IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

MAVERICK KEMP GRAY,
Petitioner.

No. 2 CA-CR 2019-0251-PR
Filed April 15, 2020

Petition for Review from the Superior Court in Pima County
No. CR20132758001
The Honorable Scott Rash, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Joel Feinman, Pima County Public Defender
By David J. Euchner, Assistant Public Defender, Tucson
Counsel for Petitioner

MEMORANDUM DECISION

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

E P P I C H, Presiding Judge:

¶1 Maverick Gray seeks review of the trial court's order summarily dismissing his untimely and successive petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P.[1] We review a court's denial of post-conviction relief for an abuse of discretion.[2] *State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). Gray has not demonstrated such abuse here.

¶2 Following a jury trial in 2014, Gray was convicted of sale of a narcotic drug, and sentenced to a 9.25-year prison term. We affirmed Gray's conviction and sentence on appeal, and although our supreme court likewise did so on review, it vacated our opinion. *State v. Gray*, 238 Ariz. 147, ¶ 13 (App. 2015), *vacated*, 239 Ariz. 475, ¶¶ 18, 22 (2016) (requirement that defendant affirmatively admit substantial elements of charged offense to assert entrapment defense does not violate Fifth Amendment right against self-incrimination). Gray filed a timely notice of post-conviction relief, and after two extensions, appointed counsel, Cedric Hopkins, filed a notice stating he had reviewed the record but found "no basis in fact and/or law for post-conviction relief."[3] Ordering Hopkins to remain in an advisory

[1] Effective January 1, 2020, our supreme court amended the post-conviction relief rules. Ariz. Sup. Ct. Order R-19-0012 (Aug. 29, 2019). The amendments apply to all cases pending on the effective date unless a court determines that "applying the rule or amendment would be infeasible or work an injustice." *Id*. Because it is feasible and does no injustice, we apply and cite to the current version of the rules, with the single exception set forth in footnote three.

[2] We decline to address Gray's suggestion that the abuse of discretion standard of review is improper and that he is instead entitled to a de novo standard of review.

[3] Although the new version of the rule includes a lengthy list of items that counsel must include in the notice of no colorable claim, *see* Rule 32.6(c), because that rule and those requirements did not exist when

capacity, the trial court granted Gray permission to file a pro se petition, but dismissed the proceeding in March 2017 when he failed to either file a petition or request an extension of time.[4]

¶3 Almost two years later, in March 2019, appellate counsel, David Euchner, filed a "Predecessor Counsel's Motion for Status Conference" to reopen the Rule 32 proceeding, asserting that Hopkins had not previously shared the trial file with Gray, much less received or reviewed it himself; and, because Gray "was unaware that his Rule 32 had been dismissed" in 2017, he had not been provided an "opportunity to pursue his Rule 32." He contended Hopkins had been "duty-bound" to raise the "arguably meritorious" claim whether trial counsel should have offered Gray the option to stipulate to the elements of the charged offense in order to assert the entrapment defense, rather than telling him he was required to testify. *See* A.R.S. § 13-206(A). The trial court denied the motion for a status conference.

¶4 In April 2019, Euchner filed a second notice of post-conviction relief on Gray's behalf, stating in the form notice that Gray had not received any mail from Hopkins, who had not contacted trial counsel to obtain his file, and that Gray "apparently" had been "unaware" that the Rule 32 proceeding had been dismissed in 2017.[5] He also stated that under *Maples*

Hopkins filed his notice of completion, it would not be feasible to evaluate his notice under those standards. *See* Ariz. Sup. Ct. Order R-19-0012 (new rule does not apply where its application would be infeasible). Moreover, as Gray acknowledged below, as a non-pleading defendant, he has no constitutional right to the effective assistance of Rule 32 counsel. *See State v. Escareno-Meraz*, 232 Ariz. 586, ¶ 4 (App. 2013). Despite this acknowledgement, Gray discussed Hopkins's shortcomings at length below and on review and described *only* his conduct in the notice of post-conviction relief. In fact, the trial court viewed the arguments Gray presented in his petition as claims of ineffective assistance of both Rule 32 and trial counsel. Ultimately, however, any claim of ineffective assistance of Rule 32 counsel is not cognizable under Rule 32 for a non-pleading defendant like Gray.

[4]Gray was included on the distribution list of the March 6, 2017 order dismissing the Rule 32 proceeding.

