

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

JUAN TAMERIN PETROVICH,
Petitioner.

No. 2 CA-CR 2015-0032-PR
Filed March 2, 2015

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NOT FOR PUBLICATION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. CR2008165837001DT

The Honorable Susanna C. Pineda, Judge

REVIEW GRANTED; RELIEF DENIED

Juan T. Petrovich, Eloy
In Propria Persona

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MEMORANDUM DECISION

Judge Vásquez authored the decision of the Court, in which Presiding Judge Kelly and Judge Howard concurred.

VÁSQUEZ, Judge:

¶1 Petitioner Juan Petrovich seeks review of the trial court's order dismissing his notice of post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. "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, 166 P.3d 945, 948 (App. 2007). Petrovich has not sustained his burden of establishing such abuse here.

¶2 After a jury trial, Petrovich was convicted of sexual conduct with a minor and two counts of child molestation. The trial court sentenced him to consecutive, presumptive sentences totaling fifty-four years' imprisonment. Petrovich's convictions and sentences were affirmed on appeal. *State v. Petrovich*, No. 1 CA-CR 10-0173 (memorandum decision filed Aug. 30, 2011).

¶3 On November 13, 2012, Petrovich filed a notice of post-conviction relief, claiming "lack of jurisdiction," "vindictive [and] selective prosecution," "prosecutorial misconduct," various trial and due process errors, and, apparently, ineffective assistance of trial and appellate counsel. The trial court found the notice untimely and dismissed it on the ground that it "fail[ed] to state a claim for which relief can be granted in an untimely . . . Rule 32 proceeding." Petrovich filed a motion for reconsideration claiming he had been misled about the availability of post-conviction relief by his counsel and was therefore without fault in relation to the untimely filing. The court denied the motion, pointing out that Rule 32.1(f) only provides relief in regard to the untimely filing of "a notice of post-conviction relief of-right or notice of appeal."

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¶4 On review, Petrovich contends the trial court erred in concluding his notice of post-conviction relief was not “of-right” and dismissing the notice, and his claims of ineffective assistance of counsel, on that basis. We cannot agree, however, that the court abused its discretion in refusing to permit Petrovich to raise his claims in a delayed post-conviction proceeding pursuant to Rule 32.1(f). As a general proposition, claims under Rule 32.1(f) are among the kinds of claims that may be asserted in an untimely post-conviction proceeding, *see* Ariz. R. Crim. P. 32.4(a), so long as the defendant states valid reasons for failing to file a timely notice of post-conviction relief. *See* Ariz. R. Crim. P. 32.2(b). But based on its clear language, Rule 32.1(f) is not available to Petrovich, a non-pleading defendant who already has had an appeal.

¶5 Rule 32.1(f) is the procedural vehicle through which non-pleading defendants who have failed to file a timely notice of appeal through no fault of their own may seek leave to file a delayed direct appeal. Similarly, the rule provides pleading defendants with the equivalent of seeking such relief; a pleading defendant’s right of appellate review is through a post-conviction proceeding, and such a defendant may seek leave to file a delayed “of-right” notice of post-conviction relief. Ariz. R. Crim. P. 32.1(f); *see also* *Moreno v. Gonzalez*, 192 Ariz. 131, ¶ 18, 962 P.2d 205, 208 (1998) (“[A] Rule 32 petition for post-conviction relief in the trial court is not an ‘appeal’ within the meaning of Rule 32.1(f), Ariz. R. Crim. P. ‘Appeal’ as used in Rule 32.1(f) means appeal under Rule 31[, Ariz. R. Crim. P.]”). Pleading defendants do not have the right to a direct appeal. A.R.S. § 13-4033(B). As our supreme court stated in *Montgomery v. Sheldon*, 181 Ariz. 256, 258, 889 P.2d 614, 616, *supp. op.*, 182 Ariz. 118, 119, 893 P.2d 1281, 1282 (1995), the first of-right proceeding pursuant to Rule 32 is equivalent to a direct appeal for a pleading defendant; it is “the only means available for exercising the [defendant’s] constitutional right to appellate review.” *See also* *State v. Pruett*, 185 Ariz. 128, 131, 912 P.2d 1357, 1360 (App. 1995) (pleading defendant entitled to effective assistance of counsel on first, of-right petition for post-conviction relief, which is “the counterpart of a direct appeal”). The rule therefore gives pleading and non-pleading defendants the same opportunity to request a delayed first review.

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¶6 Nothing in the rule, however, gives any defendant but a pleading defendant in an “of-right” proceeding the right to seek leave to file a delayed notice of post-conviction relief. And Rule 32.1 defines an “of-right proceeding” solely to encompass a first proceeding for a “person who pled guilty or no contest, admitted a probation violation, or whose probation was automatically violated based upon a plea of guilty or no contest.” If the supreme court had wanted to provide non-pleading defendants with the means to seek leave to file a delayed notice of post-conviction relief to assert a first claim of ineffective assistance of trial or appellate counsel, the court could have so provided in Rule 32.1(f). It did not include such a provision, and we can neither construe the rule to include words that are not there nor rewrite the rule. *See Potter v. Vanderpool*, 225 Ariz. 495, ¶ 13, 240 P.3d 1257, 1262 (App. 2010).

¶7 Therefore, although we grant the petition for review, we deny relief.