

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

JIMMY LASHAWN MCGILL,
Petitioner.

No. 2 CA-CR 2017-0095-PR
Filed July 19, 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NOT FOR PUBLICATION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 Pinal County
No. S1100CR16474
The Honorable Lawrence M. Wharton, Judge

REVIEW GRANTED; RELIEF GRANTED

COUNSEL

Kent P. Volkmer, Pinal County Attorney
By Daniel E. Thorup, Deputy County Attorney, Florence
Counsel for Respondent

Arizona Capital Representation Project, Tucson
By Amy Armstrong and Sam Kooistra
Counsel for Petitioner

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MEMORANDUM DECISION

Presiding Judge Vásquez authored the decision of the Court, in which Judge Staring and Judge Howard¹ concurred.

V Á S Q U E Z, Presiding Judge:

¶1 Petitioner Jimmy McGill seeks review of the trial court’s order dismissing his notice for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. We will not reverse a trial court’s ruling in a proceeding for post-conviction relief “absent a clear abuse of discretion.” *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We conclude the court abused its discretion in summarily dismissing McGill’s notice and therefore grant relief.

¶2 After a jury trial, McGill, who had been sixteen at the time of the offense, was convicted of first-degree murder, sexual assault, and second-degree burglary. The trial court imposed a life sentence, of which he was required to “serve 25 calendar years before [being] eligible for parole or any type of early release,” to be followed by consecutive, aggravated terms of fourteen and ten years on the sexual assault and burglary convictions. This court affirmed the convictions and sentences on appeal. *State v. McGill*, No. 2 CA-CR 92-0544 (Ariz. App. Aug. 30, 1994) (mem. decision). McGill sought and was denied post-conviction relief on the ground of ineffective assistance of trial counsel, and failed to file a petition for review from that decision. *Id.*

¶3 McGill again sought post-conviction relief in 1995, and the trial court denied relief. This court denied relief on review. *State*

¹The Hon. Joseph W. Howard, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and our supreme court.

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v. McGill, No. 2 CA-CR 99-0385-PR (Ariz. App. Jan. 11, 2000) (mem. decision).

¶4 In January 2017, McGill initiated a third proceeding for post-conviction relief, asserting the decisions in *Miller v. Alabama*, 567 U.S. 460 (2012), *Montgomery v. Louisiana*, ___ U.S. ___, 136 S. Ct. 718 (2016), and *State v. Valencia*, 241 Ariz. 206, 386 P.3d 392 (2016), constituted a significant change in the law entitling him to relief. He requested the appointment of counsel. The trial court concluded that *Miller* and the related decisions were “a significant change in the law,” but that McGill had not established how these decisions “appl[ied] to his sentence.” The court noted that, in regard to his life sentence, McGill was “eligible for parole upon the completion of the minimum sentence.” On this basis, the court dismissed the notice.

¶5 On review, McGill argues the trial court erred in dismissing his notice, contending he received a de facto life sentence without release. He maintains he is “entitled to file a petition for post-conviction relief.” Rule 32.4(a) provides that in an untimely proceeding a defendant may only raise claims pursuant to Rule 32.1(d), (e), (f), (g), or (h). McGill’s claim arises under Rule 32.1(g). In order to survive dismissal, a notice in an untimely or successive proceeding “must set forth the substance of the specific exception and the reasons for not raising the claim in the previous petition or in a timely manner.” Ariz. R. Crim. P. 32.2(b). It is only when “the specific exception and meritorious reasons do not appear substantiating the claim and indicating why the claim was not stated in the previous petition or in a timely matter,” that the notice may be summarily dismissed. *Id.*

¶6 In this case, McGill indicated in his notice that he was raising a claim pursuant to one of the exceptions, specifically that there had been a significant change in the law and that the change applied to him because he received a de facto life sentence. He also set forth the decisions upon which he was relying, which, as the trial court acknowledged, have been determined to constitute a significant change in the law and to be retroactively applicable. *Valencia*, 241 Ariz. 206, ¶¶ 14-15, 386 P.3d at 395. He also cited cases from other jurisdictions applying those decisions in circumstances at least

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arguably similar to his own. Thus, because the notice met the minimal requirements of Rule 32.2(b), the trial court was not authorized by Rule 32 to dismiss it. Rather, the court should have allowed McGill to file a petition for post-conviction relief.

¶7 McGill further contends he “is entitled to appointment of counsel.” He first contends his claim is “timely,” asserting “Rule 32.4(a) states that a post-conviction notice is due 90 days after entry of judgment or 30 days after the mandate issues, unless the notice raises a claim pursuant to “Rule 32.1(d), (e), (f), (g) or (h).” (Emphasis omitted.) But this misstates the rule. Rule 32.4(a) provides that in order to be timely, “a notice must be filed within ninety days after the entry of judgment and sentence or within thirty days after the issuance of the order and mandate in the direct appeal, whichever is the later.” Ariz. R. Crim. P. 32.4(a). And, “[a]ny notice not timely filed may only raise claims pursuant to Rule 32.1(d), (e), (f), (g) or (h).” *Id.* Thus, such a notice is untimely; the rule simply limits those claims that may be raised in an untimely proceeding.

¶8 McGill further contends that because Rule 32.4(c)(2) requires appointment of counsel “[u]pon the filing of a timely or first notice in a Rule 32 proceeding,” the rule must anticipate allowing claims under Rule 32.1, subsection (d) through (h), as timely. But, as this court explained in *Osterkamp v. Browning*,

In an of-right proceeding, a “timely” notice is one filed within ninety days after the entry of judgment and sentence, clearly contemplating the pleading defendant’s first post-conviction proceeding following a conviction. It is also a notice filed within thirty days either after the trial court has entered a final order in the first post-conviction proceeding or, if the defendant seeks review of the trial court’s ruling pursuant to Rule 32.9, Ariz. R. Crim. P., within thirty days after this court issues its mandate.

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226 Ariz. 485, ¶ 17, 250 P.3d 551, 555 (App. 2011). Thus, the use of the disjunctive in the rule applies to pleading defendants filing a timely second notice, raising a claim of ineffective assistance of Rule 32 counsel, not to those claims allowed in an untimely proceeding. *Id.*

¶9 Rule 32.4(c)(2), however, gives the presiding judge in non-capital cases the discretion to appoint counsel. On the record before us, it appears McGill's notice was dismissed before any ruling on the request for counsel was expressly made. We therefore remand the matter to the superior court for the trial court to exercise its discretion in the first instance. Once the court rules as to appointment of counsel, McGill will have sixty days in which to file a petition for post-conviction relief, as set forth in Rule 32.4(c)(2).

¶10 For the reasons above, we grant the petition for review and grant relief.