

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

CURTIS DEWAYNE DECKER,
Petitioner.

No. 2 CA-CR 2020-0150-PR
Filed October 1, 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NOT FOR PUBLICATION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 Maricopa County
No. CR2012135551001DT
The Honorable Pamela Gates, Judge

REVIEW GRANTED; RELIEF DENIED

Curtis Dewayne Decker, San Luis
In Propria Persona

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MEMORANDUM DECISION

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

STARING, Presiding Judge:

¶1 Curtis Decker 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. *State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). Decker has not demonstrated such abuse here.

¶2 Following a jury trial in 2014, Decker was convicted of first-degree murder and burglary, and was sentenced to life in prison without the possibility of release until he had served twenty-five years, and to a concurrent 10.5-year sentence. We affirmed Decker’s convictions and sentences on appeal. *State v. Decker*, 239 Ariz. 29 (App. 2016). In April 2017, almost seven months after the mandate on his appeal had issued, Decker filed a “delayed” notice of post-conviction relief. The trial court summarily dismissed that notice in June 2017, finding that Decker was not entitled to file a delayed Rule 32 proceeding pursuant to Rule 32.1(f), and that he could not raise claims of ineffective assistance of counsel in an untimely proceeding. Decker did not seek review of that ruling.

¶3 In July 2019, Decker filed a notice of and petition for post-conviction relief, challenging various jury instructions given at trial, which he asserted had resulted in structural error, thereby violating his right to due process and a fair trial and rendering his sentence illegal; and arguing trial and appellate counsel had been ineffective for failing to

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

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challenge the purportedly defective jury instructions. Relying on *Stewart v. Smith*, 202 Ariz. 446, ¶ 12 (2002), Decker asserted he was entitled to raise his claims in a successive proceeding because they were of “sufficient constitutional magnitude” such that they required a knowing waiver, which had not occurred.

¶4 The trial court treated Decker’s notice and petition as “a single” notice, and dismissed the proceeding. The court found Decker’s claims, raised pursuant to Rule 32.1(a) and (c), untimely and precluded, noting he could have raised the jury instructions claims on appeal and he had already raised the ineffective assistance of counsel claims in his first Rule 32 proceeding. The court concluded Decker not only had “fail[ed] to state a claim for which relief can be granted in a successive Rule 32 proceeding,” but he had also failed to “adequately explain the reasons for their untimely assertion.” This petition for review followed.

¶5 On review, Decker reasserts his challenges to the accuracy of various jury instructions, including those related to first-degree burglary, intent, and reasonable doubt, arguing he was denied due process at trial and his sentence was illegal, and reasserts his claims of ineffective assistance of trial and appellate counsel.² Once again, he contends that because his claims are “of sufficient constitutional magnitude,” they are exempt from the rule of preclusion.³

¶6 We conclude the trial court did not abuse its discretion by summarily dismissing the Rule 32 proceeding, which Decker apparently does not dispute is untimely. *See* Ariz. R. Crim. P. 32.4(b)(3). The notice being untimely, Decker was precluded from raising claims under Rule

²Although Decker asserts the trial court “unreasonably, capriciously, and arbitrarily dismissed” his petition below, the correct standard of review is abuse of discretion. *See Roseberry*, 237 Ariz. 507, ¶ 7.

³The outcome is the same under both the new and prior version of Rule 32.2, Ariz. R. Crim. P. Current Rule 32.2(a)(3) does not preclude a claim that “raises a violation of a constitutional right that can only be waived knowingly, voluntarily, and personally by the defendant.” Similarly, the comment to prior Rule 32.2 provided, “[S]ome issues not raised . . . in a previous collateral proceeding may be deemed waived without considering the defendant’s personal knowledge, unless such knowledge is specifically required to waive the constitutional right involved.”

