

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

JONATHAN JAMES SPANGLER,
Appellant.

No. 2 CA-CR 2015-0434
Filed August 17, 2016

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NOT FOR PUBLICATION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.

Appeal from the Superior Court in Pima County
No. CR20094100001
The Honorable Danelle B. Liwski, Judge

APPEAL DISMISSED

COUNSEL

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Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Amy M. Thorson, Assistant Attorney General, Tucson
Counsel for Appellee

Dean Brault, Pima County Legal Defender
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MEMORANDUM DECISION

Judge Staring authored the decision of the Court, in which Presiding Judge Howard and Judge Espinosa concurred.

STARING, Judge:

¶1 Jonathan Spangler appeals the denial of his motion to vacate two restitution orders the state requested more than six months after a court-imposed deadline to submit claims. For the following reasons, we dismiss Spangler’s appeal.

Factual and Procedural Background

¶2 “We view the facts and all reasonable inferences therefrom in the light most favorable to upholding the trial court’s restitution order.” *State v. Lewis*, 222 Ariz. 321, ¶ 2, 214 P.3d 409, 411 (App. 2009). In May 2010, pursuant to a plea agreement, Spangler was convicted of multiple charges arising from an automobile accident he caused driving while intoxicated. The trial court sentenced him to concurrent terms of probation, the longest of which was five years. Under the terms of the plea agreement, Spangler also agreed to pay restitution to as many as seventeen accident victims in an aggregate amount up to \$137,000, and waived the right to an evidentiary hearing to determine specific amounts. The court initially awarded \$11,922.48 in restitution and imposed a sixty-day deadline for the state to request additional restitution.

¶3 In March and June 2011, the trial court granted two uncontested requests for additional restitution totaling \$56,192.36. In April 2015, the court granted the state’s petition to continue Spangler’s probation for an additional five years because he still owed a large restitution balance. Spangler thereafter filed a motion to vacate the 2011 restitution orders, which the court denied. This appeal followed.

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Discussion

¶4 On appeal, Spangler contends the trial court improperly granted additional restitution that was waived by the state's failure to submit timely claims, and thus abused its discretion when it later refused to vacate the restitution orders. *See State v. Nuckols*, 229 Ariz. 266, ¶ 5, 274 P.3d 536, 538 (App. 2012) (trial court may require timely assertion of restitution claims to avoid waiver). We will not consider this issue, however, because we lack jurisdiction over Spangler's appeal. *See State v. Bejarano*, 219 Ariz. 518, ¶ 2, 200 P.3d 1015, 1016 (App. 2008) ("This court may not address an issue or provide relief if it lacks jurisdiction to do so and we have an independent duty to ensure that we have jurisdiction before addressing the merits of any claim raised on appeal.").

Jurisdiction to Consider Restitution Challenge

¶5 Section 13-4033(B), A.R.S., provides: "In noncapital cases a defendant may not appeal from a judgment or sentence that is entered pursuant to a plea agreement" In general, pleading defendants must exercise their constitutional right to appellate review via the rules governing post-conviction relief proceedings. *State v. Smith*, 184 Ariz. 456, 458, 910 P.2d 1, 3 (1996). And, dispositive here, our supreme court has specifically held that "§ 13-4033(B) bars a defendant from directly appealing a contested post-judgment restitution order entered pursuant to a plea agreement that contemplated payment of restitution and capped the amount." *Hoffman v. Chandler*, 231 Ariz. 362, ¶ 19, 295 P.3d 939, 943 (2013) ("In such situations, a pleading defendant must vindicate the constitutionally guaranteed right of appellate review through Rule 32[, Ariz. R. Crim. P.] post-conviction relief proceedings.").¹ Thus, Spangler could have challenged the post-judgment restitution orders

¹ "[E]xcluding a post-judgment restitution order entered pursuant to a plea agreement from the reach of § 13-4033(B) would create a hybrid system of appellate review[,]" allowing a pleading defendant to challenge a post-judgment restitution order by direct appeal but requiring him to raise all other issues in Rule 32 proceedings. *Hoffman*, 231 Ariz. 362, ¶ 10, 295 P.3d at 941.

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in a timely Rule 32 proceeding, and is prohibited by § 13-4033(B) from doing so in a direct appeal.²

¶6 Spangler, however, argues the requirement that pleading defendants seek relief through Rule 32 post-conviction relief proceedings does not apply here because he is asserting a due process claim rather than contesting the restitution amount. Specifically, he contends the trial court violated his right to due process when it ignored its own order imposing a deadline for submitting additional restitution claims. But, as noted above, § 13-4033(B) and *Hoffman* make clear that pleading defendants must pursue claims for appellate review in Rule 32 proceedings. And, notably, Rule 32.1(a) identifies a “conviction or . . . sentence . . . in violation of the Constitution of the United States or of the State of Arizona” as a possible ground for relief. Thus, assuming without deciding that his due process argument is something other than a challenge to the amount of restitution, Spangler would still be limited to pursuing it in Rule 32 proceedings.

¶7 Spangler also contends his direct appeal is authorized because the entry of restitution orders more than ninety days after his original sentencing prevented him from challenging the restitution in a timely Rule 32 petition. *See* Ariz. R. Crim. P. 32.4(a). In *Hoffman*, however, the court also held that a post-judgment restitution order is considered part of a defendant’s sentence for purposes of § 13-4033(B). 231 Ariz. 362, ¶ 9, 295 P.3d at 941. Nothing in Rule 32.2 precludes a defendant from challenging restitution granted more than ninety days after a defendant’s original sentencing. Further, *Hoffman* requires us to “broadly interpret Rule 32 to preserve the rights of pleading defendants to

²Even if directly appealable pursuant to § 13-4033(A)(3) as “order[s] affecting the substantial rights of the party,” the restitution orders were issued in 2011, and Spangler’s notice of appeal was not filed until 2015. Thus, we would still lack jurisdiction due to untimeliness. *See* Ariz. R. Crim. P. 31.3 (notice of appeal timely if filed within twenty days after sentencing); *State v. Berry*, 133 Ariz. 264, 266, 650 P.2d 1246, 1248 (App. 1982) (timely notice of appeal essential to exercise of jurisdiction).

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appellate review.”³ *Id.* ¶ 18. Because the post-judgment restitution orders were part of his sentence, Spangler could have challenged them in a timely Rule 32 proceeding.

Disposition

¶8 For the reasons stated, we dismiss Spangler’s appeal for lack of jurisdiction.

³The court in *Hoffman* appeared to tacitly recognize the possibility of a timely Rule 32 proceeding commenced more than ninety days after sentencing, as the restitution there was granted “[a]pproximately three months” after sentencing. *See id.* ¶ 3.