IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

LEO RODRIGUEZ,
Petitioner.

No. 2 CA-CR 2017-0118-PR
Filed July 27, 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NOT FOR PUBLICATION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 Pima County
No. CR20094084001
The Honorable Paul E. Tang, Judge

REVIEW GRANTED; RELIEF GRANTED

COUNSEL

Law Offices of Cornelia Wallis Honchar, P.C.
By Cornelia Wallis Honchar
Counsel for Respondent

MEMORANDUM DECISION

Presiding Judge Vásquez authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Kelly[1] concurred.

V Á S Q U E Z, Presiding Judge:

¶1 Leo Rodriguez seeks review of the trial court's order 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. Roseberry*, 237 Ariz. 507, ¶ 7, 353 P.3d 847, 848 (2015). We grant review and relief.

¶2 After an August 2011 jury trial held in his absence, Rodriguez was convicted of stalking, sixty-one counts of aggravated harassment, trafficking in the identity of another person or entity, and computer tampering. Following his arrest in 2012, Rodriguez was sentenced to concurrent and consecutive sentences totaling 16.5 years. At sentencing, the court advised Rodriguez that, because he had been convicted after a jury trial, "[o]rdinarily, . . . you would have had a right to appeal those matters. But because that time has long expired, apparently your only right of review is by Petition for Post-Conviction Relief."

¶3 Rodriguez then sought post-conviction relief. He raised various claims related to his sentences, including that his aggregate prison term was excessive and that his consecutive sentences were improper. He additionally claimed his trial counsel had been ineffective at sentencing and the court had "violated [his] Sixth Amendment right to a fair trial[] by failing to inform him of his right

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[1]The Hon. Virginia C. Kelly, 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.

to appeal his sentence on the basis that was illegal or excessive," citing A.R.S. § 13-4033(C).

¶4 The trial court rejected the bulk of Rodriguez's claims. It concluded Rodriguez was entitled to be resentenced for his conviction of computer tampering as a class three felony because "he was convicted under instructions for . . . Class 5 Felony Computer Tampering."[2] *See* A.R.S. § 13-2316(E). As to Rodriguez's claim regarding § 13-4033(C), the court agreed it had erred by failing to inform Rodriguez he could appeal his sentences, but concluded Rodriguez had not shown prejudice because he was permitted to challenge his sentences pursuant to Rule 32.1(c), which provides for post-conviction relief if "[t]he sentence imposed exceeded the maximum authorized by law, or is otherwise not in accordance with the sentence authorized by law." This petition for review followed.

¶5 On review, Rodriguez's sole argument is that the trial court erred in rejecting his claim the court had violated his constitutional rights by informing him he had no right to appeal. Pursuant to § 13-4033(C), "[a] defendant may not appeal" a final judgment, guilty verdict, or order denying a new trial motion "if the defendant's absence prevents sentencing from occurring within ninety days after conviction and the defendant fails to prove by clear and convincing evidence at the time of sentencing that the absence was involuntary." However, a defendant is still entitled to appeal post-judgment orders affecting substantial rights or, relevant here, "[a] sentence on the grounds that it is illegal or excessive."[3] § 13-4033(A)(3), (4), (C).

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[2]The trial court resentenced Rodriguez to a 1.75-year prison term for computer tampering, thus reducing his aggregate prison term to 11.75 years.

[3]Rodriguez has not asserted that he was not advised that his voluntary absence could result in the loss of his right to appeal his conviction. *See State v. Bolding*, 227 Ariz. 82, ¶ 20, 253 P.3d 279, 285 (App. 2011) (determining § 13-4033(C) applicable "only if the defendant has been informed he could forfeit the right to appeal if he voluntarily delays his sentencing for more than ninety days").

¶6 The Arizona Constitution provides criminal defendants with "the right to appeal in all cases." Ariz. Const. art. II, § 24. And Rule 26.11(a), Ariz. R. Crim. P., requires sentencing courts to inform defendants of that right. As we noted above, the trial court agreed it had misinformed Rodriguez by stating he was not permitted to appeal but concluded Rodriguez was not prejudiced by the error because he could raise his sentencing claims under Rule 32.1(c). But Rule 32.1(c) does not provide an avenue for relief equivalent to an appeal. *See State v. Glassel*, 233 Ariz. 353, ¶ 10, 312 P.3d 1119, 1120 (2013) ("[T]he Rule 32 process does not equate to a direct appeal."); *State v. Leyva*, 241 Ariz. 521, ¶ 8, 389 P.3d 1266, 1269 (App. 2017) ("[P]ost-conviction relief under Rule 32 'is more limited' than that available by direct appeal."), *quoting Wilson v. Ellis*, 176 Ariz. 121, 125, 859 P.2d 744, 748 (1993) (Martone, J., dissenting).

¶7 For example, claims that could have been raised on appeal, but were not, are subject to preclusion pursuant to Rule 32.2(a)(1) or (3). Although the trial court here chose not to apply preclusion to bar Rodriguez's claims, nothing would prevent this court from doing so on review. Ariz. R. Crim. P. 32.2(c). Additionally, Rule 32 implies that it is not equivalent to an appeal. Pursuant to Rule 32.1(f), a defendant is entitled to a delayed appeal if the "failure to file a . . . notice of appeal within the prescribed time was without fault on the defendant's part." But nothing in Rule 32.1(f) restricts such relief to only those claims that cannot be raised under Rule 32, which would be appropriate if the two proceedings were actually equivalent.

¶8 Thus, the trial court abused its discretion by concluding review under Rule 32.1(c) was sufficient to mitigate Rodriguez's loss of his right to appeal. Although Rodriguez did not cite Rule 32.1(f) below, instead characterizing this claim as a violation of his constitutional rights,[4] he has made at least a colorable claim that his

[4]Although we normally find a claim not properly raised below to be waived, such waiver is discretionary, and this court may address claims raised for the first time on review. *Cf. State v. Boteo-Flores*, 230 Ariz. 551, ¶ 7, 288 P.3d 111, 113 (App. 2012); *State v. Lopez*, 217 Ariz. 433, n.4, 175 P.3d 682, 687 n.4 (App. 2008); *State v. Manzanedo*, 210 Ariz.

failure to appeal pursuant to § 13-4033(A)(4) was without fault on his part.

¶9 We grant review and relief. We remand the case to the trial court to determine whether Rodriguez is entitled to relief under Rule 32.1(f).

292, ¶ 15, 110 P.3d 1026, 1030 (App. 2005). To do so here is particularly appropriate given the constitutional basis of the right to appeal. *See State v. Herrera*, 232 Ariz. 536, ¶ 42, 307 P.3d 103, 117 (App. 2013).