

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

GEORGE MICHAEL HAUSS,
Petitioner.

No. 2 CA-CR 2019-0053-PR
Filed April 23, 2019

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NOT FOR PUBLICATION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. CR06642001
The Honorable James E. Marner, Judge

REVIEW GRANTED; RELIEF DENIED

George Michael Hauss, Florence
In Propria Persona

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MEMORANDUM DECISION

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

E P P I C H, Presiding Judge:

¶1 George Hauss seeks review of the trial court's orders summarily denying his petition for post-conviction relief 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 find no such abuse here.

¶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. In 1982, 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 Hauss filed his first notice of post-conviction relief in February 2002, which the trial court dismissed in October 2003 pursuant to his motion for voluntary dismissal.¹ Hauss initiated his second post-conviction proceeding in July 2017. After appointed counsel notified the 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* priors² 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)

¹Although these pleadings are not part of the record before us, we take judicial notice of them, and also note that Hauss does not seem to dispute their existence.

²*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 counsel³ was ineffective by failing to explain the state's plea offer to him and not challenging the constitutionality of the sentencing statute.

¶4 The trial court summarily denied relief in April 2018. 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. 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).

¶5 Hauss filed a petition for review of the trial court's denial of his Rule 32 petition; on review, we granted relief in part and denied relief in part. *State v. Hauss*, No. 2 CA-CR 2018-0146-PR (Ariz. App. Sept. 18, 2018) (mem. decision). In our memorandum decision, we adopted that portion of the court's April 2018 ruling denying relief on Hauss's claims based on newly discovered evidence and a significant change in the law, *see State v. Whipple*, 177 Ariz. 272, 274 (App. 1993), and rejected his claim of ineffective assistance of counsel based on newly discovered evidence, *Hauss*, No. 2 CA-CR 2018-0146-PR, ¶ 5. We noted, however, that it was unclear from the record whether the court had dismissed Hauss's first notice of post-conviction relief without prejudice in 2003, as he asserted. *Id.* ¶ 7. Nor were we able to determine on what basis the court had rejected Hauss's argument that the timeliness requirements of Rule 32.4 do not apply to him, thereby making it impossible to determine if it had abused its discretion by summarily denying as untimely the claims raised pursuant to Rule 32.1(a). *Id.* ¶ 8. We thus remanded the case, directing the court to determine whether this is Hauss's first Rule 32 proceeding, and if so, directing it to review his claims raised pursuant to Rule 32.1(a). *Id.*

¶6 In a January 2019 ruling, the trial court incorporated by reference the portion of its April 2018 ruling that this court had adopted pursuant to *Whipple*, specifically, the claims based on newly discovered evidence and a significant change in the law. The trial court further clarified it had considered Hauss's 2002 notice of post-conviction relief as his first

³Although 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 was primarily challenging the conduct of trial counsel.

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Rule 32 proceeding, and his 2017 notice as a successive filing. The court concluded, therefore, that Hauss's claims of ineffective assistance of counsel and his challenge to the constitutionality of the sentencing statute, raised pursuant to Rule 32.1(a), were waived. *See* Ariz. R. Crim. P. 32.2(a)(3). This petition for review followed.

¶7 On review, Hauss argues the trial court failed to determine if the court in 2003 had "follow[ed] the laws in effect at the time" or whether it abused its discretion when it dismissed his 2002 notice of post-conviction relief "without prejudice," which he contends would entitle him to file a new petition without having waived any claims. He also asserts he is entitled to an evidentiary hearing. Notably, in his September 2003 motion to dismiss his first Rule 32 proceeding, signed by both Hauss and his former Rule 32 counsel, Hauss did not request dismissal without prejudice, nor did the court's October 2003 order granting that motion contain any such language. We reject Hauss's suggestion that the judge "ma[d]e her intent clear" that she was dismissing his 2002 notice of post-conviction relief without prejudice by stating that no petition had been filed. As the trial court noted in its January 2019 ruling, Hauss's first post-conviction proceeding was commenced by the filing of the *notice* of post-conviction relief in 2002. *See* Ariz. R. Crim. P. 32.4(a)(1). We note, moreover, that although the court may have had the inherent power to grant a dismissal without prejudice, Rule 32 does not expressly provide for such a dismissal. Accordingly, because it does not appear the court dismissed Hauss's first Rule 32 proceeding *without prejudice* in 2003, the trial court here did not review whether that ruling constituted an abuse of discretion for that reason.

