

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

WALTER JAMES VAN JR.,
Petitioner.

No. 2 CA-CR 2019-0121-PR
Filed August 22, 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NOT FOR PUBLICATION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. CR052748
The Honorable John Hinderaker, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Barton & Storts P.C., Tucson
By Brick P. Storts III
Counsel for Petitioner

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MEMORANDUM DECISION

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

ESPINOSA, Judge:

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

¶2 After a jury trial, Van was convicted of armed robbery, kidnapping, first-degree burglary, and aggravated assault. He was sentenced to concurrent, flat-time prison terms, the longest of which are twenty-eight years. We affirmed his convictions and sentences on appeal. *State v. Van*, No. 2 CA-CR 96-0550 (Ariz. App. Jan. 29, 1998) (mem. decision). Van has previously sought and been denied post-conviction relief at least five times. *State v. Van*, No. 2 CA-CR 2012-0205-PR (Ariz. App. Sept. 14, 2012) (mem. decision); *State v. Van*, No. 2 CA-CR 2008-0301-PR (Ariz. App. Mar. 27, 2009) (mem. decision); *State v. Van*, No. 2 CA-CR 2002-0394-PR (Ariz. App. Apr. 25, 2003) (mem. decision); *State v. Van*, No. 2 CA-CR 2000-0291-PR (Ariz. App. Dec. 21, 2000).

¶3 In 2018, Van filed another petition for post-conviction relief asserting, pursuant to Rule 32.1(c), that he was not required to serve his full prison term because the trial court had imposed a flat-time sentence but also imposed community supervision. In light of this "ambiguity," Van argued, the rule of lenity required that he serve only eighty-five percent of his sentence before his release to community supervision. In his reply to the state's response, in which the state argued this claim was untimely and precluded, he sought to amend his petition to raise the same argument under Rule 32.1(d). The trial court summarily dismissed the petition, concluding his claim under Rule 32.1(c) was untimely and precluded. The court declined to address Van's claim under Rule 32.1(d) because Van had raised it for the first time in his reply. This petition for review followed.

¶4 On review, Van repeats his claim and argues it is timely. Van asserts his claim is timely because it is "different both in terms of a remedy

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and a legal argument” to claims raised in previous Rule 32 proceedings. But any purported difference between this and his previous claims is immaterial to whether Van timely sought relief under Rule 32. A notice of post-conviction relief must 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.” Ariz. R. Crim. P. 32.4(a)(2)(D). Thus, Van’s most-recent request for post-conviction relief was patently untimely. He was therefore not permitted to seek relief under Rule 32.1(c).¹ See Ariz. R. Crim. P. 32.4(a)(2)(A).

¶5 Van additionally argues the trial court should have evaluated the claim under Rule 32.1(d). But he has not established the trial court erred in denying his request to amend his petition to raise the claim pursuant to Rule 32.1(d). Rule 32.6(c) provides that a court may permit amendment “only for good cause.” Van has not asserted he showed good cause warranting amendment. *State v. Stefanovich*, 232 Ariz. 154, ¶ 16 (App. 2013) (insufficient argument waives claim).

¶6 And, in any event, Van has not demonstrated that he is entitled to relief under Rule 32.1(d). Although a claim under Rule 32.1(d) may be raised in an untimely proceeding like this one, Ariz. R. Crim. P. 32.4(a)(2)(A), it provides relief only if “the defendant continues to be in custody after his or her sentence expired.” Van has not asserted that his twenty-eight-year flat-time sentence has expired.² His argument is instead that he should not be subject to a twenty-eight-year flat-time sentence at all. Such a claim is cognizable under subsection (c), not subsection (d).

¶7 Although we grant review, relief is denied.

¹Because Van’s claim is untimely, we need not address his argument that it was not subject to preclusion under Rule 32.2(a).

²Indeed, Van has not established that he would be eligible for release to community supervision even if he was not subject to a flat-time sentence.