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32.1(a) and was only permitted to raise claims under Rule 32.1(b) through (h).⁴ 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 Decker failed to adequately explain the reasons for asserting his untimely claims, a finding the court made and which the record supports, the court correctly found his claims waived and precluded.⁵

¶7 A claim of ineffective assistance cannot be raised in an untimely post-conviction proceeding.⁶ See Ariz. R. Crim. P. 32.1(a), 32.2(a)(3), 32.4(b)(3)(A); see also *State v. Petty*, 225 Ariz. 369, ¶ 11 (App. 2010) (ineffective assistance of counsel claim “cognizable under Rule 32.1(a)”). And although a timely claim of sufficient constitutional magnitude may be exempt from preclusion, such a claim is not exempt from the timeliness requirements of Rule 32.4(b)(3). See *State v. Lopez*, 234 Ariz. 513, ¶¶ 8-9 (App. 2014) (untimely notice of post-conviction relief without an exception is time-barred by jurisdictional limitations regardless of the claim’s “constitutional magnitude”). “Thus, whether the underlying claim is of a

⁴Although claims raised pursuant to Rule 32.1(c), Ariz. R. Crim. P., are not subject to the same rules of preclusion as before the changes in the rule, the outcome here is the same under either the former or current version of the rule. See Ariz. R. Crim. P. 32.2(b).

⁵Even though the trial court did not specifically address Decker’s arguments that structural error had occurred and that his claims were of sufficient constitutional magnitude to avoid the rule of preclusion, we can infer from the court’s ruling that it rejected those arguments. Cf. *State v. Perez*, 141 Ariz. 459, 464 (1984) (appellate court obliged to affirm trial court’s ruling if result legally correct for any reason).

⁶Decker’s claims of ineffective assistance of counsel were also time-barred under former Rule 32.4, Ariz. R. Crim. P. 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 and the record before us, it is clear Decker would not have been entitled to relief under either the former or current version of the rule.

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sufficient constitutional magnitude to require a knowing, voluntary, and intelligent waiver is immaterial” *Id.* ¶ 8.

¶8 Nor is this the first time Decker attempted to raise claims of ineffective assistance. In general, when “ineffective assistance of counsel claims are raised, or could have been raised, *in a Rule 32 post-conviction relief proceeding*, subsequent claims of ineffective assistance will be deemed waived and precluded.” *State v. Spreitz*, 202 Ariz. 1, ¶ 4 (2002); *see also Stewart*, 202 Ariz. 446, ¶ 12 (where petitioner previously raised ineffective assistance claims in first Rule 32 proceeding, “the nature of the right allegedly affected by counsel’s ineffective performance” is neither determinative nor relevant). Because Decker’s claims of ineffective assistance are both untimely and precluded, we conclude the trial court properly dismissed them.

¶9 Nor has Decker established that the trial court abused its discretion by dismissing his claims raised pursuant to Rule 32.1(c), to wit, that several deficient jury instructions were given, thereby violating his right to a fair trial and rendering his sentence illegal. Decker has not only failed to show that the instructions as given constituted structural error, or that the rights underlying his claims are of sufficient constitutional magnitude to require a knowing, voluntary, and intelligent waiver, but in many instances, he has failed to establish that the instructions were in any way deficient. *See State v. Swoopes*, 216 Ariz. 390, ¶¶ 26-28 (App. 2007) (“mere assertion by a defendant that his or her right to a fair trial has been violated is not a claim of sufficient constitutional magnitude” to avoid finding waiver under Rule 32).

¶10 Decker is mistaken that, merely because his claims may implicate due process, they are of sufficient constitutional magnitude to require his personal waiver and cannot be regarded as waived for the purposes of Rule 32.2(a)(3) by his failure to have raised them in previous proceedings. *See Swoopes*, 216 Ariz. 390, ¶ 28. Additionally, Decker has cited no persuasive authority to support his argument that, even if the purportedly deficient jury instructions might constitute structural error, they involved a right that must be waived personally.⁷ Finally, we note

⁷Decker has cited and discussed numerous cases in his petition for review that he did not mention in his petition below. To the extent he is attempting to present new arguments, albeit ones related to the claims he previously raised in his petition below, we do not consider them. *Cf. Ariz. R. Crim. P. 32.16(c)(2)(B)* (appellate court reviews issues presented to trial

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that, merely because the jury asked questions about some of the jury instructions does not mean those instructions were unconstitutional or that structural error resulted, as Decker suggests.

¶11 Accordingly, although we grant review, we deny relief.

court); *State v. Ramirez*, 126 Ariz. 464, 468 (App. 1980) (appellate court will not address arguments asserted for first time in petition for review).