

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

RICHARD E. MCDADE,
Petitioner.

No. 2 CA-CR 2017-0092-PR
Filed April 12, 2017

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NOT FOR PUBLICATION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. CR2009163837001DT
The Honorable Rosa Mroz, Judge

REVIEW GRANTED; RELIEF DENIED

Richard McDade, Winslow
In Propria Persona

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MEMORANDUM DECISION

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

M I L L E R, Judge:

¶1 Richard McDade seeks review of the trial court's order, summarily denying his untimely and successive 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. Roseberry*, 237 Ariz. 507, ¶ 7, 353 P.3d 847, 848 (2015). McDade has not met his burden of demonstrating such abuse here.

¶2 McDade pled guilty to shoplifting and first-degree trafficking in stolen property and was sentenced to an eleven-year prison term for trafficking in stolen property, to be followed by a three-year term of probation for shoplifting. He sought post-conviction relief, and appointed counsel filed a notice stating he had reviewed the record but found no claims to raise in a Rule 32 proceeding. McDade then filed a pro se petition asserting his trial counsel had been ineffective in failing to present mitigating evidence. The court summarily denied the petition. McDade did not seek review of that ruling.

¶3 Four years later, McDade filed a notice of and petition for post-conviction relief, asserting his trial and Rule 32 counsel had been ineffective, that his failure to timely seek post-conviction relief was without fault on his part, that his consecutive term of probation was improper, and that there was newly discovered evidence relevant to his sentence. Most of his claims centered on his assertion that he had only recently obtained documents showing he had never been convicted of a driving under the influence (DUI) offense, purportedly one of three previous felonies upon which the court had relied in

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imposing an aggravated sentence.¹ The trial court summarily denied relief, and this petition for review followed.

¶4 On review, McDade reasserts his claims. None warrant relief. His claims of ineffective assistance of counsel fall within Rule 32.1(a) and thus cannot be raised in this untimely proceeding. Ariz. R. Crim. P. 32.4(a). Nor can his sentencing claim be raised in this proceeding. Ariz. R. Crim. P. 32.1(c), 32.4(a).

¶5 And, although McDade contends his failure to timely seek post-conviction relief was without fault on his part, *see* Ariz. R. Crim. P. 32.1(f), he conflates this claim with his claim that Rule 32 counsel was ineffective in failing to raise his sentencing claim in his first proceeding.² Rule 32.1(f) does not permit an untimely petition based on McDade's belief Rule 32 counsel should have raised a particular claim. It permits relief only when a defendant "was unaware of his right to petition for post-conviction relief or of the time within which a notice of post-conviction relief must be filed or that he intended to challenge the court's decision but his attorney or someone else interfered with his timely filing of a notice." *State v. Poblete*, 227 Ariz. 537, ¶ 7, 260 P.3d 1102, 1104-05 (App. 2011).

¶6 A claim of newly discovered evidence, however, may be raised in an untimely petition like this one. Ariz. R. Crim. P. 32.1(e), 32.4(a). But, although McDade claims he only recently obtained documents showing he was not convicted of the DUI, he has not

¹McDade's slightly aggravated, enhanced, eleven-year prison term was stipulated in the plea agreement. McDade was sentenced as a category-two repetitive offender based on his previous conviction for second-degree escape, and the trial court considered his remaining three previous felony offenses as aggravating factors. *See* A.R.S. § 13-703(B), (I).

²For a pleading defendant like McDade, Rule 32.1(f) applies only to an of-right notice of post-conviction relief. A second, of-right proceeding typically would be limited to a claim of ineffective assistance of first Rule 32 counsel. *See Osterkamp v. Browning*, 226 Ariz. 485, ¶¶ 7, 10, 15-17, 250 P.3d 551, 553-56 (App. 2011).

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demonstrated the evidence “could not have been discovered and produced at trial through reasonable diligence.” *State v. Saenz*, 197 Ariz. 487, ¶ 7, 4 P.3d 1030, 1032 (App. 2000). Indeed, McDade raised the issue at sentencing. And, in any event, McDade has not shown the evidence “probably would have changed . . . [his] sentence” as required for relief under Rule 32.1(e). Although McDade claims the DUI offense was one of three felonies the court relied on in aggravating his sentence, the documents he attached to his notice below instead show the DUI conviction was a misdemeanor offense. McDade has identified nothing in the record suggesting that misdemeanor conviction was relevant to his sentence.

¶7 We grant review but deny relief.