

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

THOMAS DAVID MCWATERS,
Petitioner.

No. 2 CA-CR 2016-0246-PR
Filed October 4, 2016

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NOT FOR PUBLICATION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. 31.24.

Petition for Review from the Superior Court in Gila County
No. CR201000417
The Honorable Gary V. Scales, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Bradley D. Beauchamp, Gila County Attorney
By June Ava Florescue, Deputy County Attorney, Globe
Counsel for Respondent

Thomas David McWaters, Florence
In Propria Persona

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MEMORANDUM DECISION

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

V Á S Q U E Z, Presiding Judge:

¶1 Thomas McWaters seeks review of the trial court’s order denying his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that order unless the court abused its discretion. *State v. Roseberry*, 237 Ariz. 507, ¶ 7, 353 P.3d 847, 848 (2015). McWaters has not met his burden of demonstrating such abuse here.

¶2 McWaters pled guilty to attempted second-degree murder and was sentenced to a fourteen-year prison term. He sought post-conviction relief, and appointed counsel filed a notice stating she had reviewed the record but found no claims to raise pursuant to Rule 32. The trial court granted McWaters leave to file a pro se petition, but dismissed the proceeding when he failed to do so within the time allowed.

¶3 More than two-and-a-half years later, McWaters filed a pro se motion seeking to “reinstate” his “second ‘of right’ [petition for post-conviction relief pursuant to] Rule 32.” In that motion, he indicated he wished to raise claims of ineffective assistance of trial and Rule 32 counsel. He also claimed he had “good cause” to file a late petition due to his first counsel’s ineffectiveness and his “bona fide ongoing investigation” of his claims. McWaters further asserted he had been unable to file his petition previously because he was not “in possession of his entire case file,” apparently because, during his first proceeding, he had sent the file to an attorney for review and the attorney had not returned it. The trial court granted the motion, reinstating McWaters’s first Rule 32 proceeding.

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¶4 McWaters filed a petition raising claims of ineffective assistance of trial counsel and asserting his first Rule 32 counsel was ineffective for failing to raise those issues. He additionally suggested he was entitled to have counsel appointed to address his claim of ineffective assistance of Rule 32 counsel. Along with his petition, McWaters filed a motion seeking the “stay and abeyance” of his Rule 32 proceeding, asserting he had not yet recovered his “entire case file” from the attorney to whom he had sent his file, and asking the court to order that attorney to return the file to him.

¶5 The trial court summarily denied relief. It concluded McWaters’s various claims of ineffective assistance of trial counsel were not colorable and, thus, that Rule 32 counsel was not “ineffective for failing to advise him of those non-meritorious claims.” The court further stated McWaters was not entitled to another appointed attorney, having already had his case reviewed by counsel. And the court denied McWaters’s request for a stay, determining McWaters had not been diligent despite having ample opportunity to obtain the missing record items and raise his claims. This petition for review followed.

¶6 On review, McWaters restates his claims of ineffective assistance of counsel. He additionally argues he was entitled to appointed counsel for this proceeding and argues the trial court erred in rejecting his request for a stay.

¶7 Nothing in Rule 32 contemplates a motion to reinstate a dismissed proceeding. To the extent the trial court construed McWaters’s motion as an attempt to seek rehearing pursuant to Rule 32.9(a), the motion was not filed timely. The court had no authority under the criminal rules to merely “reinstate” McWaters’s long-dismissed first of-right proceeding. *Cf. State v. Shrum*, 220 Ariz. 115, ¶ 12, 203 P.3d 1175, 1178 (2009) (“By requiring that all post-conviction claims be raised promptly, Rule 32.2(a) not only serves important principles of finality, but also allows any relief to be issued at a time when the interests of justice, from the perspectives of the defendant, the State, and the victim, can be best served.”) (citations omitted).

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¶8 Because McWaters’s motion to reinstate his proceeding and his subsequent petition were filed well outside the time limitations of Rule 32, he was only permitted to raise claims pursuant to Rule 32.1(d) through (h). Ariz. R. Crim. P. 32.4(a). His claims of ineffective assistance of counsel fall within Rule 32.1(a) and, thus, cannot be raised in this proceeding. *See State v. Petty*, 225 Ariz. 369, ¶ 11, 238 P.3d 637, 641 (App. 2010).

¶9 McWaters’s assertion that he had “good cause” to file a delayed petition for post-conviction relief, however, arguably constitutes a claim under Rule 32.1(f) that his failure to timely initiate a second, of-right proceeding was without fault on his part.¹ Although the trial court did not expressly construe McWaters’s various filings as raising such a claim, it tacitly rejected it by finding McWaters had ample opportunity “to collect the needed documents and make his case” but had not been diligent in doing so. McWaters has not disputed this conclusion on review and has not demonstrated he is entitled to relief pursuant to Rule 32.1(f).

¶10 McWaters lists under the heading “Other Fundamental Issues” a claim that his plea agreement is “invalid” and his sentence “illegal” because he admitted to aggravating factors constituting elements of the offense and did not waive his right to have those factors found beyond a reasonable doubt. To the extent McWaters

¹A second, of-right proceeding typically would be limited to a claim of ineffective assistance of first Rule 32 counsel, a claim for which McWaters would have been entitled to the appointment of counsel. *See Osterkamp v. Browning*, 226 Ariz. 485, ¶¶ 7, 10, 15-17, 250 P.3d 551, 553-56 (App. 2011). However, a trial court is not required to appoint counsel unless the second proceeding was timely filed. *See id.* ¶ 17; *see also* Ariz. R. Crim. P. 32.4(c)(2) (requiring appointment of counsel only for “timely or first notice in a Rule 32 proceeding”). Because McWaters’s claim of ineffective assistance of Rule 32 counsel was not timely raised, and he has not raised a colorable claim for relief under Rule 32.1(f), he was not entitled to appointed counsel.

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seeks relief on this basis, we do not address claims not raised below. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980).

¶11 Because McWaters has not demonstrated his claims for relief are exempt from the timeliness requirements of Rule 32.4(a), the trial court was required to summarily dismiss his most-recent petition for post-conviction relief. And we may affirm the trial court's ruling for any reason supported by the record. *State v. Banda*, 232 Ariz. 582, n.2, 307 P.3d 1009, 1012 n.2 (App. 2013). Accordingly, we grant review but deny relief.

¶12