

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 2009-0219-PR
)	DEPARTMENT B
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
MICHAEL JOSEPH WIEBER,)	Rule 111, Rules of
)	the Supreme Court
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20041641

Honorable Michael J. Cruikshank, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
Attorneys for Respondent

Michael J. Wieber

Hinton, OK
In Propria Persona

_____ E C K E R S T R O M, Presiding Judge.

¶1 Petitioner Michael Wieber was convicted after a jury trial of armed robbery, aggravated assault, and two counts of kidnapping. The trial court found Wieber had two prior felony convictions and sentenced him to enhanced, concurrent, presumptive prison terms totaling 15.75 years. We affirmed his convictions on appeal, but remanded the case to the trial court for clarification of its findings in support of the enhanced sentences. *State v. Wieber*, No. 2 CA-CR 2004-0407 (memorandum decision filed Aug. 21, 2006). Our mandate issued in October 2006; the trial court affirmed the sentences imposed, and no further appeal was filed.

¶2 In July 2005, Wieber filed his first notice of post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P. The trial court appointed counsel and stayed Wieber's Rule 32 proceeding pending our decision on his direct appeal. In the petition that followed reinstatement of the proceeding, Wieber alleged he had been deprived of a fair trial because a member of the jury had failed to disclose he had worked previously with Wieber's mother and also had been acquainted with Wieber. Wieber alleged this was newly discovered evidence that had not come to light until his mother had been reviewing trial documents. The trial court denied relief, finding Wieber had not shown juror bias and, in any event, his claim of jury misconduct was precluded because it could have been raised on appeal. The court also rejected Wieber's suggestion that his claim had been excepted from the rule of preclusion because it was based on newly discovered evidence. The court denied Wieber's

subsequent request for rehearing, and Wieber did not petition this court for review of the decision denying relief.

¶3 Wieber filed his second notice of post-conviction relief in March 2008, and the trial court again appointed counsel. In lieu of filing a petition, counsel notified the court he had reviewed the record but could find no colorable claim entitling Wieber to Rule 32 relief. In a supplemental pro se petition, Wieber argued he was entitled to a new trial because his first Rule 32 counsel had been ineffective in failing to communicate with him and in failing to investigate or raise claims Wieber had wished to allege and also had been deficient in arguing the claim of juror misconduct.

¶4 The trial court denied relief, finding Wieber's claim of juror misconduct had been addressed fully on its merits and was therefore precluded. After addressing Wieber's arguments, the court also found he had failed to state a colorable claim of ineffective assistance of Rule 32 counsel.

¶5 In his petition for review of the trial court's ruling, Wieber contends the trial court abused its discretion in denying relief on his claim of ineffective assistance of counsel and in doing so without an evidentiary hearing. We will not disturb a trial court's denial of post-conviction relief absent an abuse of discretion. *State v. Mata*, 185 Ariz. 319, 331, 916 P.2d 1035, 1047 (1996). We find no abuse of discretion in the court's summary denial of relief.

¶6 Relying on *State v. Pruett*, 185 Ariz. 128, 131, 912 P.2d 1357, 1360 (App. 1995), Wieber argues that “a pleading defendant . . . is constitutionally entitled to the effective assistance of counsel on his first petition for post-conviction relief” because, for a pleading defendant, Rule 32 is the constitutional “counterpart of a direct appeal.” *Id.* But Wieber was not a “pleading defendant” because he had not pled guilty, and unlike a pleading defendant, he had enjoyed a right to a direct appeal. *Id.* Our supreme court has made clear that a nonpleading defendant’s allegation of ineffective assistance of Rule 32 counsel is not a cognizable constitutional claim under Rule 32. *Mata*, 185 Ariz. at 336-37, 916 P.2d at 1052-53.

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

PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

J. WILLIAM BRAMMER, JR., Judge

GARYE L. VÁSQUEZ, Judge