

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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THE STATE OF ARIZONA,  
*Respondent,*

*v.*

DONALD WAYNE AINSWORTH,  
*Petitioner.*

No. 2 CA-CR 2020-0158-PR  
Filed January 7, 2021

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Petition for Review from the Superior Court in Maricopa County  
No. CR2017119799001DT  
The Honorable Peter A. Thompson, Judge

**REVIEW GRANTED; RELIEF DENIED**

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COUNSEL

Allister Adel, Maricopa County Attorney  
By Amanda M. Parker, Deputy County Attorney, Phoenix  
*Counsel for Respondent*

Donald W. Ainsworth, Florence  
*In Propria Persona*

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**OPINION**

Vice Chief Judge Staring authored the opinion of the Court, in which  
Chief Judge Vásquez and Judge Brearcliffe concurred.

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STARING, Vice Chief Judge:

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¶1 Petitioner Donald Ainsworth seeks review of the trial court’s order dismissing his petition for post-conviction relief, filed pursuant to former Rule 32, Ariz. R. Crim. P., arguing his post-conviction rights to court appointed counsel were ignored and violated. “We will not disturb a trial court’s ruling on a petition for post-conviction relief absent a clear abuse of discretion.” *State v. Swoopes*, 216 Ariz. 390, ¶ 4 (App. 2007). Ainsworth has not sustained his burden of establishing such abuse here.

¶2 Pursuant to a plea agreement, Ainsworth was convicted of three counts of attempted child molestation. The trial court sentenced him to a five-year prison term on the first count and suspended the imposition of sentence on the remaining two counts, placing Ainsworth on life terms of probation. At the sentencing hearing, Ainsworth also signed a notice of his right to seek post-conviction relief, which explained that he was required to file a notice “within 90 days of the entry of judgment and sentence” and stated that “to file a notice of post-conviction relief, you should contact a lawyer . . . telling him or her that you want to seek post-conviction relief.”

¶3 Approximately ten months later, Ainsworth filed a notice of post-conviction relief, requesting appointment of counsel and arguing in his simultaneously filed petition that Rule 32.1(f) entitled him to relief, *see* Ariz. Sup. Ct. Order R-17-0002 (Aug. 31, 2017), that he had received ineffective assistance of counsel, and that his plea had not been knowing and voluntary. He also maintained he was entitled to relief under Rule 32.1(e) based on his newly “discovered information and material facts” relating to counsel’s having purportedly coerced his plea. *See* Ariz. Sup. Ct. Order R-17-0002. The trial court denied Ainsworth’s request for counsel and summarily dismissed the petition, concluding that Ainsworth had not established he was without fault for the late filing of his notice and that the remainder of his claims were either untimely or without merit.

¶4 Our supreme court amended the post-conviction relief rules, effective January 1, 2020. Ariz. Sup. Ct. Order R-19-0012 (Aug. 29, 2019). The amendments involved restyling and re-ordering of the rules and some substantive changes, including a division of former Rule 32 into two new rules—Rules 32 and 33. *Id.* Those “amendments apply to all cases pending on the effective date unless a court determines that ‘applying the rule or amendment would be infeasible or work an injustice.’” *State v. Mendoza*, 249 Ariz. 180, n.1 (App. 2020) (quoting Ariz. Sup. Ct. Order R-19-0012).

¶5 This court ordered the state to respond to Ainsworth’s petition for review to address, among other issues, the application of the

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amended rules for post-conviction relief. Specifically, we asked whether new Rule 33.5(a), Ariz. R. Crim. P.—which substantially, but not exactly, covers matters addressed in former Rule 32.4(b)(2)—would work an injustice if applied to Ainsworth. *See* Ariz. Sup. Ct. Order R-17-0002. The state concedes that Rule 33.5(a) should not apply. It points out that Ainsworth might have been entitled to appointment of counsel below under former Rule 32.4(b)(2), but would not be entitled under Rule 33.5(a). The state argues, however, that Ainsworth’s notice was “facially non-meritorious” and that the trial court therefore properly declined to appoint counsel, even under former Rule 32.4(b)(2).

¶6 As we have previously stated, “Nothing in Rule 32.2(b) suggests that counsel must be appointed for an indigent defendant before a trial court conducts the preliminary review mandated by that rule . . . .” *State v. Harden*, 228 Ariz. 131, ¶ 11 (App. 2011). We therefore must decide whether the trial court properly dismissed Ainsworth’s notice as inexcusably untimely and non-meritorious under former Rule 32.2(b). On review, Ainsworth argues the trial court abused its discretion because it “ignored” his argument that his trial counsel had a “duty of continuing representation” under Rule 6.3(b), Ariz. R. Crim. P. He contends that the court should not have denied him relief under Rule 32.1(f) and, therefore, that the remainder of its ruling was also incorrect. We disagree.

¶7 Rule 32.1(f) applies when a court has not informed a defendant of the right to seek post-conviction relief or when someone else has interfered with a defendant’s attempt to file a timely petition. *See* Ariz. Sup. Ct. Order R-17-0002 (comment to former Rule 32.1(f) explaining rule applies when “defendant fails to appeal because the trial court . . . did not advise him of his appeal rights” or “defendant intended to appeal and thought timely appeal had been filed by his attorney when in reality it had not”). The record is clear here that Ainsworth was advised of his right to file a notice of post-conviction relief and of the deadline by which to do so. Ainsworth asserted in his petition that trial counsel had not filed a notice on his behalf and had not “even inquire[d] if he desired to seek” post-conviction relief. But the notice of post-conviction rights that Ainsworth signed explained he “should contact a lawyer” to tell him or her that he wished to seek post-conviction relief. Apparently, he did not do so.

¶8 Despite these warnings, however, Ainsworth contends his trial counsel was required to file a notice of post-conviction relief based on Rule 6.3(b). Rule 6.3(b) provides that, unless permitted to withdraw, “counsel who represents a defendant at any stage of a case has a continuing duty to represent the defendant in all further proceedings in the trial court,

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including the filing of a notice of appeal.” *Id.* But, as a pleading defendant, Ainsworth expressly waived his right to appeal. And, although proceedings for post-conviction relief are analogous to an appeal for some purposes, *see State v. Smith*, 184 Ariz. 456, 458 (1996), Ainsworth has cited no authority to suggest that Rule 6.3(b)’s requirements extend to the filing of a notice of post-conviction relief.

¶9 Indeed, pursuant to former Rule 32.4(b)(2), even if the defendant was entitled to court-appointed counsel, appointment of counsel was required (in a noncapital proceeding) *only* upon the filing of a “timely or first notice” and a defendant’s request. *See Ariz. Sup. Ct. Order R-17-0002*. This stands in contrast to Rule 31.5(e), Ariz. R. Crim. P., which provides that, for such a defendant, “[i]f a court allows a defendant’s appointed attorney to withdraw, the superior court or the appellate court must appoint new counsel . . . .” The trial court therefore did not abuse its discretion in concluding Ainsworth’s claim pursuant to Rule 32.1(f) was facially non-meritorious without first appointing him counsel.

¶10 And finally, although, as Ainsworth suggests, a claim of newly discovered evidence could be raised in an untimely proceeding under former Rule 32.4(a)(2)(A), *see Ariz. Sup. Ct. Order R-17-0002*, Ainsworth’s claim of newly discovered evidence was instead the assertion of a newly discovered legal claim, which is not cognizable under that rule, *see State v. Botello-Rangel*, 248 Ariz. 429, ¶ 11 (App. 2020). The trial court did not abuse its discretion in summarily dismissing each of Ainsworth’s claims.

¶11 We grant the petition for review, but we deny relief.