

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

FILED BY CLERK

MAY 16 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

In re)	2 CA-CV 2011-0158
)	DEPARTMENT A
APPROXIMATELY \$19,040.00 U.S.)	
CURRENCY (Item no. 12).)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
)	Rule 28, Rules of Civil
)	Appellate Procedure
)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20109913

Honorable Ted B. Borek, Judge

AFFIRMED

Gallego Law Firm, P.C.
By Rafael F. Gallego

Tucson
Attorney for Appellant

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By Albert B. Lassen

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Attorneys for Appellee

H O W A R D, Chief Judge.

¶1 Appellant Fernando Fernandez appeals the trial court's order striking his claim in a forfeiture action as untimely. On appeal, Fernandez argues the state waived

any objection to the claim's timeliness through its conduct. Because Fernandez did not raise the waiver argument below and because his claim was untimely, we affirm.

Factual and Procedural Background

¶2 The relevant procedural background is undisputed. On December 22, 2010, the state filed a notice of pending forfeiture for various items and quantities of money, including currency in the amount of \$19,040. On February 1, 2011, Fernandez filed a claim for the \$19,040. On February 23, the state filed a motion to strike Fernandez's claim as being untimely. Following two hearings, as well as supplemental briefing, the trial court found Fernandez's claim had been filed untimely and ordered it stricken. This appeal followed. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(3). *State ex rel. Goddard v. Ochoa*, 224 Ariz. 214, ¶ 6, 228 P.3d 950, 952 (App. 2010); *see* 2011 Ariz. Sess. Laws, ch. 304, § 1.

Waiver

¶3 The only issue Fernandez presents on appeal is whether “the state's conduct may have constituted waiver or estoppel of [its] position.” However, because Fernandez did not make this argument in the trial court, he has waived it on appeal.¹ *See City of Tempe v. Fleming*, 168 Ariz. 454, 456, 815 P.2d 1, 3 (App. 1991) (“arguments not made at the trial court cannot be asserted on appeal”); *see also Trantor v. Fredrikson*, 179 Ariz. 299, 300, 878 P.2d 657, 658 (1994) (purpose of requiring party to make specific

¹Because Fernandez has not provided us with transcripts as required by Rule 11(b), Ariz. R. Civ. App. P., we will presume the transcripts support the trial court's findings and conclusions. *See State ex rel. Dep't of Econ. Sec. v. Burton*, 205 Ariz. 24, ¶ 16, 66 P.3d 70, 73 (App. 2003).

objection in trial court is to give court opportunity to rule before appellant claims error in this court).

¶4 Moreover, even if Fernandez had preserved this argument, the state did not waive its objection to the timeliness of his claim. We have found waiver by conduct “when a governmental entity has taken substantial action to litigate the merits of the claim that would not have been necessary had the entity promptly raised the defense.” *Jones v. Cochise County*, 218 Ariz. 372, ¶ 26, 187 P.3d 97, 105 (App. 2008). Here, the state’s first action following Fernandez’s filing of a claim was to file a motion to strike based on the claim being untimely. And it filed the motion to strike twenty-two days after Fernandez filed his claim. Twenty-two days with no intervening action does not constitute substantial action to litigate the merits, and the state did not waive its objection by its conduct. *See id.*

Timeliness of Claim

¶5 Although Fernandez does not list as an issue whether his claim was filed timely, he suggests in the argument portion of his brief that the trial court erred in finding it untimely. Because we prefer to dispose of cases on the merits, and because the state has responded to this issue as a precautionary measure, we will address it. *Hirsch v. Nat’l Van Lines, Inc.*, 136 Ariz. 304, 308, 666 P.2d 49, 53 (1983).

¶6 Fernandez asserts that the trial court committed reversible error in granting the state’s motion to strike his claim as being untimely filed under A.R.S. § 13-4311. Fernandez claims that the requirements under § 13-4311 were met “when the verified claim was personally delivered to the State,” because there is no indication in the statute

of “where the claim must be filed.” He further argues that subsection D of the statute does not indicate that “no [time] extensions are permitted” or that a “claim is mandatory.” “We interpret statutes in accordance with the intent of the legislature, ‘look to the plain language of the statute . . . as the best indicator’ of its intent, and if the language is clear and unambiguous, ‘we give effect to that language.’” *State ex rel. Goddard v. Ochoa*, 224 Ariz. 214, ¶ 9, 228 P.3d 950, 953 (App. 2010), quoting *Fragoso v. Fell*, 210 Ariz. 427, ¶ 7, 111 P.3d 1027, 1030 (App. 2005).

¶7 Section 13-4311(D) provides that in forfeiture proceedings an owner or interest holder in the property at issue “may file a claim against the property, within thirty days after the notice, for a hearing to adjudicate the validity of his claimed interest in the property.” The “notice” under the statute is “the notice of pending forfeiture.” *In re Forty-Seven Thousand Six Hundred Eleven Dollars and Thirty-One Cents (47,611.31) U.S. Currency*, 196 Ariz. 1, ¶ 6, 992 P.2d 1, 2 (App. 1999). A claimant must file a claim within thirty days after the date of notice, which for certified mail is the date of mailing, and “[n]o extension of time for the filing of a claim may be granted.” *Id.* ¶¶ 9, 12, quoting § 13-4311(F) (alteration in *In re \$47,611.31*). However, if notice is served by mail, Rule 6(e), Ariz. R. Civ. P., gives the claimant five extra days to file a claim in addition to the thirty days provided in § 13-4311(D). *In re \$47,611.31*, 196 Ariz. 1, ¶ 16, 992 P.2d at 4. Furthermore, to “file a claim,” the claimant must file it with the clerk of court or appropriate judge if the judge permits. See Ariz. R. Civ. P. 5(h); *State v. Chacon*, 221 Ariz. 523, ¶ 6, 212 P.3d 861, 864 (App. 2009).

¶8 Fernandez has not provided transcripts from the two hearings the trial court held regarding his claim for the amount of \$19,040 and the state's motion to strike his claim as being untimely. The appellant has the burden of ensuring all transcripts have been included in the record on appeal. *Blair v. Burgener*, 226 Ariz. 213, ¶ 9, 245 P.3d 898, 902 (App. 2010). When no transcript is provided, we assume the record supports the court's findings and conclusions. *See Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995).

¶9 Moreover, the portions of the record that have been provided support the trial court's finding that Fernandez's claim was untimely under § 13-4311. An affidavit of mailing filed by the state shows that the notice was mailed to Fernandez on December 22, 2010. Fernandez had thirty-five days after December 22, 2010 to file his claim after the state mailed his notice, which was until January 26, 2011. Fernandez's claim for the amount of \$19,040 was filed with the clerk of the superior court on February 1, 2011. This was after the thirty-five days allowed by Arizona law. Fernandez argues that because he sent the original claim to the state on January 31, 2011, he properly "filed" it because the state had notice of his intent to file the claim. However, to properly "file" a claim, he was required to file it with either the clerk of court or with the appropriate judge, if permitted. *See Ariz. R. Civ. P. 5(h); Chacon*, 221 Ariz. 523, ¶ 6, 212 P.3d at 864. Further, even if he had filed it on January 31, 2011, it still would have been outside the thirty-five-day limit. Accordingly, the court did not err in finding the claim was filed untimely. *See Ochoa*, 224 Ariz. 214, ¶ 12, 228 P.3d at 954 ("The trial court had no discretionary power to allow the filing of an untimely claim.").

Conclusion

¶10 For the foregoing reasons, we affirm.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge