

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

FALEH HASSAN ALMALEKI,
Petitioner.

No. 2 CA-CR 2016-0121-PR
Filed May 23, 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NOT FOR PUBLICATION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 Maricopa County
No. CR2009007938001DT
The Honorable Roland J. Steinle, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Kimerer & Derrick, P.C., Phoenix
By Michael D. Kimerer
Counsel for Petitioner

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MEMORANDUM DECISION

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

H O W A R D, Presiding Judge:

¶1 Faleh Almaleki seeks review of the trial court's order summarily dismissing his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that order unless the court clearly abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Almaleki has not met his burden of demonstrating such abuse here.

¶2 After a jury trial, Almaleki was convicted of second-degree murder, aggravated assault, and two counts of leaving the scene of an accident involving serious physical injury. The trial court sentenced him to a combination of concurrent and consecutive prison terms totaling 34.5 years. On appeal, we vacated his conviction and sentence for one count of leaving the scene of an accident but affirmed his remaining convictions and sentences. *State v. Almaleki*, No. 1 CA-CR 11-0320, ¶ 13 (memorandum decision filed Mar. 5, 2013). Our mandate issued on April 22, 2013.

¶3 On October 9, 2013, Almaleki, through counsel, filed a motion seeking leave to file a late notice of and petition for post-conviction relief. The motion cited Rule 32.1(f) and Rule 32.2(b) and explained Almaleki had not timely filed a notice of post-conviction relief because counsel had not received a copy of our mandate, possibly because the public defender's office, which initially had represented Almaleki on appeal, was still listed as his attorney of record. The state did not respond to the motion, and the trial court did not rule on it. In May 2014, Almaleki filed a petition for post-conviction relief asserting his trial counsel had been ineffective. The court, noting it had received both the motion and the petition, dismissed Almaleki's petition without further addressing his

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motion, concluding Almaleki's claims could not be brought in an untimely proceeding. This petition for review followed.

¶4 On review, Almaleki asserts he is entitled to file a late petition pursuant to Rule 32.1(f). We first observe that nothing in Rule 32 permits a defendant to file a motion seeking permission to file a delayed notice of post-conviction relief. Instead, a pleading defendant must request such relief by initiating a Rule 32 proceeding and demonstrating, pursuant to Rule 32.1(f), that the failure to timely file a notice of post-conviction relief "was without fault on the defendant's part." See Ariz. R. Crim. P. 32.2, 32.4(a). But even were we to construe Almaleki's motion as a notice and petition seeking relief pursuant to Rule 32.1(f), that provision does not apply in these circumstances. Although Rule 32.1(f) permits a pleading defendant to seek leave to file an untimely notice, it "makes no similar provision for [non-pleading] defendants . . . who share no culpability in the untimely filing of their first post-conviction petitions." *State v. Diaz*, 228 Ariz. 541, ¶ 10, 269 P.3d 717, 720 (App. 2012).

¶5 Almaleki further contends that the time limit for filing a notice of post-conviction relief "is not jurisdictional" and is therefore subject to "equitable tolling," citing *State v. Pope*, 130 Ariz. 253, 635 P.2d 846 (1981). In *Pope*, our supreme court determined the time limit for filing a motion for rehearing pursuant to Rule 32.9 was not jurisdictional and, thus, a late motion could be considered if there was "a valid reason for non-compliance with the time requirements." *Id.* at 255-56. But the time limit for filing a notice of post-conviction relief is jurisdictional. A.R.S. § 13-4234(G); *State v. Lopez*, 234 Ariz. 513, ¶ 8, 323 P.3d 1164, 1166 (App. 2014). Thus, the reasoning in *Pope* is inapplicable.

¶6 We also reject Almaleki's suggestion that his claims should be reviewable "[i]n the interest of judicial economy" because, in *Martinez v. Ryan*, ___ U.S. ___, 132 S. Ct. 1309 (2012), the United States Supreme Court "extended the right to counsel to collateral first-review post-conviction relief proceedings, even if the defendant has gone to trial." Thus, he asserts, his claims of ineffective assistance could be reviewed to prevent litigation of a claim of

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ineffective assistance of Rule 32 counsel. But, as this court has explained, “*Martinez* does not alter established Arizona law” that non-pleading defendants “have no constitutional right to counsel in post-conviction proceedings.” See *State v. Escareno-Meraz*, 232 Ariz. 586, ¶¶ 4, 6, 307 P.3d 1013, 1014 (App. 2013).

¶7 The trial court correctly concluded that Almaleki’s claims of ineffective assistance of trial counsel could not be raised in this untimely proceeding. See Ariz. R. Crim. P. 32.4(a). Accordingly, although we grant review, we deny relief.