

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

MARCUS LASALLE FINCH,
Petitioner.

No. 2 CA-CR 2015-0473-PR
Filed May 18, 2016

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Pima County
No. CR061452
The Honorable Howard Fell, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

COUNSEL

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

Marcus L. Finch, Tucson
In Propria Persona

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MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Howard and Judge Staring concurred.

ESPINOSA, Judge:

¶1 Petitioner Marcus Finch seeks review of the trial court’s order dismissing his notice of post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. “We will not disturb a trial court’s ruling [i]n a [proceeding] for post-conviction relief absent a clear abuse of discretion.” *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Finch has not sustained his burden of establishing such abuse here.

¶2 After a jury trial, Finch was convicted on multiple counts, including first-degree, felony murder, for which the trial court imposed the death penalty. Our supreme court affirmed his convictions and sentences, *State v. Finch*, 202 Ariz. 410, 46 P.3d 421 (2002), but later set aside his death sentence and ordered resentencing based on the United States Supreme Court’s decision in *Ring v. Arizona*, 536 U.S. 584 (2002), *State v. Finch*, 205 Ariz. 170, 68 P.3d 123 (2003). On remand, the state withdrew the “death notice,” and the court imposed a natural-life sentence in March 2005.

¶3 In October 2015, Finch filed a notice of post-conviction relief seeking a delayed appeal from his resentencing pursuant to Rule 32.1(f). In the notice and an accompanying “supplemental citation of authorities,” Finch asserted that he had not waived his right to appeal, but that counsel’s “abandonment” and “error or oversight . . . caused him to lose out on his constitutional right to appeal.” The trial court denied relief, finding that it had advised Finch of his right to appeal at the resentencing hearing and that Finch had not explained the nine-year delay in his request for an appeal.

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¶4 Finch then filed a motion for rehearing in which he conceded the trial court had informed him of his right to appeal, but he asserted he had told his counsel he wanted to appeal and did “not know why this did not occur.” Finch also added that because of his time on death row, he “suffer[ed] from a number of serious mental health issues” and because of those issues had not filed a notice of appeal when counsel failed to do so. He submitted an affidavit to that effect, but no medical evidence to support his claims of diagnosed mental illness. The court denied the motion.

¶5 On review, Finch argues the trial court erred in “not decid[ing]” his claims that he suffered from “psychological conditions” that entitled him to a hearing, and that his counsel had “abandoned” him or “were otherwise ineffective” in failing to file a notice of appeal. The court, however, dismissed Finch’s notice because it failed to comply with the requirement of Rule 32.2(b) that a notice raising a claim pursuant to Rule 32.1(f) in an untimely proceeding must “set forth the substance of the specific exception [to preclusion] and the reasons for not raising the claim in . . . a timely manner.” If such reasons are not given, “the notice shall be summarily dismissed.” Ariz. R. Crim. P. 32.2(b).

¶6 Finch’s notice was clearly untimely and provided no reasons for his failure to realize that an appeal had not been filed in the nine years after his resentencing, nor did it clearly assert a claim that counsel had informed Finch he would file a notice of appeal. A petitioner “must strictly comply with Rule 32 or be denied relief. Failure to comply with Rule 32 procedure will result in a finding that petitioner waived his right to present a Rule 32 petition.” *State v. Carriger*, 143 Ariz. 142, 146, 692 P.2d 991, 995 (1984) (citation omitted); *see also State v. Jones*, 182 Ariz. 432, 434, 897 P.2d 734, 736 (App. 1995) (suggesting time limits added to Rule 32.4(a) in order to “prevent unwarranted delay”).

¶7 Finch did ultimately provide some explanation for his failure to timely raise his claim and asserted that he had asked counsel to file an appeal on his behalf. But, as detailed above, he did so only in a motion for rehearing and supported only by his own affidavit. A motion for rehearing is not the proper vehicle for

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presenting new evidence to the court. *See* Ariz. R. Crim. P. 32.9(a) (motion for rehearing must “set[] forth in detail the grounds wherein it is believed the court erred” in denying post-conviction relief); *State v. Stice*, 23 Ariz. App. 97, 99, 530 P.2d 1130, 1132 (1975) (“Petitioner has the burden of establishing the absence of any fault on his part.”); *State v. Ramirez*, 126 Ariz. 464, 467-68, 616 P.2d 924, 927-28 (App. 1980) (court not required to address argument first raised in motion for rehearing); *cf. Brookover v. Roberts Enters., Inc.*, 215 Ariz. 52, n.2, 156 P.3d 1157, 1162 n.2 (App. 2007) (court may not consider new evidence presented in motion for reconsideration). The trial court, therefore, was not required to consider the new arguments and evidence presented in Finch’s motion for rehearing, and we cannot say it abused its discretion in dismissing the proceeding as required by Rule 32.2(b).

¶8 For these reasons, although we grant the petition for review, relief is denied.