

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

MICHAEL BLAS RIVERA,
Petitioner.

No. 2 CA-CR 2020-0166-PR
Filed October 2, 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NOT FOR PUBLICATION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
Nos. CR2006168151001DT and CR2007006174001DT
The Honorable Susanna C. Pineda, Judge

**REVIEW GRANTED IN PART AND DENIED IN PART;
RELIEF DENIED**

Michael Blas Rivera, 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.

S T A R I N G, Presiding Judge:

¶1 Michael Rivera seeks review of the trial court’s ruling summarily dismissing his notice of 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). Rivera has not shown such abuse here.

¶2 After a jury trial, Rivera was convicted of four counts of aggravated assault and two counts each of attempted second-degree murder and endangerment. He was sentenced to consecutive and concurrent prison terms totaling thirty-six years. We affirmed his convictions and sentences on appeal. *State v. Rivera*, No. 1 CA-CR 09-0630 (Ariz. App. Mar. 31, 2011) (mem. decision).

¶3 Rivera timely sought post-conviction relief, which the trial court dismissed in December 2012. This court granted Rivera’s petition for review but denied relief. *State v. Rivera*, No. 1 CA-CR 13-0078 PRPC (Ariz. App. Apr. 22, 2014) (mem. decision). In 2018, Rivera again sought post-conviction relief, asserting he had recently discovered that throughout his trial, appeal, and first post-conviction proceeding, his attorneys had a conflict of interest—apparently based on their purported “sympathies to the State’s position” and refusal to manage the case to his satisfaction. He asserted this conflict essentially deprived him of counsel, constituting structural error. The trial court summarily dismissed the proceeding, and Rivera did not seek review of that decision.

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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¶4 In July 2019, Rivera filed another notice of post-conviction relief in which he raised essentially the same claims he had in his 2018 notice. He additionally argued there has been a significant change in the law, specifically that *McCoy v. Louisiana*, ___ U.S. ___, 138 S. Ct. 1500 (2018), altered the standard for evaluating his claims. The trial court again summarily dismissed the notice, and this petition for review followed.

¶5 On review, Rivera seems to argue that his claims of conflicted counsel are not subject to summary dismissal because they are grounded in structural error and are of sufficient constitutional magnitude to avoid preclusion. He also repeats his argument that the claims are grounded in newly discovered evidence and that *McCoy* is a significant change in the law.

¶6 The trial court did not err in summarily dismissing Rivera’s notice. First, the bulk of Rivera’s claims were raised and rejected in his previous proceeding and he is thus precluded from raising them anew. *See* Ariz. R. Crim. P. 32.2(a)(2). And, in any event, this proceeding is untimely, and constitutional claims cannot be raised in an untimely proceeding. *See* Ariz. R. Crim. P. 32.4(b)(3)(A). Although Rivera argues he is nonetheless entitled to raise his constitutional claims pursuant to *Stewart v. Smith*, 202 Ariz. 446 (2002), because they are of sufficient constitutional magnitude to require a knowing waiver, we have explained that such reasoning does not apply to untimely proceedings, *State v. Lopez*, 234 Ariz. 513, ¶¶ 7-8 (App. 2014).² Rivera’s argument that he may raise this claim under Rule 32.1(e) fails because that provision does not encompass newly discovered legal arguments but is instead limited to “newly discovered material facts” that “probably would have changed the judgment or sentence.” *See also State v. Serna*, 167 Ariz. 373, 374 (1991) (describing five elements of a cognizable newly discovered evidence claim).

² Rule 32.4(b)(3)(D) provides that a defendant may raise constitutional claims in an untimely proceeding if “the defendant adequately explains why the failure to timely file a notice was not the defendant’s fault.” This provision does not apply to Rivera’s successive proceeding—he did not raise these claims in his first and only timely post-conviction proceeding. His later discovery of constitutional claims does not change the fact that he has already had a timely post-conviction proceeding, thus making him ineligible for relief under Rule 32.4(b)(3)(D). *Cf. State v. Poblete*, 227 Ariz. 537, ¶ 7 (App. 2011) (concluding that similarly worded Rule 32.1(f) does not excuse an untimely notice based on later discovery of claim).

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¶7 Nor has Rivera established that *McCoy* altered the law, much less that it applies to his case. See Ariz. R. Crim. P. 32.1(g). The Supreme Court in *McCoy* determined counsel may not pursue litigation objectives (as opposed to strategies) that are contrary to the defendant’s wishes – in that case, by disregarding his client’s claim of innocence and admitting at trial that the defendant had killed the victims, apparently in an effort to “gain[] mercy at the sentencing stage.” 138 S. Ct. at 1505, 1508. The Court determined that counsel’s conduct resulted in structural error because it “block[ed] the defendant’s right to make the fundamental choices about his own defense.” *Id.* at 1511. First, Rivera has identified no precedent that *McCoy* overrules or calls into question. Indeed, the Supreme Court has long maintained that a reviewing court will presume prejudice when there is a conflict that significantly affects counsel’s performance. See *Mickens v. Taylor*, 535 U.S. 162, 173 (2002). And, even if *McCoy* did alter the law, Rivera has not identified any instance of similar conduct by his counsel. He instead baselessly accuses counsel of violating E.R. 1.7, Ariz. R. Sup. Ct. 42,³ and provides a laundry list of perceived faults in counsel’s representation more suited for a claim of ineffective assistance of counsel.

¶8 We additionally note that Rivera listed two cause numbers on his notice below and on his petition for review. As the trial court correctly observed, in the first of those cause numbers – CR2006-168151-001 DT – the charges against Rivera were dismissed without prejudice. His convictions and sentences were under CR2007-006174-001 DT. Because Rivera was not “convicted and sentenced for a criminal offense” in CR2006-168151-001 DT, he is necessarily ineligible for post-conviction relief in that case. Ariz. R. Crim. P. 32.1. Thus, insofar as Rivera has requested such relief, we deny review.

¶9 We grant review in part and deny review in part. We deny relief.

³E.R. 1.7 requires counsel to avoid a concurrent conflict of interest arising from representation of clients with adverse interests or a client with interests adverse to the attorney’s interests. Rivera has not identified any specific act by any attorney that violates this rule. Instead, the events Rivera describes show only that counsel was skeptical of his claims of innocence, believed the state had a strong case and he should accept a plea offer, and were unwilling to fruitlessly invest resources in his defense. None of these allegations suggest counsel had an interest adverse to Rivera’s.