

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK
JAN 31 2008
COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,)
)
 Appellee,) 2 CA-CR 2007-0269
) DEPARTMENT B
)
 v.) MEMORANDUM DECISION
) Not for Publication
) Rule 111, Rules of
 GENE ANTHONY CHECCHI,) the Supreme Court
)
 Appellant.)
)
 _____)

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-33296

Honorable Javier Chon-Lopez, Judge

AFFIRMED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
Attorneys for Appellee

Gene Anthony Checchi

Yuma
In Propria Persona

V Á S Q U E Z, Judge.

¶1 A jury found appellant Gene Anthony Checchi guilty of first-degree murder and second-degree burglary, and the trial court sentenced him to life imprisonment for murder and to a concurrent, five-year term for burglary. Pima County Superior Court Judge Michael D. Alfred presided over both the trial and sentencing in 1991, and we affirmed Checchi’s convictions and sentences on appeal. *State v. Checchi*, No. 2 CA-CR 91-0811 (memorandum decision filed Dec. 22, 1994). In 2007 Checchi filed a “motion to vacate void judgment” citing Rule 60(c), Ariz. R. Civ. P.¹ He claimed his convictions and sentences should be “voided ab initio” because Judge Alfred had failed to file an Oath of Office with the Secretary of State before hearing his case. The trial court denied his motion, and he filed a notice of appeal. We affirm.

¶2 First, we question whether this court has jurisdiction over this appeal. We have already affirmed Checchi’s convictions and sentences on appeal and denied relief on review of the trial court’s denial of his petition for post-conviction relief. *State v. Checchi*, Nos. 2 CA-CR 91-0811, 2 CA-CR 94-0147-PR (consolidated) (memorandum decision filed Dec. 22, 1994). Thus, although not addressed by the trial court, Checchi’s claims are also precluded under Rules 32.2 and 32.5, Ariz. R. Crim. P., the latter of which required him to

¹Checchi’s motion also asserted the judgment was void under Rule 60(b) of the Federal Rules of Civil Procedure. He makes this argument on appeal as well. However, proceedings in Arizona state court are governed by the state rules, not the federal rules. *See* Ariz. R. Civ. P. 1 (rules govern superior courts of Arizona in all civil proceedings); Fed. R. Civ. P. 1 (rules govern proceedings in all civil actions in United States district courts). Therefore, the federal rules of procedure do not apply here.

include in his previous Rule 32 proceeding “every ground known to him . . . for vacating . . . all judgments or sentences.” *See also State v. Rosales*, 205 Ariz. 86, ¶ 12, 66 P.3d 1263, 1267 (App. 2003).

¶3 Even if we treat Checchi’s “appeal” as a petition for review of a nonprecluded claim under Rule 32, the claim is, nevertheless, meritless for a variety of reasons. Checchi argues the trial court should have granted his motion because there was no evidence Judge Alfred had filed his Oath of Office before presiding over Checchi’s trial, rendering the resulting conviction and sentences void. The trial court denied Checchi’s motion on two grounds. First, it found his “motion under the Arizona Rules of Civil Procedure in a criminal case is improper and no relief can be granted.” Second, the court concluded that “even if relief could be granted, [Checchi’s] motion to vacate a void judgment is without merit. Judge Michael Alfred was a properly appointed judicial officer.” The court was correct on both grounds.

¶4 Checchi filed his motion ostensibly pursuant to Rule 60(c)(4), Ariz. R. Civ. P., which provides for relief from a void judgment. However, Rule 60(c)(4) is a rule of civil procedure, and Checchi seeks to have his criminal convictions voided. Prior to 1973, Rule 60(c) applied to criminal and civil cases. *See State v. Lerch*, 107 Ariz. 529, 531-32, 490 P.2d 1, 3-4 (1971); *see also* 16A A.R.S. p. 3 (1998). But in 1973 our supreme court adopted new rules of criminal procedure and created Rule 24.2, Ariz. R. Crim. P., to “replace Arizona Rules of Civil Procedure, Rule 60(c) with specifically criminal post-trial

remedies of similarly broad scope. Arizona Rules of Civil Procedure, Rule 60(c) . . . does not have any further application to criminal cases.” Ariz. R. Crim. P. 24.2, cmt. Therefore, even assuming Checchi were correct that Judge Alfred was not fully authorized to act as a judge at the time of Checchi’s trial, Rule 60(c) does not afford him an avenue for seeking relief.

¶5 And, even if we were to interpret his motion as a motion to vacate judgment under Rule 24.2, Checchi’s motion is untimely. Rule 24.2(a) states that “[u]pon motion made no later than 60 days after the entry of judgment and sentence but before the defendant’s appeal . . . the court may vacate the judgment” More than sixteen years have elapsed since Checchi was convicted and sentenced, and under the time limits mandated by Rule 24.2, the trial court would have been without jurisdiction to consider Checchi’s motion. *See State v. Hickie*, 129 Ariz. 330, 332, 631 P.2d 112, 114 (1981) (trial court lacked jurisdiction to consider motion for new trial filed outside time limits of rule); *State v Hill*, 85 Ariz. 49, 53-54, 330 P.2d 1088, 1090-91 (1958) (trial court is not required to consider “merits or demerits” of motions filed outside time limits of criminal rules of procedure).

¶6 Finally, the trial court did not err in denying Checchi’s motion on the merits. When a judge is constitutionally qualified to be a superior court judge, but his appointment is deficient in some way that does not nullify the appointment, the defendant must raise the defect before the relevant court proceeding or it is waived. *In re Estate of Escandon*, 215

Ariz. 247, ¶¶ 12, 16, 159 P.3d 557, 561 (App. 2007). Checchi does not claim Judge Alfred failed to “meet the minimum constitutional requirements to qualify as a judge of the superior court.” *Id.* ¶ 12. He claims only that the judge had failed to file an oath of office before 1992 and therefore did not have authority to preside over Checchi’s trial in 1991.

¶7 However, in *Rogers v. Frohmiller*, 59 Ariz. 513, 520-21, 130 P.2d 271, 274-75 (1942), our supreme court adopted the “de facto officer doctrine” to determine the validity of acts of public officers whose appointments or elections are legally deficient in some way. In particular, the court noted that a de facto officer is one who acts, *inter alia*, “under color of a known or valid appointment . . . but where the officer ha[s] failed to conform to some precedent requirement or condition, such as to take an oath, give a bond, or the like.” *Id.* at 521, 130 P.2d at 274, *quoting State v. Carroll*, 1871 WL 1596 *1 (Conn. Sept. 1871). This is precisely the sort of defect Checchi asserts. Therefore, even assuming Checchi were correct that Judge Alfred had failed to file an oath of office at the time of Checchi’s trial, Alfred would still have had de facto authority to act as a judge. *See id.* Thus, any defect in the filing of the judge’s oath of office was technical rather than jurisdictional. Consequently, Checchi waived his claim by failing to raise the issue before trial. *See Escandon*, 215 Ariz. 247, ¶ 16, 159 P.3d at 562. The trial court did not err in dismissing Checchi’s untimely and unauthorized motion.

Disposition

¶8 For the reasons stated above, we affirm.

GARYE L. VÁSQUEZ, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

PHILIP G. ESPINOSA, Judge