¶8 In a related argument, Hauss reasserts the trial court erred by finding his claims based on Rule 32.1(a) waived, maintaining he is not subject to the time limitations in Rule 32 because he was sentenced before 1992. 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 (1992). The 1992 amendment to former Rule 32.4(a) imposed time limits, *see* 170 Ariz. LXVIII, which have not changed since and are reflected in the current version of Rule 32.4(a)(2)(D), which requires 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."

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¶9 Although the current timeliness rules were adopted after Hauss committed his crimes, the order promulgating the 1992 amendments made them “applicable 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). Accordingly, because Hauss filed his first notice of post-conviction relief in 2002, which he voluntarily moved to dismiss in 2003, the trial court properly found his 2017 post-conviction proceeding successive.⁴ See Ariz. R. Crim. P. 32.4(a)(1) (defendant starts post-conviction proceeding by filing notice of post-conviction relief). The court, therefore, did not abuse its discretion by summarily finding that Hauss’s claims based on Rule 32.1(a) were untimely.

¶10 Hauss also asserts the trial court should have determined whether Rule 32 counsel was ineffective for instructing him that “[w]ithout prejudice” meant he could file a Rule 32 petition “later in the future,” and for advising him to have his first notice dismissed without prejudice. Assuming, without finding, that this claim is properly before us not as a claim of ineffective assistance of counsel, but as part of Hauss’s broader argument that the court failed to address the propriety of the 2003 dismissal order, we address it.

¶11 Hauss attached to his petition below and on review a June 2003 letter Rule 32 counsel wrote to him before he filed his motion to dismiss in September 2003. In that letter, counsel discussed the merits of continuing with the post-conviction proceeding and explained, “I am coming to a point where I will have to tell the court that I cannot find anything for a Rule 32 petition,” and added, “At that point, you can elect to dismiss the Rule 32 petition without prejudice to refile it later or I can file a pleading which allows you to proceed on your own, pro per.” (Footnote

⁴As previously noted, although the promulgating order provided that certain deadlines in the 1992 amendments to Rule 32 do not apply to a pre-1992 defendant who is filing his first Rule 32 *petition*, we find no meaningful distinction between the terms *notice* and *petition* for waiver purposes in this context. Nor do we see any principled reason to permit a defendant like Hauss to begin and abandon a post-conviction proceeding without consequence. We additionally note that the pre-1992 version of Rule 32.4(a) provided that a Rule 32 proceeding commenced with the timely filing of a petition, rather than a notice, thus likely explaining the supreme court’s use of *petition* in the promulgating order. See 170 Ariz. LXVIII.

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omitted.) She also explained, ‘ “[w]ithout prejudice’ means that you can file a PCR later in the future and the fact you had filed a Notice of PCR in 2002 would not be a bar to this hypothetical future PCR.” However, counsel’s letter does not establish that she intended to request a dismissal without prejudice, as Hauss maintains, or that she advised him to seek that outcome. Moreover, as we previously noted, Hauss did not request a dismissal without prejudice, nor did the trial court so order. Accordingly, there was no reason for the court to address counsel’s conduct in this regard.

¶12 Additionally, insofar as Hauss reurges his claims based on a significant change in the law and newly discovered evidence, we remind him that we adopted the trial court’s denial of those claims in our previous decision in this matter. *Hauss*, No. 2 CA-CR 2018-0146-PR, ¶ 5. We therefore do not address them again.

¶13 Accordingly, we grant review but deny relief.