

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

LASCELLE BENNETT JR.,
Petitioner.

No. 2 CA-CR 2017-0186-PR
Filed September 18, 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NOT FOR PUBLICATION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. CR20131352001

The Honorable Jane L. Eikleberry, Judge

REVIEW GRANTED; RELIEF DENIED

Lascelle Bennett Jr., Florence
In Propria Persona

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MEMORANDUM DECISION

Presiding Judge Staring authored the decision of the Court, in which Judge Espinosa and Judge Kelly¹ concurred.

S T A R I N G, Presiding Judge:

¶1 Petitioner Lascelle Bennett Jr. seeks review of the trial court's order dismissing his successive petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. We grant review but, for the following reasons, we deny relief.

¶2 After pleading guilty, Bennett was convicted in April 2014 of burglary and attempted theft and sentenced to enhanced, concurrent prison terms, the longer of which is ten years. According to the trial court, Bennett filed a timely, first notice of post-conviction relief, but, after appointed counsel could find no issues to raise under Rule 32, Bennett failed to file a pro se petition, despite the court's having granted his request for an extended filing deadline, and the proceeding was dismissed. The court dismissed Bennett's second, untimely Rule 32 notice, filed in March 2015, finding that the constitutional claims he identified were precluded and that he had failed to comply with the procedural requirements in Rule 32.2(b) with respect to his non-precluded claims. Bennett did not seek review of that ruling.

¶3 In April 2017, Bennett filed a successive, untimely "motion" for post-conviction relief without first filing the notice required by Rule 32.4 and, for the first time, he asserted a claim of ineffective assistance of Rule 32 counsel. Construing the motion as a petition for post-conviction relief, the trial court summarily dismissed it on the ground that a claim of ineffective assistance of counsel could

¹The 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.

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not be raised in a third, untimely petition. This petition for review followed.²

¶4 On review, Bennett argues the trial court had “no grounds to summarily dismiss” his petition, asserting he had stated a non-precluded claim pursuant to Rule 32.1(f). We review a trial court’s summary dismissal of a Rule 32 petition for an abuse of discretion. *State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006). We find none here.

¶5 Rule 32.1(f) provides a ground for relief when “[t]he defendant’s failure to file a notice of post-conviction relief of-right . . . within the prescribed time was without fault on [his] part.” Bennett did not refer to this provision in his petition below. Neither did he assert any facts relevant to a failure to file a timely, of-right notice of post-conviction relief. Instead, he cited various reasons he believes his Rule 32 counsel was ineffective when representing him in his first post-conviction proceeding. As the trial court correctly concluded, such a claim is grounded in Rule 32.1(a), and may not be raised in a third, untimely notice of post-conviction relief. *See* Ariz. R. Crim. P. 32.2(a), (b), 32.4(a).

¶6 Because he did not raise it below, Bennett’s claim based on Rule 32.1(f) is not properly before us and, accordingly, we will not address it. *See* Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review to contain issues “decided by the trial court . . . which the defendant wishes to present to the appellate court for review”); *State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (appellate court does not consider issues in petition for review that “have obviously never been presented to the trial court for its consideration”). Moreover, he has failed to establish the trial court abused its discretion in

²Within thirty days of the trial court’s decision, Bennett filed in this court a “motion for reconsideration of successive motion for post-conviction relief.” We have construed that motion as a petition for review of the trial court’s final decision on his petition. *See* Ariz. R. Crim. P. 32.9(c).

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dismissing his untimely, successive petition. Accordingly, although we grant review, we deny relief.