IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

CARY KEVIN VANDERMEULEN,
Petitioner.

No. 2 CA-CR 2017-0219-PR
Filed September 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NOT FOR PUBLICATION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 Maricopa County
No. CR2012153633001DT
The Honorable Christine E. Mulleneaux, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

Cary K. VanDerMeulen, Phoenix
In Propria Persona

MEMORANDUM DECISION

Presiding Judge Vásquez authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Eppich concurred.

V Á S Q U E Z, Presiding Judge:

¶1 Cary VanDerMeulen seeks review of the trial court's order summarily dismissing his successive and untimely notice of post-conviction relief. We will not disturb that order unless the court clearly abused its discretion. *See State v. Roseberry*, 237 Ariz. 507, ¶ 7, 353 P.3d 847, 848 (2015). VanDerMeulen has not met his burden of demonstrating such abuse here.

¶2 VanDerMeulen pled guilty to solicitation to commit possession of marijuana for sale. In May 2013, the trial court suspended the imposition of sentence and placed VanDerMeulen on a three-year term of probation. The court revoked his probation in March 2014 after he pled guilty to prohibited possession of a firearm in another cause number. The court sentenced him to a one-year prison term.

¶3 VanDerMeulen filed a notice of post-conviction relief listing both cause numbers. Appointed counsel notified the court he had reviewed the record but found no claims to raise in a petition for post-conviction relief. VanDerMeulen filed a pro se petition raising various claims. The trial court summarily dismissed the proceeding and denied VanDerMeulen's motion for rehearing. He did not seek review of those rulings.

¶4 In May 2016, VanDerMeulen filed a notice of post-conviction relief listing only this cause number. He asserted his previous proceeding "only pertained to probation revocation" and raised claims asserting he was actually innocent because the activity "giving rise to the charge of a 'sale of marijuana' . . . in fact did not occur" on the date alleged, and because his status as "a licensed

medical patient" should have shielded him "from arrest, search, or seizure and would also have provided for an affirmative defense." He further asserted his indictment was based on "deceptive and untrue testimony" and his trial counsel was ineffective in failing to raise these issues and for failing to notify him of purported plea offers. Citing Rule 32.1(e) and (f), Ariz. R. Crim. P., he additionally claimed he could only now raise these claims because he did not receive his case file until "long after the hearing on the case."

¶5 The trial court summarily dismissed the notice. It determined VanDerMeulen was not entitled to relief under Rule 32.1(f) because it did not apply to successive proceedings and that his claims of ineffective assistance and trial error could not be raised in an untimely proceeding. As to VanDerMeulen's claim of newly discovered evidence pursuant to Rule 32.1(e), the court noted, inter alia, that VanDerMeulen's "conclusory statements about when he obtained access to the [case] materials" were insufficient to determine whether VanDerMeulen had "exercised reasonable diligence in obtaining this information." Finally, it rejected his claim of actual innocence under Rule 32.1(h), concluding he had "failed to meet" the burden of showing "a reasonable fact finder could not find the defendant guilty." This petition for review followed.

¶6 On review, VanDerMeulen first asserts the trial court erred in characterizing the proceeding as successive because his earlier proceeding "pertained to the revocation ONLY." He points to the trial court's order appointing counsel in that proceeding, which states the "Rule 32 proceeding has been timely filed as it pertains to . . . the probation revocation in CR 2012-0153633-001." But VanDerMeulen is not entitled to relief even if we assume, without deciding, that his first Rule 32 proceeding was limited to the revocation proceeding and, therefore, that this proceeding should be treated as an of-right proceeding as to his guilty plea.[1]

[1]A defendant is entitled to appointed counsel in an of-right post-conviction proceeding, even an untimely one. Ariz. R. Crim. P. 32.4(c). But a court is not required to appoint counsel if the notice of post-conviction relief must be summarily dismissed pursuant to Rule

¶7 VanDerMeulen's notice was untimely, having been filed years after his guilty plea and disposition. Ariz. R. Crim. P. 32.4(a). He was therefore restricted to claims under Rule 32.1(e) through (h). Ariz. R. Crim. P. 32.4(a). And, before he could raise such claims, he was required to "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). Thus, the trial court was required to dismiss the notice if it did not include the "specific exception and meritorious reasons . . . substantiating the claim and indicating why the claim was not stated in the previous petition or in a timely manner." *Id.*

¶8 VanDerMeulen cited Rule 32.1(f) in his notice. That rule allows a defendant to file an untimely, of-right notice if the defendant was "without fault" in failing to timely seek post-conviction relief. Ariz. R. Crim. P. 32.1(f). But VanDerMeulen's only explanation in his notice for his failure to timely file his notice is that there were delays in his receipt of his case file and he thus lacked the opportunity to review it. Rule 32.1(f) does not permit an untimely petition based on VanDerMeulen's later discovery of what he believes to be viable claims. 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 (App. 2011). VanDerMuelen made no such allegation in his notice below.

¶9 VanDerMeulen also did not adequately explain in his notice his failure to previously raise claims of newly discovered evidence pursuant to Rule 32.1(f). Although he asserted it took "months amounting to years" for him to receive his "original trial file," containing the purported new evidence, he does not state when he received that file or describe his efforts to obtain it earlier. And his

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32.2(b). *See State v. Harden*, 228 Ariz. 131, ¶ 11, 263 P.3d 680, 682-83 (App. 2011).

notice provides no explanation for his failure to timely raise his claim of actual innocence pursuant to Rule 32.1(h).

¶10 Because VanDerMeulen's untimely notice did not comply with Rule 32.2(b), the trial court was required to summarily dismiss it. We will affirm the trial court's ruling if it is correct for any reason. *State v. Lopez*, 234 Ariz. 513, ¶ 10, 323 P.3d 1164, 1166 (App. 2014). We therefore grant review but deny relief.