[5]On the form notice, Euchner checked the box indicating Gray was raising a claim of ineffective assistance of counsel; he did not check any boxes indicating the notice was being raised pursuant to any of the exceptions to preclusion under former Rule 32.1(d) through (h). It thus

v. Thomas, 565 U.S. 266 (2012), and *State v. Diaz*, 236 Ariz. 361 (2014), he could "show that Rule 32 counsel's failure to comply with professional norms and his failure to keep his client (who has intellectual disabilities) informed provide sufficient excuse for any procedural default." Gray subsequently filed a petition for post-conviction relief "pursuant to Rule 32.1(a) and (f)."[6] Finding Gray's claims untimely and precluded, the trial court dismissed the petition without conducting an evidentiary hearing, and this petition for review followed.

¶5 On review, Gray reasserts his argument that trial counsel was ineffective because he failed to advise him that he could have stipulated to the elements of the offense instead of testifying in order to assert the entrapment defense, a claim Euchner maintains he shared with Hopkins.[7] Gray maintains he is mentally incompetent and has "extreme intellectual disabilities," and that he was unable to comprehend or act upon Hopkins's letter explaining that he could file a pro se petition. In Gray's declaration, included in the appendix attached to the petition below, he stated he did not recall ever speaking to Hopkins on the telephone, he did not understand

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appears that the trial court was partially mistaken when it stated in its ruling below that Gray had "checked boxes [in the notice] stating that his claim is pursuant to Rule 32.1(a) and (f)." The court appointed Euchner to represent Gray in the Rule 32 proceeding.

[6] Although Gray stated on the first page of his petition for post-conviction relief that his filing was made pursuant to Rule 32.1(a) and (f), he did not refer specifically to Rule 32.1(f) elsewhere in the petition, nor does he mention it at all in his petition for review, much less address its inapplicability to non-pleading defendants in a Rule 32 proceeding, as discussed below.

[7] In Euchner's declaration included in the appendix to the petition below, he opined that Gray did not receive a "first post-conviction proceeding within the meaning of *State v. Diaz*, 236 Ariz. 361 (2014)," due to Hopkins's failure to speak to trial counsel or Gray, or to obtain the trial file, and in light of counsel's having filed a notice of completion despite Euchner having informed him of an "obvious issue for relief." The appendix also included a declaration by trial counsel stating he had not given Hopkins the trial file and he was "unaware at the time of trial that, as an alternative to Mr. Gray testifying, that the defense could offer a stipulation to the elements of the offense and still get the jury instruction on entrapment." The appendix also contained various letters, including some written by Gray.

the mail he had received from him, and if he had known he "had to file anything in court . . . to have [his] case heard," he "would have sent something to the court." He asserts Hopkins essentially abandoned him.

¶6 Gray does not dispute that his most recent notice and petition were untimely, although he maintains his untimely filing is not his fault. *See* Ariz. R. Crim. P. 32.1(a), 32.4(b)(3); *State v. Petty*, 225 Ariz. 369, ¶ 11 (App. 2010) (ineffective assistance claim raised under Rule 32.1(a)).[8] The notice being untimely, Gray was precluded from raising a claim under Rule 32.1(a) and was only permitted to raise a claim under Rule 32.1(b) through (h). *See* Ariz. R. Crim. P. 32.4(b)(3)(B) (non-precluded claim under Rules 32.1(b) through (h) must be raised in notice filed within reasonable time after discovery of basis for claim), 32.2(b) (defendant must explain why non-precluded claim raised in successive or untimely notice was not raised in previous notice or petition or in timely manner). However, because the trial court also determined that Gray failed to sufficiently explain why he did not raise his untimely claim pursuant to Rule 32.1(f) in a previous notice or petition or in a timely manner, as Rule 32.2(b) requires, it found his claim waived and precluded.[9]

¶7 In addition, as the trial court accurately concluded, this is not a claim of sufficient constitutional magnitude that would require Gray's knowing, voluntary and intelligent waiver. *Diaz*, 236 Ariz. 361, ¶ 8; *see* Ariz. R. Crim. P. 32.2(a)(3) (defendant precluded from relief waived at trial or on appeal, or in previous post-conviction proceeding, except when claim raises violation of constitutional right that can only be waived knowingly, voluntarily, and personally by defendant).[10] As this court has explained,

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[8] Gray's claim of ineffective assistance of counsel was also time-barred under former Rule 32.4. And, although current Rule 32.4(b)(3)(D) directs the trial court to excuse an untimely notice raising a claim pursuant to Rule 32.1(a) "if the defendant adequately explains why the failure to timely file a notice was not the defendant's fault," based on the trial court's ruling below, it is clear Gray would not have been entitled to relief under either the former or current version of the rule.

[9] Although claims like this one are not subject to the same rules of preclusion as before the changes in the rule, the outcome here is the same under either version of Rule 32.2.

