IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

JAMES MICHAEL HARRIES,
Petitioner.

No. 2 CA-CR 2020-0142-PR
Filed September 17, 2020

Petition for Review from the Superior Court in Maricopa County
No. CR2001014438001
The Honorable Erin O'Brien Otis, Judge

REVIEW GRANTED; RELIEF GRANTED

COUNSEL

Allister Adel, Maricopa County Attorney
By Daniel Strange, Deputy County Attorney, Phoenix
Counsel for Respondent

Rosenstein Law Group PLLC, Scottsdale
By Craig J. Rosenstein
Counsel for Petitioner

MEMORANDUM DECISION

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

V Á S Q U E Z, Chief Judge:

¶1 James Harries 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.[1] We will not disturb that order unless the court abused its discretion. *See State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). We find such abuse here and for the reasons stated, we grant relief.

¶2 In 2001, Harries pled guilty to solicitation to possess a dangerous drug, a class six undesignated felony offense, and the trial court placed him on probation for three years. In August 2017, Harries filed a pro se application to designate his felony a misdemeanor; the state took no position regarding the application and in an order filed on September 25, 2017, the court designated the offense a misdemeanor. Almost three months later, in December 2017, the state filed a motion to reconsider the misdemeanor designation, asserting Harries had "made a false avowal in his application." Harries responded through counsel,[2] objecting to the state's motion to reconsider and asking the court to strike it as untimely. In an order filed on February 1, 2018, the court granted the state's motion to reconsider, vacated its September 2017 order designating the offense a misdemeanor, and ordered that the conviction "remain as an undesignated

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[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. *See State v. Mendoza*, 249 Ariz. 180, n.1 (App. 2020).

[2] On December 20, 2017, the week after the state filed its motion to reconsider, attorney William Morris filed a notice of appearance on behalf of Harries.

offense." *See* A.R.S. § 13-604(A) (undesignated class six felony treated as felony "for all purposes" until designated as misdemeanor).

¶3 On February 27, 2018, Harries filed a motion to strike the February 1 order and a request for re-hearing.[3] Pursuant to Harries's request, the trial court held oral argument on June 8, 2018. In a written ruling filed on July 12, 2018, the court denied Harries's motion to strike, thereby upholding its February 1 order redesignating the offense as an undesignated felony; the court specifically noted, as it had at the June 8 hearing, that if it had known Harries had a pending felony case when it had considered his application, it would not have designated the offense a misdemeanor. On July 18, 2018, Harries filed a notice of appeal from "the final ruling, order, and judgment," referring to the court's most recent order filed on July 12, 2018.

¶4 In a May 13, 2019, ruling, another division of this court[4] ruled that Harries's notice of appeal, filed on July 18, 2018, was not timely filed from the February 1, 2018, order, *see* Ariz. R. Crim. P. 31.2(a)(2)(B), which "is appealable as a post-judgment order affecting [Harries's] substantial rights," *State v. Harries*, No. 1 CA-CR 18-0520 (Ariz. App. May 13, 2019) (order) (citing A.R.S. § 13-4033(A)(3) and *State v. Delgarito*, 189 Ariz. 58, 60 (App. 1997)). The order also provided that the trial court's July 12, 2018 order, which "simply denied reconsideration of the February 1 decision," and from which Harries's notice of appeal had been timely filed, "is not independently appealable." *Id.* at 1-2 (citing *State v. Berry*, 133 Ariz. 264, 267 (App. 1982)). The order stayed the appeal, and permitted Harries to file a petition for post-conviction relief pursuant to Rule 32.1(f), Ariz. R. Crim. P., to establish whether "the failure to timely file the notice of appeal [from the February 1, 2018, ruling] was without fault on [his] part," and whether he should be granted leave to file a delayed notice of appeal. *Id.* at 2-3.

¶5 Harries thus filed a Rule 32 petition in May 2019, asserting his failure to file a timely notice of appeal was not his fault because the February 1 redesignation order constituted a new sentence imposed without a hearing and without the trial court having notified him of his right to appeal, *see* Ariz. R. Crim. P. 26.11(a)(1), thereby affecting his

[3]Attorney Craig Rosenstein filed the motion to strike and a "Notice of Appearance (Joint Counsel)."

