

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

MARCUS LASALLE FINCH,
Petitioner.

No. 2 CA-CR 2016-0260-PR
Filed October 6, 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NOT FOR PUBLICATION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 Finch, Tucson
In Propria Persona

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MEMORANDUM DECISION

Judge Miller authored the decision of the Court, in which Presiding Judge Vásquez and Chief Judge Eckerstrom concurred.

M I L L E R, Judge:

¶1 Marcus Finch seeks review of the trial court’s order denying the relief requested in his successive and untimely notice of 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. *State v. Roseberry*, 237 Ariz. 507, ¶ 7, 353 P.3d 847, 848 (2015). Finch has not met his burden of demonstrating such abuse here.

¶2 After a jury trial, Finch was found guilty of felony murder, two counts of attempted murder, “and forty-five counts of armed robbery, kidnapping, and aggravated assault, all stemming from three separate robberies that occurred over a sixteen-day period in April, 1998,” and was sentenced to death. *State v. Finch*, 205 Ariz. 170, ¶ 4, 68 P.3d 123, 125 (2003) (*Finch II*). Our supreme court initially affirmed Finch’s convictions and sentences, *State v. Finch*, 202 Ariz. 410, ¶ 59, 46 P.3d 421, 430 (2002), but later supplemented that decision to vacate his death sentence for felony murder in light of *Ring v. Arizona*, 536 U.S. 584 (2002), and remanded for resentencing, *Finch II*, 205 Ariz. 170, ¶¶ 1, 12, 68 P.3d at 124-25, 126. At Finch’s March 2005 resentencing, the state withdrew the “death notice” and the trial court imposed a natural life sentence, to be served consecutively to his other prison terms.

¶3 In 2014, Finch filed a motion citing Rule 24.4, Ariz. R. Crim. P., and seeking permission to file a delayed appeal, which the trial court denied, noting Finch had been properly advised of his right to appeal. In 2015, Finch filed a notice of post-conviction relief, claiming pursuant to Rule 32.1(f) that his failure to timely appeal after his resentencing was without fault on his part. After the court denied relief, Finch filed a motion for rehearing asserting that he

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suffered from mental health issues that prevented him from timely filing a notice of appeal. The court denied that motion, and we denied relief on Finch's subsequent petition for review, noting the court was not required to consider the new arguments and evidence he had presented in the rehearing motion. *State v. Finch*, No. 2 CA-CR 2015-0473-PR, ¶¶ 7-8 (Ariz. App. May 18, 2016) (mem. decision).

¶4 After our decision issued, Finch filed another notice of post-conviction relief, again indicating that he was raising a claim pursuant to Rule 32.1(f).¹ In his accompanying memorandum, he asserted that his failure to timely seek post-conviction relief after his resentencing was without fault on his part, asserting "he is entitled to proceed and present a Rule 32 petition of-right" because he "entered an unwritten oral plea agreement," pursuant to which the state had withdrawn its death notice in exchange for his having waived his right to a "penalty phase" trial. He further explained he had not timely sought post-conviction relief due to deficient access to legal resources and his mental health issues. The court denied relief, and this petition for review followed.

¶5 On review, Finch again asserts he is entitled to relief pursuant to Rule 32.1(f) due to the insufficient access to legal resources in prison and his mental health issues. It is not entirely clear, however, whether he seeks relief from his failure to timely appeal after his resentencing, or from his failure to timely seek post-conviction relief. Indeed, he suggests there is "some confusion" whether he is entitled to a direct appeal due to the purported "oral plea agreement" regarding his resentencing.

¶6 Finch is not entitled to an of-right proceeding under Rule 32. An "of-right proceeding" is available only when a person has "pled guilty or no contest, admitted a probation violation, or whose probation was automatically violated based upon a plea of

¹A few days later, Finch filed another notice asserting a claim of newly discovered evidence and a motion asking the court to "consolidate" his post-conviction proceedings. The trial court did not address that notice or motion in its ruling.

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guilty or no contest.” Ariz. R. Crim. P. 32.1. Even had Finch entered into some agreement regarding his resentencing,² that agreement would not constitute a guilty plea. Because Finch is not entitled to an of-right proceeding, he is not entitled to relief under Rule 32.1(f) for his failure to timely seek post-conviction relief.

¶7 Moreover, in his most-recent notice and memorandum, Finch did not squarely present a claim that his failure to file a timely notice of appeal was without fault on his part. Although that claim may be raised in a successive proceeding, Ariz. R. Crim. P. 32.1(f), 32.2(b), even had Finch done so, it was already raised and rejected in his first Rule 32 proceeding. *See State v. Little*, 87 Ariz. 295, 304, 350 P.2d 756, 761-62 (1960) (doctrine of res judicata generally applies in criminal cases). We therefore do not address this issue further.

¶8 We grant review but deny relief.

²Nothing in the transcript of Finch’s resentencing supports the notion Finch waived his appellate rights as part of an agreement with the state. Indeed, the trial court specifically advised him of his right to appeal.