[10] The outcome is the same under both the new and prior version of Rule 32.2. *See* prior Ariz. R. Crim. P. 32.2, cmt. ("[S]ome issues not raised . . . in a previous collateral proceeding may be deemed waived without

the waiver principles discussed in *Stewart v. Smith*, 202 Ariz. 446 (2002), do not apply to untimely proceedings like this one. *See State v. Lopez*, 234 Ariz. 513, ¶¶ 7-8 (App. 2014). In any event, Gray has not expressly argued that "the nature of the right allegedly affected by counsel's ineffective performance," is of sufficient constitutional magnitude as described by our supreme court in *Stewart*. 202 Ariz. 446, ¶ 12.

¶8 Relying on *Diaz*, 236 Ariz. 361, and *State v. Goldin*, 239 Ariz. 12 (App. 2015), Gray reasserts that these cases permit "untimely and successive notices of post-conviction relief when no prior petition has been filed and the defendant is blameless." His argument ignores the facts and reasoning of *Diaz* and *Goldin*, which do not create an exception here. In *Diaz*, our supreme court determined a defendant whose counsel had failed to file a petition in two previous Rule 32 proceedings was entitled to raise a claim of ineffective assistance of counsel in a third proceeding. 236 Ariz. 361, ¶¶ 3-5, 10-11, 13. The court concluded that, in that "peculiar scenario," Diaz's claim of ineffective assistance should not be precluded because he did not waive that claim but, instead, had timely filed a notice of post-conviction relief and the claim went unadjudicated "through no fault of his own." *Id.* ¶¶ 10, 12. However, as the trial court here correctly noted, our supreme court stated that *Diaz* is not a case in which a "'defendant fails to timely file a pro per PCR petition after PCR counsel filed a notice stating that counsel could not find any meritorious claims.'" *See id*. ¶ 10. In contrast, the case before us *is* such a case. Moreover, as the court correctly observed here, Gray failed to provide a meritorious reason for his failure to file his claim in his first, timely Rule 32 proceeding.

¶9 The trial court also distinguished this case from *Goldin*, in which we concluded the defendant's "actions or inaction" did not waive his Rule 32 rights because his counsel had misinformed him about "the functional length of his sentence" and about how to seek post-conviction relief from what counsel perceived was the miscalculation of that sentence by the Arizona Department of Corrections. 239 Ariz. 12, ¶¶ 20-21, 23. As a result, Goldin did not timely seek post-conviction relief and, when he finally did so, he raised a claim that was not colorable under Rule 32. *Id*. ¶¶ 4-5, 21. Thus, we determined, Goldin was entitled to raise a claim pursuant to Rule 32.1(f) that his failure to timely seek post-conviction relief was without fault on his part. *Id*. ¶ 25. Unlike the defendants in *Diaz* and *Goldin*, the trial court noted that Gray had not identified any conduct or

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considering the defendant's personal knowledge, unless such knowledge is specifically required to waive the constitutional right involved.").

erroneous advice by Hopkins that had prevented him from seeking post-conviction relief. We agree.[11]

¶10 Moreover, to the extent Gray asserts a claim under Rule 32.1(f), maintaining his failure to file a timely notice was not his fault due to his mental incapacity and Hopkins's conduct, we find that claim unavailing, as did the trial court. *Cf. State v. Oakley*, 180 Ariz. 34, 36 (App. 1994) (appellate court "will affirm the trial court when it reaches the correct result even though it does so for the wrong reasons"). Notably, based on the clear language in both the former and current version of Rule 32.1(f), relief under that rule is not available to a non-pleading defendant, like Gray, in a post-conviction proceeding. *See* Ariz. R. Crim. P. 32.1(f) (failure to timely file notice of appeal was not defendant's fault). Additionally, insofar as Gray also challenges the court's rejection of his incompetency as a ground for his failure to file a timely pro se petition in his first Rule 32 proceeding, we note that the court expressly stated, "[a]lthough the assertions of counsel [regarding Gray's claimed mental incapacity] are afforded weight, in this instance, the Court allots greater weight to its previous finding that [Gray] was competent to stand trial." The court further noted it had "also previously found the absence of a reasonable basis for a Rule 11[, Ariz. R. Crim. P.,] examination during the initial trial."

¶11 For all of these reasons, we grant review but deny relief.

[11]In light of our ruling, we decline to address Gray's discussion of *Maples v. Thomas*, 565 U.S. 266 (2012), and *Holland v. Florida*, 560 U.S. 631 (2010). Despite Gray's citation to these federal habeas cases, he acknowledges they are distinguishable from his case.