

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

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DEC -3 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2010-0223-PR
)	DEPARTMENT B
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
FREDERICK RAMON, JR.,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR038802

Honorable Anna M. Montoya-Paez, Judge

PETITION GRANTED; RELIEF GRANTED IN PART, DENIED IN PART

Robert J. Hirsh, Pima County Public Defender
By Rebecca A. McLean

Tucson
Attorneys for Petitioner

K E L L Y, Judge.

¶1 After a jury trial, petitioner Frederick Ramon, Jr., was convicted of first-degree murder and armed robbery based on the shooting and robbery of a convenience store clerk on May 9, 1992, attempted murder and armed robbery of a gasoline station attendant on May 13, and three counts of theft of a motor vehicle, committed on May 13

and 14. Ramon was sentenced to a life term of imprisonment for the murder conviction and presumptive, concurrent terms on the remaining offenses. On appeal, Ramon raised a number of issues. We affirmed the convictions and the sentences on the first two counts, but vacated the remaining prison terms on the ground that they had been improperly enhanced, and remanded the matter to the trial court for resentencing. *State v. Ramon*, No. 2 CA-CR 93-0394 (memorandum decision filed Feb. 7, 1995). After we issued our mandate on July 25, 1995, Ramon was resentenced in December 1995. Over fourteen years later, Ramon sought post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P. and, in this petition for review, he challenges the trial court's order dismissing that petition.

¶2 We will not disturb the trial court's ruling absent an abuse of discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). A trial court abuses its discretion when it commits an error of law. *State v. Petty*, 225 Ariz. 369, ¶ 7, 238 P.3d 637, 639 (App. 2010). And "the interpretation of rules is a question of law, which we review de novo." *Id.*

¶3 When Ramon filed his notice of post-conviction relief in October 2008, he attached his own affidavit and affidavits of both trial and appellate counsel in support of his contention that he had not known the notice had to be filed within thirty days after we issued our mandate. In a memorandum in support of the notice of post-conviction relief, counsel from the public defender's office stated Ramon had contacted her office about post-conviction proceedings. Although her office had not been appointed to represent Ramon at that point, counsel suggested the court consider the fact that a number of years

after Ramon's trial, our supreme court found that detective Joseph Godoy, who had investigated Ramon's case and testified at Ramon's May 1993 trial, had testified falsely in other murder trials held the same year as Ramon's trial. *See State v. Minnitt*, 203 Ariz. 431, ¶¶ 15-17, 41, 55 P.3d 774, 778, 783 (2002).

¶4 After the trial court appointed the public defender's office to represent Ramon, he filed a petition for post-conviction relief stating he was seeking relief "pursuant to Rule 32.1(a), (e), (f), & (g), Ariz. R. Crim. P." Ramon raised the following claims: ineffective assistance of trial and appellate counsel; newly discovered evidence based on the discovery that Godoy had provided perjured testimony in *Minnitt*; and a significant change in the law, which was the supreme court's decision in *State v. Phillips*, 202 Ariz. 427, 46 P.3d 1048 (2002), relating to accomplice liability.¹

¶5 In dismissing Ramon's petition, the trial court correctly observed that, as a non-pleading defendant, Ramon was required to file a notice of post-conviction relief within the later of ninety days after the entry of judgment and sentence or within thirty days after the issuance of our mandate in his direct appeal.² *See* Ariz. R. Crim. P. 32.4. As the court also correctly pointed out, the later of the two was thirty days after the issuance of our mandate; therefore, Ramon was required to file his notice of post-conviction relief by August 24, 1995.

¹Because an issue arose regarding possible conflicts of interest within the Pima County Superior Court bench, the case was assigned to Judge Montoya-Paez of Santa Cruz County Superior Court as a visiting judge.

²Because Ramon was sentenced after September 30, 1992, the time limits in Rule 32.4(a), which were the part of the 1992 amendments to the rule, apply to him. *See* 171 Ariz. XLIV.

¶6 Arguably, at least with regard to the counts for which Ramon was resentenced, the time for filing the notice of post-conviction relief began to run from the resentencing. *See State v. Viramontes*, 211 Ariz. 115, ¶ 8, 118 P.3d 630, 631-32 (App. 2005) (when supreme court vacated the only sentence imposed, time limit for post-conviction proceeding began to run from resentencing); *but see State v. Rosales*, 205 Ariz. 86, 66 P.3d 1263 (App. 2003) (distinguishing claims of ineffective assistance of counsel on appeal from ineffectiveness of same counsel at resentencing and finding different time limits applied to initiating post-conviction relief proceeding on these independent claims). But even if the time for filing a notice of post-conviction relief began anew upon Ramon’s resentencing, the notice was nevertheless untimely when it was filed thirteen years later.³

