

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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SEP -8 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2010-0083-PR
)	DEPARTMENT A
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
JOSEPH SAMUEL GARFIELD,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20021033

Honorable Virginia C. Kelly, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
Attorneys for Respondent

Robert J. Hirsh, Pima County Public Defender
By Rebecca A. McLean

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Attorneys for Petitioner

H O W A R D, Chief Judge.

¶1 Pursuant to a 2002 plea agreement, petitioner Joseph Garfield was convicted of aggravated assault, a class three felony, and possession of a deadly weapon by a prohibited possessor, a class four felony, both committed while he was on probation

in another matter. Garfield's probation was revoked, and he was sentenced to a seven-year prison term in that matter, to be served concurrently with a seven-year prison term for the aggravated assault conviction in this case; the court ordered both of the seven-year terms be served consecutively to the three-year sentence for the weapons misconduct conviction. Pursuant to Rule 32, Ariz. R. Crim. P., counsel filed a notice stating she had been unable to find any issues to raise and asking that Garfield be permitted to file a pro se petition, a request the trial court granted. Garfield did not file a petition, however, and the court dismissed the notice of post-conviction relief in its June 2003 minute entry.

¶2 In October 2009, more than six years later, Garfield filed a second notice of post-conviction relief, completing the form notice to reflect his intent to raise a claim pursuant to Rule 32.1(d), Ariz. R. Crim. P. Consistent with that subsection of the rule, he marked a box indicating he was claiming that he was "being held in custody after the sentence imposed has expired." In the portion of the form notice that required Garfield to state the facts that support his claim and his reasons for not raising the claim in a prior post-conviction proceeding, Garfield stated that the prison terms for the aggravated assault and weapons misconduct convictions should have been concurrent, rather than consecutive, and he had not previously raised this claim "due to ineffective assistance of counsel." The trial court summarily dismissed the notice of post-conviction relief and denied Garfield's motion for reconsideration. In his petition for review he contends the court erred in dismissing the notice without appointing counsel to represent him and denying relief summarily. He requests that this court either remand this matter to the trial court for an evidentiary hearing or find he has served the entire term and order his release. We review the court's decision for an abuse of discretion. *State v. Rosales*, 205

Ariz. 86, ¶ 1, 66 P.3d 1263, 1264 (App. 2003) (reviewing summary dismissal of notice of post-conviction relief for abuse of discretion). We find no such abuse here.

¶3 A Rule 32 “proceeding is commenced by timely filing a notice of post-conviction relief.” Ariz. R. Crim. P. 32.4(a). The notice must be filed “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.” If it is filed untimely or a petitioner is filing a successive notice of post-conviction relief, the petitioner may only raise claims that are cognizable under Rule 32.1(d), (e), (f), (g) or (h). *Id.* And, the notice “must set forth the substance of the specific exception and the reasons for not raising the claim in the previous petition or in a timely manner.” Ariz. R. Crim. P. 32.2(b). Further, “[i]f the specific exception and meritorious reasons do not appear substantiating the claim and indicating why the claim was not stated in the previous petition or in a timely manner, the notice shall be summarily dismissed.” *Id.*

¶4 Garfield asserts that his otherwise untimely and precluded notice of post-conviction relief is timely because he is “being held unlawfully past the date of a lawfully imposed sentence.” Although Garfield asserts that Rule 32.1(d) applies to his “lawfully imposed sentence,” at the same time he suggests that the imposition of consecutive sentences rendered his sentences illegal. Relying on *State v. Carreon*, 210 Ariz. 54, 107 P.3d 900 (2005), and *State v. Gordon*, 161 Ariz. 308, 778 P.2d 1204 (1989), Garfield contends that, because the trial court improperly imposed consecutive sentences for aggravated assault and prohibited possession, and because he has completed the seven-year sentence for aggravated assault, he should be released. Thus, he argues, the court incorrectly found his claim not cognizable under Rule 32.1(d) and precluded.

¶5 We note at the outset Garfield incorrectly states the trial court ordered him to serve the three-year term to run “concurrent to the 7-year term” for the weapons misconduct conviction. Contrary to that contention, the sentencing and commitment orders, and the sentencing transcript establish that the three-year term on the weapons misconduct conviction is consecutive to both seven-year terms. Accordingly, even if the sentences for aggravated assault and the weapons misconduct convictions were concurrent, as Garfield argues they should be, the three-year sentence nonetheless would be consecutive to the seven-year term in the other matter.¹

¶6 In its ruling dismissing Garfield’s notice of post-conviction relief, the trial court found any claim of ineffective assistance of counsel to be untimely and thus found Garfield had failed to present a meritorious reason why his claim raised pursuant to Rule 32.1(d) should not be dismissed summarily. Notably, in his motion for reconsideration, Garfield expressly stated he was not raising a claim of ineffective assistance of counsel. In its ruling denying the motion for reconsideration, the court then found

[t]he facts alleged by [Garfield] do not substantiate a claim under [Rule 32.1(d)]. [Garfield] alleges that the sentence on his prohibited possessor count should have been concurrent with his aggravated assault sentence. He does not allege that the sentence imposed has expired and that he is still being held in custody.

¹The plea agreement in this matter provided: “The parties understand that there is no agreement as to whether the sentences will run concurrently or consecutively with the sentence in CR-20001229 [the probation matter]. That decision will remain solely with the sentencing judge.”

¶7 The trial court correctly dismissed Garfield’s notice of post-conviction relief for several reasons. First, Garfield’s claim is not cognizable under Rule 32.1(d). Rather, he has raised a direct challenge to his sentence, a claim that is precluded and does not fall within any of the exceptions of the rule of preclusion. In addition, although Rule 32.1(d) recognizes a claim that the defendant is being “held in custody after the sentence imposed has expired,” Garfield does not assert that the sentence imposed has expired. And the trial court noted in its ruling denying the motion for reconsideration that the sentence, as imposed, in fact had not expired. Second, Garfield’s claim is not subject to any of the other exceptions to preclusion set forth in Rule 32.2(b). The court explained that, because Garfield knew at the time of sentencing that these sentences were not concurrent, he could have raised this claim in his first Rule 32 petition. Having failed to do so, Rule 32.2(a)(3) precludes him from raising this claim now. Third, even if Garfield’s first Rule 32 counsel was ineffective for having failed to challenge his sentence on this ground in the first post-conviction proceeding, Garfield made clear in his motion for reconsideration that he is not raising a claim of ineffective assistance of counsel in this proceeding. And, in any event, an independent claim of ineffective assistance of counsel would have been untimely, as the court correctly noted. *See* Ariz. R. Crim. P. 32.4(a).

¶8 For all of these reasons, the trial court did not abuse its discretion when it found that Garfield did not provide “meritorious reasons’ to substantiate that he has a claim pursuant to Rule 32.1(d), thus entitling him to [an] exception from preclusion for his untimely successive Notice.” In addition, even if Garfield’s claim was cognizable under Rule 32.1(d), counsel could not have raised it when Garfield’s first post-conviction

proceeding was pending, as his seven-year sentences had not yet expired. We further note that we disagree with Garfield that the comment to Rule 32.1(d), which provides the rule “is intended to include claims . . . [such as] miscalculation of sentence . . . [and] questions of computation of good time,” somehow makes it “clear” that the rule applies to him. Ariz. R. Crim. P. 32.1(d) 2007 cmt.

¶9 Finally, because Garfield’s claim is not cognizable under Rule 32.1(d), we need not address his argument that the trial court incorrectly found he could not rely on *Carreon* because it was decided after his conviction was final.

¶10 Although the petition for review is granted, relief is denied.

/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