

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

SEAN MICHAEL MCCAIN,
Petitioner.

No. 2 CA-CR 2015-0092-PR
Filed June 11, 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NOT FOR PUBLICATION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 Graham County

No. CR201300151

The Honorable R. Douglas Holt, Judge

REVIEW GRANTED; RELIEF GRANTED

Sean Michael McCain, Florence
In Propria Persona

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MEMORANDUM DECISION

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

K E L L Y, Presiding Judge:

¶1 In this petition for review, petitioner Sean McCain contends the trial court erred in dismissing his untimely notice of post-conviction relief, summarily denying his request for leave to file a delayed notice pursuant to Rule 32.1(f), Ariz. R. Crim. P., and not permitting him to substantiate his claim by conducting an evidentiary hearing. We find the trial court has abused its discretion here. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 Pursuant to a plea agreement, McCain was convicted of two counts of child abuse/domestic violence and sentenced on October 7, 2013, to an aggravated prison term of nine years on one count, followed by a lifetime term of probation on the other. On February 5, 2015, McCain filed a notice of post-conviction relief. In the form notice, McCain checked boxes to reflect he was requesting that counsel be appointed to represent him, he intended to raise a claim of ineffective assistance of counsel, and the notice was untimely but he intended to raise a claim under Rule 32.1(d), (e), (f), (g) or (h), further specifying he was seeking relief pursuant to Rule 32.1(f) because, as the printed provision stated, “[t]he defendant’s failure to file a timely notice of post-conviction relief . . . was without fault on the defendant’s part.” In a space on the form notice where the defendant is asked to explain the basis for his or her claim, McCain stated he had been afraid to file his own notice because other inmates would have access to information regarding sex offenses he had committed and would assault him. He stated his attorney told him “not to worry,” assuring him she would file the notice and that the court would contact him.

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¶3 McCain further alleged in his notice that, based on information another inmate gave him, he filed a motion in the trial court seeking a compassionate release and reduction of his sentence. The trial court denied the motion and in its order, the court stated McCain had ninety days from the date of sentencing to file a notice of post-conviction relief but had failed to do so. McCain stated in his notice of post-conviction relief he filed the notice when he learned, through that order, that his counsel had not done so.

¶4 The trial court dismissed McCain's notice, finding the "excuses offered by Mr. McCain," did not "justify filing . . . [the] notice over a year after it should have been filed." The court also denied McCain's request for counsel, stating it appoints counsel only when a timely notice has been filed. In his petition for review, McCain contends the court erred and argues that he was entitled to an evidentiary hearing on the question of what his counsel told him, claiming counsel was ineffective in telling him she would file the notice. McCain argues he also is entitled to the appointment of counsel to represent him in this matter, and that he is being deprived of his right as a pleading defendant to an appeal in the form of post-conviction review.

¶5 When a defendant files an untimely notice of post-conviction relief, he may only raise claims under Rule 32.1(d), (e), (f), (g), or (h). See Ariz. R. Crim. P. 32.4(a). The notice must make a threshold showing of the basis for the relief sought and the applicable subsection, which McCain did. As this court observed in *State v. Poblete*, "Rule 32.1(f) provides that a petitioner may request the right to file a delayed notice of post-conviction relief if his failure to file timely was 'without fault on the [petitioner's] part.'" 227 Ariz. 537, ¶ 6, 260 P.3d 1102, 1104 (App. 2011) (alteration in *Poblete*). The court added, "Relief should be granted under this rule if . . . the defendant intended to seek post-conviction relief in an of-right proceeding and had believed mistakenly his counsel had filed a timely notice or request." *Id.*, citing Ariz. R. Crim. P. 32.1(f) 2007 cmt. Here, the trial court rejected McCain's assertion that he had relied on counsel's assurance that she would file the notice, finding that, as well as McCain's other explanations, did not justify relief

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under the rule. But if true, counsel's assurance to McCain would be a sound basis for granting relief.

¶6 The trial court therefore erred by not giving McCain the opportunity to present his claim in a petition for post-conviction relief and, if the petition and any response by the state give rise to a material issue of fact, then an evidentiary hearing to determine what counsel said to McCain and whether he had reasonably relied on her assurance. *See* Ariz. R. Crim. P. 32.6(c), 32.8(a). Moreover, although a defendant is not entitled to the appointment of counsel in connection with the preparation of the notice, the rule provides that a defendant is entitled to the appointment of counsel when a pleading defendant files his first, albeit untimely notice. *See* Ariz. R. Crim. P. 32.4(c)(2); *see also Osterkamp v. Browning*, 226 Ariz. 485, ¶¶ 11, 15-16, 250 P.3d 551, 554-55 (App. 2011) (defendant entitled to appointment of counsel after "the filing of a timely or first notice" of post-conviction relief). And although Rule 32.2(b) does not require a trial court to appoint counsel when a notice of post-conviction relief is "facially non-meritorious," *State v. Harden*, 228 Ariz. 131, ¶ 11, 263 P.3d 680, 682-83 (App. 2011), based on the contents of McCain's notice and our decision in *Poblete*, we conclude the court abused its discretion in exercising that gate-keeping function here.

¶7 For the reasons stated, we grant this petition for review and grant relief, remanding this matter to the trial court for further proceedings consistent with this decision.