¶7 On review, Ramon contends the trial court erred in summarily denying relief on his claims of newly discovered evidence under Rule 32.1(e), and significant change in the law under Rule 32.1(g). He asserts, as he did in the trial court, that years after he was convicted he discovered Detective Godoy’s “character for untruthfulness.” He requested discovery under *Canion v. Cole*, 210 Ariz. 598, 115 P.3d 1261 (2005), seeking support for his contention that “Godoy had a personal bias in favor of the State that could have been the subject of cross-examination if known at the time of the suppression hearing and trial, which could support” various claims that his constitutional rights had been violated. He also maintains the court erred in denying relief summarily

³It appears that Ramon initially received only a notice of his right to appeal the convictions and sentences, but at the time he was resentenced in December 1995, he did receive notice of the right to seek post-conviction relief.

on his claim that *Phillips* is a significant change in the law as contemplated by Rule 32.1(g).

¶8 In dismissing Ramon’s petition as untimely, the trial court found “Rule 32.1(e), (f) and (g) only apply if this were a Rule 32 ‘of-right’ proceeding.” Rule 32 makes an of-right proceeding available to “[a]ny person who pled guilty or no contest, admitted a probation violation, or whose probation was automatically violated based upon a plea of guilty or no contest.” Ariz. R. Crim. P. 32.1. The court denied relief, stating it “surmises [this] is not an ‘of-right’ proceeding,” and, consequently, “Rule 32.1(e), (f) and (g) are not available to Petitioner.” We agree with Ramon that the court clearly erred.

¶9 “In interpreting rules, we apply the same principles we use in interpreting statutes.” *Petty*, 225 Ariz. 369, ¶ 7, 238 P.3d at 640. Accordingly, we must determine and give effect to the intent of our supreme court, which promulgated the rule, *id.*, “keeping in mind that the best reflection of that intent is the plain language of the rule,” *Potter v. Vanderpool*, 592 Ariz. Adv. Rep. 33, ¶ 8 (Ct. App. Oct. 5, 2010). We will not employ other principles of construction if the rule’s language is clear and unambiguous. *Id.*

¶10 Rule 32.1 begins with the following introduction: “Subject to the limitations of Rule 32.2, any person who has been convicted of, or sentenced for, a criminal offense may . . . institute a proceeding to secure appropriate relief.” Rule 32.1 then sets forth the kinds of claims that may be raised in a post-conviction proceeding. Nothing in Rule 32.1 or any other subsection of Rule 32 states or even suggests that only

pleading defendants can raise claims of newly discovered evidence or significant change in the law. The plain language of the rule, particularly Rules 32.1, 32.2, and 32.4, makes clear that any defendant, whether convicted after a jury trial, a bench trial, or pursuant to a plea agreement, may assert claims under these subsections. Rule 32.4(a) provides that any notice of post-conviction relief that is untimely filed, whether filed by a pleading defendant or a non-pleading defendant, “may only raise claims pursuant to Rule 32.1(d), (e), (f), (g) or (h).”

¶11 Rule 32.2, the rule of preclusion, is consistent with Rule 32.4, and states in subsection (b) that when a defendant files a successive or untimely notice of post-conviction relief and wishes to raise a claim under one of the subsections excepted from the rule of preclusion,

the notice of post-conviction relief must set forth the substance of the specific exception and the reasons for not raising the claim in the previous petition or in a timely manner. If the specific exception and meritorious reasons do not appear substantiating the claim and indicating why the claim was not stated in the previous petition or in a timely manner, the notice shall be summarily dismissed.

Although Ramon was entitled to assert claims pursuant to Rule 32.1(e) or (g), because the notice was untimely he was first required to establish that the untimeliness was not his fault.

¶12 As we recently noted in *Petty*, a defendant who fails to file a notice of post-conviction relief within the time limits set forth in Rule 32.4 may raise only claims that are cognizable under Rules 32.1(d), (e), (g), or (h). 225 Ariz. 369, n. 3, 238 P.3d at 641 n. 3. We pointed out that

Rule 32.2(b), which applies to both successive and untimely notices [of post-conviction relief], provides that the rule of preclusion stated in subsection (a) does not apply to claims cognizable under subsections (d), (e), (f), (g), or (h) of Rule 32.1, and it requires a defendant seeking to raise such a claim in a successive or untimely proceeding to identify the claim and explain why it was not timely raised or not raised in a previous petition.

Id. ¶ 10. And, we further pointed out, before a defendant may seek relief under any of these subsections, the defendant

“must set forth [in the notice of post-conviction relief] the substance of the specific exception [or subsection] and the reasons for not raising the claim . . . in a timely manner. If the specific exception and meritorious reasons do not appear substantiating the claim and indicating why the claim was not stated . . . in a timely manner, the notice shall be summarily dismissed.”

