

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

EFRIN OSUNA-CHAVEZ,
Petitioner.

No. 2 CA-CR 2013-0423-PR
Filed December 23, 2013

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NOT FOR PUBLICATION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); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Maricopa County

No. CR2007172912006DT

The Honorable Paul J. McMurdie, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

William G. Montgomery, Maricopa County Attorney
By Arthur Hazelton, Deputy County Attorney, Phoenix
Counsel for Respondent

Efrin Osuna-Chavez, Tucson
In Propria Persona

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MEMORANDUM DECISION

Presiding Judge Kelly authored the decision of the Court, in which Judge Espinosa and Judge Eckerstrom concurred.

K E L L Y, Presiding Judge:

¶1 Efrin Osuna-Chavez petitions this court for 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 ruling unless the court clearly has abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Osuna-Chavez has not met his burden of demonstrating such abuse here.

¶2 Osuna-Chavez was convicted after a jury trial of three counts each of kidnapping and theft by extortion, and one count each of aggravated assault and smuggling. He was sentenced to concurrent and consecutive prison terms totaling twenty-six years. We affirmed his convictions and sentences on appeal, correcting the sentencing minute entry for one count without changing the length of his consolidated prison term. *State v. Osuna-Chavez*, No. 1 CA-CR 09-0051 (memorandum decision filed Mar. 2, 2010). Our mandate issued on April 21, 2010.

¶3 Osuna-Chavez filed a form notice of post-conviction relief in September 2011, checking boxes on the form indicating that he intended to raise a claim of newly discovered material facts and that his failure to timely file the notice was without fault on his part. He stated that he had been "misle[]d to believe that a notice would be submitted by appellate counsel once the court of appeals entered its mandate." He also stated he had intended to raise a claim of ineffective assistance of counsel "at every critical stage." The trial court, observing the notice was untimely pursuant to Rule 32.4(a), appointed counsel. Counsel filed a notice stating she had reviewed

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the record and found no claims to raise in a post-conviction proceeding.

¶4 Osuna-Chavez then filed a pro se petition, raising various claims of ineffective assistance of counsel before and during trial and at sentencing. The state responded that the petition should be summarily dismissed because the notice was untimely and Osuna-Chavez had not raised any claims that could be raised in an untimely post-conviction proceeding. Citing Rule 32.6(d), Osuna-Chavez sought leave to amend his petition, stating he wished to include two “additional grounds that were omitted along with [two] exhibits. This was an accidental omission.” He explained that he wished to raise a claim of newly discovered evidence pursuant to Rule 32.1(e) and a claim that the failure to timely file his notice of post-conviction relief was without fault on his part pursuant to Rule 32.1(f).

¶5 He asserted that, in May 2010, he had directed his appellate counsel to file his notice of post-conviction relief. He also asserted that preclusion did not apply to his claims because “there is no preclusion for constitutional violations.” Osuna-Chavez also requested an extension of time to file his reply to the state’s response, pending the trial court’s ruling on his motion to amend. Without discussing either motion, the trial court summarily dismissed Osuna-Chavez’s petition. This petition for review followed.

¶6 On review, Osuna-Chavez reurges his claims of ineffective assistance of counsel and asserts the trial court abused its discretion in denying his motion to amend and request for additional time to file a reply. Because Osuna-Chavez’s notice was untimely, he is precluded from raising claims other than those pursuant to Rule 32.1(d), (e), (f), (g), or (h). Ariz. R. Crim. P. 32.4(a). A claim of ineffective assistance of counsel does not fall within any of those subsections and generally cannot be raised in an untimely proceeding.¹

¹Our supreme court stated in *Stewart v. Smith*, 202 Ariz. 446, ¶¶ 10, 12, 46 P.3d 1067, 1071-72 (2002), that a defendant could raise

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¶7 In his petition for review, Osuna-Chavez also refers to what he describes as the “denial of substantive due process” and “federal law violations.” To the extent he raised these claims below, he does not claim on review that they are excepted from preclusion. Because Osuna-Chavez did not raise a claim in his petition for post-conviction relief not subject to preclusion pursuant to Rule 32.4, the trial court did not err in summarily dismissing it.

¶8 Osuna-Chavez sought leave to raise a claim pursuant to Rule 32.1(f) that his failure to timely seek post-conviction relief was without fault on his part. Although that claim may be raised in an untimely proceeding, Ariz. R. Crim. P. 32.4(a), it is not cognizable for non-pleading defendants like Osuna-Chavez. Rule 32.1(f) only permits relief from an untimely notice of appeal or an untimely notice of post-conviction relief for a pleading defendant. Nor has Osuna-Chavez identified on review any claim he wished to raise in an amended petition that could be raised in an untimely post-conviction proceeding.² And he has not explained what argument he would have raised in his reply that could have permitted him to

ineffective assistance of counsel for the first time in a successive petition for post-conviction relief if the “right allegedly affected by counsel’s ineffective performance . . . is of sufficient constitutional magnitude to require personal waiver by the defendant and there has been no personal waiver.” Even assuming this reasoning applies with equal force to an untimely proceeding like Osuna-Chavez’s, he asserts only violations of his general due process right and does not assert a right that must be waived personally. *See State v. Swoopes*, 216 Ariz. 390, ¶ 28, 166 P.3d 945, 954 (App. 2007) (“An alleged violation of the general due process right of every defendant to a fair trial, without more, does not save that belated claim from preclusion.”).

²In his request for leave to amend, Osuna-Chavez referred below to a claim of newly discovered evidence. He never identified any such evidence below and, in any event, appears to have abandoned this claim on review. *See State v. Rodriguez*, 227 Ariz. 58, n.4, 251 P.3d 1045, 1048 n.4 (App. 2010) (declining to address argument not raised in petition for review).

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raise his claims in an untimely petition. Thus, we find no error in the trial court's implicit denial of his motion for leave to amend and request for additional time to file a reply.

¶9 Although review is granted, relief is denied.