

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

THOMAS JAMAAL GAULDIN,
Petitioner.

No. 2 CA-CR 2016-0010-PR
Filed March 1, 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NOT FOR PUBLICATION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.

Petition for Review from the Superior Court in Maricopa County
No. CR2012159730001DT
The Honorable Teresa A. Sanders, Judge

REVIEW GRANTED, RELIEF GRANTED AND REMANDED

Thomas J. Gauldin, Florence
In Propria Persona

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MEMORANDUM DECISION

Judge Miller authored the decision of the Court, in which Presiding Judge Vásquez and Chief Judge Eckerstrom concurred.

M I L L E R, Judge:

¶1 Petitioner Jamaal Gauldin seeks review of the trial court's order dismissing his untimely 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). For the reasons stated below, we grant review and relief.

¶2 Pursuant to a plea agreement, Gauldin was convicted of manslaughter and theft of means of transportation, and sentenced in July 2013 to a prison term of eighteen years followed by four years of probation. In January 2014, Gauldin filed his first, untimely, notice of post-conviction relief.¹ In the form notice, Gauldin attached an affidavit of indigency and checked boxes to reflect he was requesting that counsel be appointed to represent him. Gauldin also indicated he intended to raise a claim of ineffective assistance of counsel, and acknowledged the notice was untimely. However, he stated he intended to raise a claim under Rule 32.1(d), (e), (f), (g) or (h), and further specified he was seeking relief pursuant to Rule 32.1(e) (newly discovered material evidence) and (f) (failure to file of-right, timely notice without fault on defendant's part). Gauldin also stated on the form notice that he had been unable to file a timely notice due to "recovery time needed from personal injuries." Almost one month after he filed his notice, Gauldin filed a "Motion for Status," reminding the court he had requested appointed counsel.

¹ The notice, which was dated December 28, 2013, was notarized on December 30, 2013, and was filed on January 2, 2014.

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¶3 In March 2014, the trial court dismissed Gauldin's January 2014 notice as untimely, noting it had reviewed the notice and motion for status; the ruling did not mention Gauldin's request that counsel be appointed to represent him. Subsequently, in April 2014, the court summarily dismissed a "Notice of Post-Conviction relief filed March 4, 2014," which it characterized as Gauldin's "second Rule 32 proceeding."² Concluding the notice was both untimely and successive and noting that Gauldin had not raised a claim pursuant to Rule 32.1(d), (e), (f), (g), or (h), the court found the notice to be procedurally precluded. *See Ariz. R. Crim. P.* 32.4(a). This petition for review followed.

¶4 On review, Gauldin argues the trial court erred in finding this was his second Rule 32 proceeding and in dismissing it as untimely and successive, asks that we order the court to "re-check the record to see that this is [his] first Rule 32 proceeding," and asserts he "has a lawful reason for being untimely." Notably, Gauldin also maintains he is entitled to the appointment of counsel pursuant to Rule 32.4(c)(2).

¶5 We note that the trial court never ruled on Gauldin's repeated requests that counsel be appointed to represent him. Pursuant to Rule 32.4(c)(2), the trial court is required to appoint counsel "[u]pon the filing of a timely or first notice in a Rule 32 proceeding." *See Osterkamp v. Browning*, 226 Ariz. 485, ¶¶ 11, 15-16, 250 P.3d 551, 554-55 (App. 2011). Because the record contains only

²We note various procedural anomalies in the record. First, in March 2014, two different judges from the same court entered inconsistent orders at the same time on the same date, one of which presumably led Gauldin to believe he could file an untimely petition for post-conviction relief, which he did on March 24, 2014. Second, the record on review does not contain a notice of post-conviction relief dated March 4, 2014, the notice upon which the trial court stated it had relied in dismissing Gauldin's "second" and "successive" notice. Our review of the record shows that Gauldin filed a single notice and petition.

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one notice of post-conviction relief and one petition, this is Gauldin's first post-conviction proceeding. Gauldin is, therefore, entitled to the appointment of counsel despite the fact that his January 2014 notice is patently untimely. *See Ariz. R. Crim. P.* 32.4(a), (c)(2). We thus find the court abused its discretion by summarily dismissing Gauldin's notice without appointing counsel and by concluding he had filed a successive notice of post-conviction relief. Finally, although we note that 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), we note that the court made no such finding here.

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