

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Respondent*,

v.

BRIAN BRUN, *Petitioner*.

No. 1 CA-CR 16-0583 PRPC
FILED 9-19-2017

Petition for Review from the Superior Court in Maricopa County
No. CR 1991-002345
The Honorable J. Justin McGuire, Judge *Pro Tempore*

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Maricopa County Attorney's Office, Phoenix
By Diane Meloche
Counsel for Respondent

Brian Brun, Kingman
Petitioner

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MEMORANDUM DECISION

Judge Kenton D. Jones delivered the decision of the Court, in which Presiding Judge Margaret H. Downie and Chief Judge Samuel A. Thumma joined.

J O N E S, Judge:

¶1 Brian Brun petitions this Court for review from the dismissal of his petition for post-conviction relief. We have considered the petition for review and, for the reasons stated, grant review but deny relief.

¶2 Brun pleaded guilty to one count of child molestation and one count of attempted child molestation. The trial court sentenced Brun to twelve years' imprisonment for child molestation, followed by lifetime probation for attempted child molestation. After his release from prison, Brun violated his probation. He was reinstated on probation, but he violated his probation again that same year. The court then revoked Brun's probation and sentenced him to the presumptive term of ten years' imprisonment.

¶3 Brun timely commenced post-conviction relief (PCR) proceedings in January 2015, but appointed counsel found no colorable claims. Thereafter, the trial court granted Brun the opportunity to submit a *pro per* petition; when he failed to do so by the specified deadline, the proceeding was summarily dismissed.

¶4 Nearly seven months later, Brun moved to file a delayed petition for PCR and simultaneously filed his untimely petition. Within his motion, Brun claimed medical conditions, a transfer to another facility, and half "his legal materials c[oming] up missing" prevented him from filing in a timely manner. Within his petition, Brun alleged the trial court improperly considered an aggravating factor when it imposed his sentence. The superior court denied the motion to file a delayed PCR petition and summarily dismissed the claims presented in the petition as untimely. Brun moved to reconsider, but the motion was denied. This timely petition for review followed.

¶5 "We review the court's summary denial of post-conviction relief for an abuse of discretion, but we review *de novo* the court's

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interpretation of relevant rules.” *State v. Harden*, 228 Ariz. 131, 132, ¶ 3 (App. 2011) (citing *State v. Martinez*, 226 Ariz. 464, 466, ¶ 6 (App. 2011)).

¶6 Under Arizona Rule of Criminal Procedure 32.4(c)(2):

If counsel determines there are no colorable claims which can be raised on the defendant’s behalf, counsel shall file a notice advising the court of this determination. . . . Upon receipt of the notice, the court shall extend the time for filing a petition by the defendant *in propria persona*. The extension shall be 45 days from the date the notice is filed. Any extension beyond the 45 days shall be granted only upon a showing of extraordinary circumstances.

Moreover, Arizona courts “have consistently required that parties ‘strictly comply’ with [Rule 32] to be entitled to relief.” *Canion v. Cole*, 210 Ariz. 598, 600, ¶ 11 (2005) (quoting *State v. Carriger*, 143 Ariz. 142, 146 (1984)).

¶7 Here, the superior court actually provided Brun more time than the requisite 45 days to file his *pro per* petition. In his motion to file a delayed petition, Brun provided three reasons for his untimeliness. The court did not believe any of the three reasons provided good cause for his untimely filing, and we find no abuse of discretion.

¶8 Brun’s conclusory and unsubstantiated statements regarding his medical conditions and transfer, without more, do not show the “extraordinary circumstances” necessary under Rule 32.4(c)(2) for leave to file his untimely *pro per* petition. *Cf.* Ariz. R. Crim. P. 32.1(f) cmt. (explaining good cause for a defendant’s failure to file a timely PCR notice generally requires a showing of fault on the part of a defendant’s attorney or a trial court’s failure to properly advise a defendant of his PCR rights). Furthermore, Brun’s lack of access to his “legal materials” is not borne out by the record. After filing the notice of compliance required by Rule 32.4(c)(2), Brun’s counsel notified the superior court that she had provided Brun with all transcripts and documents relevant to his PCR proceeding. Finally, Brun lacks any explanation for waiting seven months after the dismissal of his PCR proceeding before bringing forth excuses for his untimeliness.

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¶9 Brun has not shown any abuse of discretion in the superior court's determination that he lacked good cause for his failure to timely file a petition for PCR. Accordingly, we grant review but deny relief.



AMY M. WOOD • Clerk of the Court
FILED: AA