

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.

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2009-0069-PR
)	DEPARTMENT B
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
MICHAEL W. MARSHALL,)	Rule 111, Rules of
)	the Supreme Court
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause Nos. CR-46397 and CR-48530 (Consolidated)

Honorable Leslie B. Miller, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
Attorneys for Respondent

Isabel G. Garcia, Pima County Legal Defender
By Joy Athena

Tucson
Attorneys for Petitioner

V Á S Q U E Z, Judge.

¶1 In this petition for review, petitioner Michael Marshall challenges the trial court's denial of a petition for post-conviction relief he filed in June 2008, following a successful federal habeas corpus action in which the Ninth Circuit Court of Appeals determined he was entitled to file that successive post-conviction petition. We will not disturb the trial court's ruling unless we find a clear abuse of its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 In June 1995, Marshall entered into a plea agreement in each of two separate causes. He pled guilty in CR-46397 to attempted armed robbery and, in CR-48530, to aggravated assault. He was sentenced simultaneously in both causes on July 25, 1995. In CR-46397, the trial court imposed a presumptive, enhanced, 7.5-year prison term for attempted armed robbery, a class three, dangerous-nature offense. In CR-48530, it imposed a consecutive, aggravated, seven-year term for aggravated assault, a nondangerous, nonrepetitive, class three offense. As the basis for aggravating the second sentence, the court cited Marshall's having committed the offense while on release from a previous conviction, his "prior criminal history," and his "use of a weapon in the commission of an offense."

¶3 In September 1995, Marshall filed a pro se notice of post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., and the trial court appointed counsel. In November 1995, counsel filed under both cause numbers a single, consolidated petition for post-conviction relief, stating that he had reviewed the entire record without finding any meritorious issue cognizable under Rule 32. After the trial court found Marshall had failed

to raise a colorable claim for relief and dismissed the petition, counsel filed petitions for review in this court that were substantively identical to the petitions for post-conviction relief filed below. We consolidated and granted the petitions for review but denied relief, finding no abuse of the trial court’s discretion and declining to search the record for fundamental error. *State v. Marshall*, Nos. 2 CA-CR 97-0225-PR, 2 CA-CR 97-0228-PR (consolidated) (memorandum decision filed Apr. 21, 1998). Our mandate issued on May 26, 1999.

¶4 In 2003, Marshall instituted federal habeas corpus proceedings in United States District Court, *Marshall v. Schriro*, No. 03-CV-437 TUC JMR. Although the District Court denied the requested writ, the Ninth Circuit Court of Appeals reversed. It found Marshall’s Rule 32 counsel had failed to follow an “*Anders*-compliant procedure” or to inform Marshall of his right to file a supplementary brief pro se, resulting in a constructive denial of assistance of counsel and violation of Marshall’s constitutional rights.¹ The Ninth Circuit

¹The Ninth Circuit wrote:

Thus, because his PCR counsel’s nominal representation did not supply Marshall with actual advocacy on his behalf, no court ever found that Marshall’s appeal would have been frivolous, and Marshall was not given the opportunity to file a brief on his own behalf, Marshall was constructively denied assistance of counsel during a proceeding that was equivalent to his first appeal as of right. Consequently, Marshall is entitled to another PCR proceeding under Arizona Rule of Criminal Procedure 32.

Marshall v. Schriro, No. 04-17185 (memorandum filed Jan. 23, 2007).

directed the District Court to “issue a conditional writ of habeas corpus, ordering the state to grant Marshall a new Rule 32.”

¶5 In the ensuing petition for post-conviction relief filed by new counsel in June 2008, Marshall raised two issues. First, he asserted in CR-48530 that, because he had won the right to file a new Rule 32 proceeding, his conviction had never become final, hence the intervening holding of *Blakely v. Washington*, 542 U.S. 296 (2004), should now apply to his 1995 sentencing. Because none of the factors the trial court had cited in imposing an aggravated sentence was either *Blakely*-compliant or *Blakely*-exempt, Marshall argued he was entitled to be resentenced in CR-48530 to a presumptive term of imprisonment. Second, in CR-46397, Marshall claimed the sentencing court erred in finding the offense to which he had pled guilty was dangerous in nature. As support for his argument, he noted “the offense caption” in his plea agreement did not state the offense was dangerous, the statutes cited in the agreement did not include former A.R.S. § 13-604, and the trial court during “the change of plea colloquy” did not inform him “that he was pleading to a dangerous-nature offense.”

¶6 The trial court ruled against Marshall on both issues, explaining its reasoning in a written minute entry. Briefly, in CR-46397, the court found that, although the written plea agreement had not designated the attempted armed robbery offense as either dangerous or nondangerous, all other indicators either stated or reflected that the offense was indeed a dangerous offense. Those indicators included the presentence report, the sentencing minute entry, and defense counsel’s acknowledgment at sentencing that the offense was “[of a]

dangerous nature, punishable at a higher rate.” In CR-48530, the court found that, despite Marshall’s having won the right to file a successive petition for post-conviction relief, his convictions had become final for *Blakely* purposes when our mandate issued in May 1999 at the conclusion of his first post-conviction proceeding.

¶7 Because the trial court has clearly articulated, properly analyzed, and correctly ruled on Marshall’s claims, we need not embellish or expand upon its ruling. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993) (when trial court has correctly identified and ruled on issues raised “in a fashion that will allow any court in the future to understand the resolution[, n]o useful purpose would be served by this court[’s] rehashing the trial court’s correct ruling in a written decision”). Rather, we approve and adopt its minute entry. Although we grant Marshall’s petition for review, we find no abuse of the court’s discretion and therefore deny relief.

GARYE L. VÁSQUEZ, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

J. WILLIAM BRAMMER, JR., Judge