bresnehan about [that] matter." We will not address a claim raised for the first time in a petition for review, the purpose of which is to review "the actions of the trial court." Ariz. R. Crim. P. 32.9(c).

¶11 Therefore, although the petition for review is granted, relief is denied.

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JOHN PELANDER, Chief Judge

CONCURRING:

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JOSEPH W. HOWARD, Presiding Judge

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PHILIP G. ESPINOSA, Judge