Id. ¶ 4, *quoting* Ariz. R. Crim. P. 32.2(b). Thus, the trial court was first required to determine whether Ramon had set forth in his notice sufficient reasons excusing the untimeliness of his claims. And, assuming the court accepted Ramon’s explanations, it was then required to address the merits of these claims. In failing to do so, the court abused its discretion.

¶13 Ramon also contends the trial court should have granted his request for relief pursuant to Rule 32.1(f) and permitted him to file a delayed notice and petition for post-conviction relief in order to raise his claims of ineffective assistance of counsel. The trial court’s ruling on this claim is somewhat unclear. Like the claims under Rule 32.1(e) and (g), the court found Rule 32.1(f), “only appl[ies] if this were a Rule 32 ‘of-right’

proceeding,” which it is not. Finding this claim, too, was untimely, the court denied relief summarily.

¶14 Ramon’s claims of ineffective assistance of trial and appellate counsel fall under Rule 32.1(a). *See Petty*, 225 Ariz. 369, ¶ 11, 238 P.3d at 641. Consequently, he was barred from raising these claims in this untimely post-conviction proceeding. *See Ariz. R. Crim. P. 32.4*. As we stated in *State v. Rosales*, 205 Ariz. 86, ¶ 11, 66 P.3d 1263, 1267 (App. 2003), with respect to claims under Rule 32.1(a) through (c), “no exception to the preclusion or timeliness rules exists.” Consequently, the trial court did not err when it denied relief summarily on Ramon’s claims of ineffective assistance of counsel.

¶15 Nor did the court abuse its discretion in refusing to permit Ramon to raise the claims of ineffective assistance of counsel in a delayed post-conviction proceeding pursuant to Rule 32.1(f). As a general proposition, claims under Rule 32.1(f) are among the kinds of claims that may be asserted in an untimely post-conviction proceeding, so long as the defendant states valid reasons for failing to file a timely notice of post-conviction relief. *See Ariz. R. Crim. P. 32.4(a)*; *see also Ariz. R. Crim. P. 32.2(b)*. But based on its clear language, Rule 32.1(f) is not available to Ramon, a non-pleading defendant who already has had an appeal.

¶16 Rule 32.1(f) is the procedural vehicle through which non-pleading defendants who have failed to file a timely notice of appeal through no fault of their own may seek leave to file a delayed direct appeal. Similarly, the rule provides pleading defendants with the equivalent of seeking such relief; a pleading defendant’s right to

review is through a post-conviction proceeding and such a defendant may seek leave to file a delayed notice of post-conviction relief. *See Moreno v. Gonzalez*, 192 Ariz. 131, ¶ 18, 962 P.2d 205, 208 (1998) (“[A] Rule 32 petition for post-conviction relief in the trial court is not an ‘appeal’ within the meaning of Rule 32.1(f), Ariz. R. Crim. P. ‘Appeal’ as used in Rule 32.1(f) means appeal under Rule 31[, Ariz. R. Crim. P.]”). Pleading defendants do not have the right to a direct appeal. As our supreme court stated in *Montgomery v. Sheldon*, 181 Ariz. 256, 258, 889 P.2d 614, 616, *supp. op.*, 182 Ariz. 118, 893 P.2d 1281 (1995), the first of-right proceeding pursuant to Rule 32 is equivalent to a direct appeal for a pleading defendant; it is “the only means available for exercising the [defendant’s] constitutional right to appellate review.” *See also State v. Pruett*, 185 Ariz. 128, 131, 912 P.2d 1357, 1360 (App. 1995) (pleading defendant entitled to effective assistance of counsel on first, of-right petition for post-conviction relief, which is “the counterpart of a direct appeal”). The rule therefore gives pleading and non-pleading defendants the opportunity to request a delayed, first review. Nothing in the rule, however, gives any defendant but a pleading defendant in an “of-right” proceeding the right to seek leave to file a delayed notice of post-conviction relief. If the supreme court had wanted to provide non-pleading defendants with the right to seek leave to file a delayed notice of post-conviction relief to assert a first claim of ineffective assistance of trial or appellate counsel, the court could have so provided in Rule 32.1(f). It did not include such a provision and we can neither construe the rule to include words that are not there nor rewrite the rule. *See Vanderpool*, 592 Ariz. Adv. Rep. 33, ¶ 13.

¶17 The petition for review is granted. We deny relief on Ramon’s claim that the trial court erred in summarily denying relief on his claims of ineffective assistance of counsel and his request for relief pursuant to Rule 32.1(f) so that he could assert the untimely raised claims of ineffective assistance of counsel in a delayed post-conviction proceeding. But the trial court abused its discretion by summarily dismissing his claims of newly discovered evidence and significant change in the law. This matter is therefore remanded to the trial court for further proceedings consistent with this decision.

/s/ Virginia C. Kelly

VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez

GARYE L. VÁSQUEZ, Presiding Judge

/s/ Peter J. Eckerstrom

PETER J. ECKERSTROM, Judge