

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

KEVIN DUNBAR,
Petitioner.

No. 2 CA-CR 2019-0298-PR
Filed May 21, 2020

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NOT FOR PUBLICATION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. CR20152260001
The Honorable Casey F. McGinley, Judge

REVIEW GRANTED; RELIEF GRANTED

Kevin Dunbar, Tucson
In Propria Persona

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MEMORANDUM DECISION

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

V Á S Q U E Z, Chief Judge:

¶1 Kevin Dunbar seeks review of the trial court’s ruling summarily dismissing his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P.¹ We grant review and relief, and we remand the case to the court to consider the merits of Dunbar’s claims.

¶2 After a jury trial, Dunbar was convicted of attempted first-degree murder, aggravated assault, kidnapping, and possession of a deadly weapon by a prohibited possessor. *State v. Dunbar*, No. 2 CA-CR 2018-0064, ¶ 1, 2020 WL 2060275 (Ariz. App. Apr. 29, 2020). The trial court sentenced him to concurrent and consecutive prison terms totaling thirty-seven years. *Id.* ¶ 4. We affirmed his convictions on appeal, but remanded for resentencing “because counts one, two, and five were improperly enhanced, counts two and three were improperly aggravated, and counts one and two were improperly imposed consecutively.” *Id.* ¶ 1.

¶3 While Dunbar’s appeal was pending, he filed a notice of and petition for post-conviction relief, in which he raised numerous claims of ineffective assistance of trial and appellate counsel and argued the trial court had lacked jurisdiction over him because the complaint was not made “under oath” and he was deprived of a preliminary hearing. Although the court initially appointed counsel, Dunbar chose to proceed pro se.

¶4 The trial court noted Dunbar’s notice had been filed more than ninety days after his sentencing. Thus, the court determined, because our mandate had not issued in Dunbar’s still-pending appeal, his notice

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 neither infeasible nor works an injustice here, we cite to and apply the current version of the rules.

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was untimely under Rule 32.4(b)(3)(A) and Dunbar could not raise his claims of ineffective assistance. The court additionally determined that Dunbar's jurisdictional argument was precluded under Rule 32.2(a)(1) because it was raisable in his direct appeal. Without Dunbar having obtained permission from this court to raise that claim as required by Rule 31.3, Ariz. R. Crim. P., the court concluded, it could not address Dunbar's jurisdiction claims. The court summarily dismissed Dunbar's petition. This petition for review followed.

¶5 Dunbar argues the trial court erred by finding his notice untimely. Pursuant to Rule 32.4(b)(3)(A), a defendant seeking post-conviction relief under Rule 32.1(a) must file a notice within ninety days of sentencing or thirty days after our mandate issues in the defendant's appeal, "whichever is later." As the court recognized, Dunbar filed his notice more than ninety days after his sentencing but while his appeal was still pending. Thus, his notice was untimely as to the date of sentencing but premature as to the issuance of our mandate on appeal—leading the court to conclude Dunbar could not yet raise his claims.

¶6 In *State v. Jones*, 182 Ariz. 432, 433-34 (App. 1995), however, this court determined that a notice filed more than ninety days after sentencing but before the mandate issued in a pending appeal was timely. We reasoned that the "two time deadlines" in Rule 32.4 are used to calculate "a single final deadline." *Id.* at 433. Thus, we concluded, the right to file a notice of post-conviction relief was not "suspended" while an appeal was pending and, effectively, the ninety-day time limit applied only if no notice of appeal had been filed. *Id.* Based on our reasoning in *Jones*, Dunbar's notice was timely.

¶7 The trial court found precluded Dunbar's claim that the court lacked jurisdiction over him at trial due to defects in the charging procedure. At the time that petition was filed, the issue was raisable on appeal and therefore precluded by Rule 32.2(a)(1). But our decision on appeal has issued and, thus, this claim is no longer precluded by that subsection and may be addressed by the court.

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¶8 We grant review and relief. We remand the case to the trial court to consider the claims raised in Dunbar's petition for post-conviction relief.²

²Because Dunbar's notice was timely filed and we have granted relief on that basis, we need not address the other arguments Dunbar raises in his petition for review.