

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

SANTOS ANGEL HERNANDEZ,
Petitioner.

No. 2 CA-CR 2016-0011-PR
Filed May 18, 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NOT FOR PUBLICATION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 Pima County
No. CR20111095001
The Honorable Howard Fell, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Barbara LaWall, Pima County Attorney
By Jacob R. Lines, Deputy County Attorney, Tucson
Counsel for Respondent

The Law Offices of Henry Jacobs, PLLC, Tucson
By Henry Jacobs
Counsel for Petitioner

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MEMORANDUM DECISION

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

ESPINOSA, Judge:

¶1 Santos Hernandez seeks review of the trial court's ruling denying his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that order unless the court clearly abused its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Hernandez has not met his burden of demonstrating such abuse here.

¶2 Hernandez pled guilty to second-degree murder and armed robbery. Pursuant to the plea agreement, the trial court sentenced him in September 2013 to consecutive prison terms of sixteen and 10.5 years, respectively. Hernandez signed a notice that advised him of his right to seek post-conviction relief within ninety days of his sentencing. *See* Ariz. R. Crim. P. 32.4(a). In January 2014, the parties filed a stipulation for the amount of restitution, and the court ordered restitution consistent with that stipulation. Hernandez did not initiate a post-conviction proceeding within ninety days of his sentence or within ninety days of the restitution order.

¶3 In January 2015, Hernandez, through trial counsel, filed a "Motion for Delayed Notice of Post-Conviction Relief," citing Rule 32 and stating that he had "requested a Notice of Post-Conviction Relief regarding the entry of the restitution issue, which was not timely filed [because] Mr. Hernandez was confused about the filing deadline." The trial court granted the motion without comment, and Hernandez filed a notice of post-conviction relief.

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¶4 The trial court appointed counsel, who filed a petition for post-conviction relief asserting trial counsel had been ineffective for allowing Hernandez to enter the plea agreement because the consecutive sentences provided by that agreement were not permitted pursuant to A.R.S. § 13-116. The court summarily denied the petition, stating that it had permitted the “delayed Rule 32 filing” only “on the limited issue of restitution.” Thus, the court concluded Hernandez’s claim of ineffective assistance was untimely. This petition for review followed.

¶5 On review, Hernandez argues the trial court “improperly limited the scope of the issues” he could raise in his Rule 32 proceeding. He asserts that, because the trial court did not explicitly limit the issues in its order granting his request to file a delayed notice, he is permitted to raise additional issues. And, he suggests, the reason for allowing the late notice—his confusion about the filing deadline—would apply to issues other than restitution.

¶6 Nothing in Rule 32 permits a trial court to grant a motion to file a delayed notice of post-conviction relief. Instead, a pleading defendant must request such relief by initiating a Rule 32 proceeding and demonstrating, pursuant to Rule 32.1(f), that the failure to timely file it “was without fault on the defendant’s part.” See Ariz. R. Crim. P. 32.2, 32.4(a). But, even assuming the trial court properly construed Hernandez’s motion as seeking, and warranting,¹ relief pursuant to Rule 32.1(f), the court granted the relief he requested—permission to file a late Rule 32 proceeding to address restitution. Nothing about the court’s order indicated it intended to grant relief Hernandez did not request, and Hernandez cites no authority suggesting a defendant is not bound by the scope of the relief he or she requests. Cf. *Wineglass Ranches, Inc. v. Campbell*, 12 Ariz. App. 571, 575, 473 P.2d 496, 500 (1970) (trial court erred by granting relief “beyond that which [party] sought”). Nor

¹Because the issue is not before us, we express no opinion whether the facts here supported a finding that Hernandez was without fault.

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does Hernandez cite any authority in support of his apparent argument that a trial court is required to grant additional and unrequested relief sua sponte.

¶7 Hernandez also argues that his trial counsel “could not be charged with the duty to advise [Hernandez] to file or not to file a post-conviction petition that could encompass a claim of [trial counsel’s] ineffective assistance” and that he cannot be held responsible for failing to raise that claim on his own. He also suggests trial counsel was ineffective for failing to file a timely notice of post-conviction relief. Hernandez did not raise these arguments in the trial court, and we therefore do not address them on review.² See *State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (appellate court need not address claims not raised below).

¶8 Because Hernandez requested and was granted permission to seek post-conviction relief limited to restitution, the trial court did not err in rejecting as untimely his claim of ineffective assistance. See Ariz. R. Crim. P. 32.4(a). Accordingly, although we grant review, relief is denied.

²We observe, however, that by filing the motion seeking leave to file an untimely notice of post-conviction relief limited to the issue of restitution, trial counsel was at least arguably acting as Hernandez’s Rule 32 counsel. As a pleading defendant, Hernandez is entitled to the effective assistance of Rule 32 counsel. See *Osterkamp v. Browning*, 226 Ariz. 485, ¶ 18, 250 P.3d 551, 556 (App. 2011). We express no opinion as to the potential merits of such a claim.