[4]On August 10, 2020, this matter was transferred from Division One to Division Two of the Arizona Court of Appeals.

substantial rights. He argued that, because this matter involved a unique procedural situation, which he maintained was not treated "in the nature of a reconsideration" at the June 8, 2018, hearing, but instead as "an extension of the prior February [1, 2018] order," his failure to file a timely notice of appeal from the February 1 ruling was not his fault.

¶6 In a ruling filed on July 30, 2019, the trial court dismissed Harries's Rule 32 petition, noting that it "vehemently" disagreed not only with Harries's argument that he had been denied his due process right to a hearing when the court had redesignated his offense a felony, but with his claim that he had been resentenced at that time. The court also concluded Harries was aware he could seek relief from the February 1 ruling, as demonstrated by his attorney filing a motion to strike on February 27, 2018, and noted that the June 8, 2018, hearing "was in the nature of a reconsideration" and "in no way was an initial hearing on the matter." The court found, "[b]ased on the discussion above, the Court's July 12, 2018 minute entry, and the rest of the record in this case, [it was] unable to conclude that the failure to timely file the notice of appeal was without fault of the Defendant." This petition for review followed.

¶7 On review, Harries maintains the trial court erroneously found it had not resentenced him when it had redesignated his offense as an open-ended felony in its February 1 order, and thus erred by finding it had not been required to advise him of his right to appeal at that time. *See* Ariz. R. Crim. P. 26.11(a)(1). He further contends that, because the court failed to conduct a hearing before it entered its February 1 ruling, or to subsequently advise him of his right to appeal, his failure to file a timely notice of appeal from that ruling was not his fault. For the reasons set forth below, we conclude the court abused its discretion.

¶8 Ariz. R. Crim. P. 32.1(f), "provides a procedural mechanism whereby a defendant who has failed to appeal through no fault of his or her own can obtain jurisdiction in this court." *State v. Rosales*, 205 Ariz. 86, ¶ 10 (App. 2003); *see* Ariz. Sup. Ct. Order R-17-0002, at 171-72 (Aug. 31, 2017) (comment to former Rule 32.1(f), Ariz. R. Crim. P., explaining good cause for defendant's failure to file timely appeal includes situation where trial court failed to properly advise defendant of appeal rights, and situation where defendant believed counsel timely filed notice of appeal but counsel failed to do so).

¶9 As we previously noted, one of Harries's attorneys filed a notice of appearance on December 20, 2017, well before the trial court

redesignated the offense an open-ended felony on February 1, 2018. Accordingly, because Harries was represented by counsel when the trial court entered its February 1 order, an order Harries clearly intended to challenge, and because no timely notice of appeal was filed from that ruling, the failure to do so was not Harries's fault.[5] Any fault instead rested with Harries's counsel.

¶10 In addition, in the portion of Harries's notice of post-conviction relief asking why his claim had not been timely raised, counsel stated: "[N]o hearing was held when Mr. Harries was re-felonized. The procedural landscape surrounding the proceedings is novel and the restraints governed by the [R]ules of [C]riminal [P]rocedure regarding at what point time limitations stop and begin is unclear as applied to this situation." Notably, counsel added, "Counsel undersigned had a good faith belief that the notice of appeal filed in this case was timely filed, and the Court of [Appeals'] finding that it was not was not due to any fault on Mr. Harries'[s] part." Finally, as Harries has repeatedly argued, the trial court did not advise him of his right to appeal. We conclude the failure to file a timely notice of appeal was not Harries's fault, and that the trial court abused its discretion by dismissing his petition.

¶11 We conclude Harries is entitled to relief under Rule 32.1(f), and that he is permitted to file a delayed notice of appeal pursuant to the court of appeals' order filed on May 13, 2019.

[5]While we recognize that it is possible that counsel advised Harries to file a notice of appeal from the February 1, 2018, order and that Harries rejected that idea, there is no evidence to support such a suggestion.