

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

GEORGE MICHAEL HAUSS,
Petitioner.

No. 2 CA-CR 2018-0146-PR
Filed September 18, 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NOT FOR PUBLICATION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. CR06642
The Honorable James E. Marner, Judge

**REVIEW GRANTED; RELIEF GRANTED IN PART
AND DENIED IN PART**

George Michael Hauss, Florence
In Propria Persona

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MEMORANDUM DECISION

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

ECKERSTROM, Chief Judge:

¶1 George Hauss seeks review of the trial court's orders summarily denying his petition for post-conviction relief and his motion for rehearing filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb those orders unless the court abused its discretion. *See State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). We grant review and, for the reasons stated, grant relief in part and deny relief in part.

¶2 Following a jury trial, Hauss was convicted of three counts of second-degree burglary, one count of aggravated assault, nine counts of kidnapping, five counts of sexual abuse, three counts of sexual assault, six counts of first-degree burglary, and one count of attempted sexual abuse. The trial court sentenced Hauss to consecutive and concurrent prison terms totaling seventy years. We affirmed his convictions and sentences on appeal. *State v. Hauss*, 142 Ariz. 159, 166 (App. 1984).

¶3 In 2017, more than thirty-three years after his appeal, Hauss sought post-conviction relief. After appointed counsel notified the trial court she was unable to find any issues to raise on appeal, Hauss filed a pro se Rule 32 petition in December 2017. He raised the following claims: 1) the legislature's 1993 amendment to former A.R.S. § 13-604(H) eliminating *Hannah* priors¹ constitutes a significant change in the law under Rule 32.1(g); 2) there was newly discovered evidence under Rule 32.1(e); 3) the statute under which he was sentenced, § 13-604, is unconstitutional; and, 4)

¹*State v. Hannah*, 126 Ariz. 575 (1980). *See* 1993 Ariz. Sess. Laws, ch. 255, § 7 (abolishing use of convictions for crimes not committed on same occasion but consolidated for trial for sentence enhancement purposes).

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trial counsel² was ineffective by failing to explain the state's plea offer to him and to challenge the constitutionality of the sentencing statute.

¶4 The trial court summarily denied relief. Noting that Hauss had been sentenced in 1982, it determined that his claims raised pursuant to Rule 32.1(a), to wit, the ineffective assistance of trial counsel and the constitutionality of the sentencing statute, were precluded as untimely because they were filed "much past the deadlines provided in Rule 32.4(c)(2)." The court also concluded that, having failed to "actually offer[]" any newly discovered facts, Hauss had not established a claim of newly discovered evidence pursuant to Rule 32.1(e). And, noting that the amendments to § 13-604(H) abolishing the use of *Hannah* priors do not apply retroactively, the court rejected Hauss's claim that those changes constitute a significant change in the law under Rule 32.1(g). This petition for review followed.

¶5 On review, Hauss generally reurges the claims he raised in his petition below. We agree with the trial court that Hauss is not entitled to relief based on his claims of newly discovered evidence and a significant change in the law, noting that he directs us to no newly discovered evidence and cites no meaningful, persuasive authority suggesting the changes to § 13-604 were intended to apply retroactively to him. *See* Rule 32.1(e), (g). We accordingly adopt that portion of the court's ruling related to those claims. *See State v. Whipple*, 177 Ariz. 272, 274 (App. 1993) (when trial court has correctly ruled on issues raised "in a fashion that will allow any court in the future to understand the resolution[, n]o useful purpose would be served by this court rehashing the trial court's correct ruling in a written decision"). Additionally, to the extent Hauss urges us to treat his claim of ineffective assistance of counsel as one of newly discovered evidence because he did not have the means to discover it earlier, thereby excepting it from the rule of preclusion, we decline to do so. Rule 32.1(e) does not contemplate a claim of newly discovered evidence of ineffective assistance of counsel, and is instead restricted to "newly discovered material facts . . . [that] probably would . . . change[] the verdict or sentence." *See State v. Serna*, 167 Ariz. 373, 374 (1991) (describing five elements of successful newly discovered evidence claim).

²Although Hauss indicated in his notice of post-conviction relief that he was raising a claim of ineffective assistance of Rule 32 counsel, it appears he is challenging the conduct of trial counsel.

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¶6 However, Hauss also reasserts that, because he is not subject to the time limitations in Rule 32, the trial court improperly found some of his claims untimely. Before the 1992 amendment to Rule 32, former Rule 32.4(a) provided that a petition for post-conviction relief “may be filed at any time after entry of judgment and sentence.” 170 Ariz. LXVIII. The 1992 amendment to former Rule 32.4(a), *see* 170 Ariz. LXVIII, as set forth in the current version of Rule 32.4(2)(D) requires, however, that a notice of post-conviction relief be filed “no later than 90 days after the entry of judgment and sentence or no later than 30 days after the issuance of the order and mandate in the direct appeal, whichever is later.”

¶7 As the trial court noted, Hauss was sentenced in 1982. Hauss repeatedly pointed out to the court that the timeliness requirements of Rule 32 apply “to all post-conviction relief petitions filed on and after September 30, 1992, except that the time limits of 90 and 30 days imposed by Rule 32.4 shall be inapplicable to a defendant sentenced prior to September 30, 1992 who is filing his first petition for post-conviction relief.” 171 Ariz. XLIV (1992). And, Hauss informed the court this was his first Rule 32 petition,³ explaining that although he had filed his first notice of post-conviction relief in 2003, upon the advice of his attorney, the court had permitted him to “dismiss[]” that notice without prejudice. However, based on the record before us, we are unable to confirm whether the court dismissed Hauss’s first notice of post-conviction relief without prejudice.

¶8 Additionally, we cannot determine from the trial court’s ruling on what basis it rejected Hauss’s argument that the timeliness requirements of Rule 32.4 do not apply to him. Accordingly, we cannot determine if the court abused its discretion by summarily denying as untimely Hauss’s claims raised pursuant to Rule 32.1(a), to wit, that trial counsel was ineffective and that the sentencing statute was unconstitutional. We thus remand the case and direct the court to determine whether this is Hauss’s first petition for post-conviction relief. If the court so finds, then the underlying petition is not untimely, thereby entitling Hauss to a review of the claims raised pursuant to Rule 32.1(a).

¶9 We grant review and relief in part, consistent with this decision. We otherwise deny relief.

³Although Hauss stated in his notice of post-conviction relief that this is his second Rule 32 petition, it appears he actually contends this is his first petition.