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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OF ARIZONA, Respondent, v. MELVIN STANDISH WOPSCHALL, Petitioner.	2 CA-CR 2008-0380-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court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-61119

Honorable John S. Leonardo, Judge

REVIEW GRANTED; RELIEF DENIED

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

Melvin Standish Wopschall
Tucson
In Propria Persona

H O W A R D, Presiding Judge.

¶1 In 1998, petitioner Melvin Wopschall was convicted after a jury trial of two counts each of kidnapping, sexual abuse, and sexual assault. The trial court sentenced him to consecutive prison terms totaling 37.75 years. We affirmed Wopschall's convictions on

appeal but vacated the sentences imposed on two counts, because they had been improperly enhanced, and remanded the case for resentencing on those counts. *State v. Wopschall*, No. 2 CA-CR 98-0520 (memorandum decision filed Nov. 10, 1999). On remand, the trial court imposed a presumptive prison term on count nine (sexual abuse) and, apparently, a partially aggravated prison term on count thirteen (kidnapping). Wopschall filed a petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P. He appealed from the resentencing and filed a petition for review of the trial court's denial of post-conviction relief. We affirmed the sentence on count nine but vacated the sentence on count thirteen and remanded for resentencing on the ground the trial court had not stated aggravating and mitigating factors at the resentencing hearing as A.R.S. § 13-702(B)[1] requires; we also granted review but denied relief on the petition for review. *State v. Wopschall*, Nos. 2 CA-CR 2000-0118, 2 CA-CR 2002-0003-PR (consolidated) (memorandum decision filed Feb. 26, 2004).

¶2 In April 2008, Wopschall filed a notice of post-conviction relief pursuant to Rule 32.4(a), claiming there was newly discovered evidence showing he was actually innocent. This petition for review arises from the trial court's denial of Wopschall's notice of post-conviction relief as untimely, and the court's denials of his related motion to amend, motion for rehearing, and motion for clarification. We will not disturb a trial court's ruling on a petition for post-conviction relief absent an abuse of discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). We find no abuse here.

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[1]This statutory subsection was recently amended and is now A.R.S. § 13-702(C). 2008 Ariz. Sess. Laws, ch. 301, § 24.

¶3 Rule 32.4(a) permits a defendant in a subsequent post-conviction proceeding, such as this one, to file a notice of post-conviction relief "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." Wopschall filed his most recent notice of post-conviction relief more than eight years after the mandate on his first appeal was issued in January 2000, well outside the time limit of Rule 32.4(a).[2] Wopschall seems to suggest that, because he intended to raise claims based on newly discovered evidence and actual innocence under Rule 32.1(e) and (h), his otherwise untimely notice has somehow been rendered timely. However, Rule 32.2(b) provides:

> When a claim under Rules 32.1(d), (e), (f), (g) and (h) is to be raised in a successive or untimely post-conviction relief proceeding, the notice of post-conviction relief must set forth the substance of the specific exception [to preclusion] and the reasons for not raising the claim . . . in a timely manner. If the specific exception and meritorious reasons do not appear substantiating the claim and indicating why the claim was not stated . . . in a timely manner, the notice shall be summarily dismissed.

¶4 In its four rulings dismissing the notice of post-conviction relief and Wopschall's related motions, the trial court repeatedly found that the reasons Wopschall had asserted for his otherwise untimely notice of post-conviction relief, specifically, "inadequate access to the law library and a limited understanding of the law," were not meritorious.[3]

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[2]The mandate on Wopschall's second appeal, which was based solely on the resentencing, was issued in April 2004, four years before Wopschall filed the notice of post-conviction relief in this matter, and also well outside the time limit of Rule 32.4(a).

[3]Although not mentioned by the trial court, Wopschall also listed two heart attacks, suffered two and six years after his trial, as well as a ruptured hernia eight years after trial, as reasons for the untimely filing of his notice of post-conviction relief.

Notably, Wopschall acknowledged in his notice of post-conviction relief that the claims he now wants to raise "should have been brought up at trial or soon after on appeal," thereby lending support to the trial court's ruling that he had not provided a meritorious reason for his untimely notice.

¶5 To the extent Wopschall intended to suggest in his notice of post-conviction relief that either trial or appellate counsel were ineffective for having failed to raise his actual innocence claim earlier, we reject any such claim as precluded. In the petition for review of the trial court's denial of his first petition for post-conviction relief, we noted that Wopschall had "filed a confusing, eighty-one-page petition for post[-]conviction relief, which the trial court interpreted as an attack on the effectiveness of trial counsel." *Wopschall*, Nos. 2 CA-CR 2000-0118 & 2 CA-CR 2002-0003, ¶ 9. Because Wopschall either raised or could have raised claims of ineffective assistance of trial or appellate counsel in his first petition, any future claims are waived and precluded. *See* Ariz. R. Crim. P. 32.2(a)(2) and (3); *State v. Swoopes*, 216 Ariz. 390, ¶¶ 23, 25, 166 P.3d 945, 952-53 (App. 2007).

¶6 Although we grant the petition for review, we deny relief.

JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

JOHN PELANDER, Chief Judge

PHILIP G. ESPINOSA, Judge