

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

ANTHONY PRO ESPINOSA,
Petitioner.

No. 2 CA-CR 2018-0075-PR
Filed July 11, 2018

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NOT FOR PUBLICATION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. 31.19(e).

Petition for Review from the Superior Court in Pima County
No. CR060206
The Honorable Kathleen Quigley, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Law Offices Sherick & Bleier PLLC, Tucson
By Adam N. Bleier
Counsel for Petitioner

MEMORANDUM DECISION

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

V Á S Q U E Z, Presiding Judge:

¶1 Anthony Espinosa seeks review of the trial court’s ruling denying his untimely petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that ruling unless the court abused its discretion. *See State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). Espinosa has not shown such abuse here.

¶2 In 1998, Espinosa pled guilty to theft by control in CR060206. The trial court sentenced him to a seven-year prison term, to be served consecutively to terms imposed in three other cause numbers. Espinosa’s only previous attempt at post-conviction relief in CR060206, filed six months after he was sentenced, was dismissed as untimely.

¶3 In September 2017, Espinosa filed a notice of and petition for post-conviction relief listing two cause numbers: CR057451¹ and CR060206. He argued counsel in CR060206 had been ineffective because he did not seek a change of judge and that counsel in CR057451 had been ineffective because he did not object to the “unlawful withdrawal of the plea agreement by the government.” He asserted his claims were not precluded because his post-conviction counsel in CR057451 and trial counsel in CR060206 had conflicts of interest. The trial court summarily denied relief. This petition for review followed.

¶4 On review, Espinosa limits his petition to the trial court’s rejection of his claim related to CR060206. He again asserts counsel was ineffective in failing to file a request for change of judge. He also asserts that trial counsel should have ensured the “assigned county attorney” was

¹In CR057451, Espinosa was convicted after a jury trial of sexual assault, kidnapping, and assault and was sentenced to concurrent prison terms, the longest of which was fourteen years. We affirmed his convictions and sentences on appeal. *State v. Espinosa*, Nos. 2 CA-CR 98-0131, CA-CR 99-0444-PR (Ariz. App. Jul. 31, 2001) (consol. mem. decision).

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present at sentencing to “confirm the State’s position that a concurrent sentence was appropriate.” Finally, he claims that counsel “was ineffective for failing to file a timely notice of post-conviction relief on behalf of his client.”

¶5 Espinosa’s claims that counsel was ineffective at sentencing cannot be raised in an untimely proceeding. See Ariz. R. Crim. P. 32.1(a), 32.4(a)(2)(A). And, to the extent he asserts he may do so pursuant to *Stewart v. Smith*, 202 Ariz. 446 (2002), his reliance on that decision is misplaced. As we have explained, the waiver principles discussed in *Stewart* do not apply to untimely proceedings like this one. See *State v. Lopez*, 234 Ariz. 513, ¶¶ 7-8 (App. 2014).

¶6 Espinosa’s claim that counsel should have filed a notice of post-conviction relief on his behalf, however, if construed as a claim pursuant to Rule 32.1(f), is not subject to the timeliness requirement of Rule 32.4(a). But, to the extent Espinosa’s petition below may be read to raise this claim, he is not entitled to relief. A pleading defendant like Espinosa is entitled to relief pursuant to Rule 32.1(f) only if he demonstrates “the failure to file a notice of post-conviction relief of-right or a notice of appeal within the required time was not [his] fault.” Espinosa signed in April 1998 a notice describing his right to seek post-conviction relief and the governing time limits. He has provided no evidence suggesting counsel told him he would file a notice on Espinosa’s behalf, only that he “believed” counsel would do so because counsel had sought modification of his sentence. In any event, Espinosa does not explain the nearly twenty-year delay in raising this claim. See Ariz. R. Crim. P. 32.2(b) (notice seeking to raise untimely claim must “explain the reasons for not raising the claim in a previous notice or petition, or for not raising the claim in a timely manner”).

¶7 We grant review but deny relief.