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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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. BRETT ALLEN BELL, Petitioner.	2 CA-CR 2011-0232-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF GILA COUNTY

Cause No. CR20070577

Honorable Peter J. Cahill, Judge

REVIEW GRANTED; RELIEF DENIED

Daisy Flores, Gila County Attorney
By June Ava Florescue — Globe
Attorneys for Respondent

Law Office of Emily Danies
By Emily Danies — Tucson
Attorney for Petitioner

B R A M M E R, Judge.

¶1 Brett Bell petitions this court for review of the trial court's denial of his petition for post-conviction relief brought pursuant to Rule 32, Ariz. R. Crim. P. We will

not disturb that ruling unless the court clearly has abused its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 Bell was convicted after a jury trial of two counts of attempted first-degree murder, four counts of aggravated assault, and one count of first-degree burglary. The trial court sentenced Bell to a combination of concurrent and consecutive prison terms totaling twenty-eight years. We affirmed his convictions and sentences on appeal. *State v. Bell*, No. 2 CA-CR 2008-0246 (memorandum decision filed Aug. 28, 2009).

¶3 Bell filed a notice and petition of post-conviction relief arguing that his trial counsel had been ineffective in failing to explain adequately the state's plea offer, the strength of the state's case, and the maximum sentence Bell could face upon conviction and that, had Bell known he could face a prison term of twenty-eight years or longer and that evidence relevant to his defense likely would be precluded, he would have accepted the state's plea offer. Bell also asserted his trial counsel should have presented evidence of Bell's physical disability. After an evidentiary hearing, the trial court denied relief.

¶4 On review, Bell asserts the trial court erred in finding trial counsel's testimony concerning the plea agreement and his explanation of the possible consequences of rejecting the plea to be more credible than Bell's. We need not address this argument because, as we explain, Bell's notice of post-conviction relief was filed untimely.

¶5 Rule 32.4(a) requires that a notice of post-conviction relief "be filed within ninety days after the entry of judgment and sentence or within thirty days after the issuance of the order and mandate in the direct appeal, whichever is the later." *See also*

A.R.S. § 13-4234(A), (C). The mandate in Bell's appeal issued on February 11, 2010. He filed his notice of post-conviction relief on May 3, 2010—approximately eighty days after our mandate issued. Thus, his notice was filed untimely.

¶6 "Any notice not timely filed may only raise claims pursuant to Rule 32.1(d), (e), (f), (g) or (h)." Ariz. R. Crim. P. 32.4(a); *see also* A.R.S. § 13-4232(B). Bell did not acknowledge that his notice was untimely, much less provide any reason for the late filing. And, even assuming the late filing was without fault on Bell's part, Rule 32.1(f) provides no relief because it encompasses only the late filing of a notice of appeal or an of-right notice of post-conviction relief. By its plain language, the rule does not permit a non-pleading defendant, like Bell, to file an untimely notice of post-conviction relief. Ariz. R. Crim. P. 32.1(f); Ariz. R. Crim. P. 32.1 cmt. (2000 amendment) ("Relief pursuant to subsection (f) [is] unavailable to all post-conviction relief proceedings not 'of-right.'").

¶7 And the time limits set forth in Rule 32.4 are jurisdictional; an untimely notice must be dismissed with prejudice. § 13-4234(G). Bell has identified no claim exempt from the timeliness requirement of Rule 32.4. Accordingly, the trial court did not abuse its discretion in denying Bell's petition for post-conviction relief. *Cf. State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984) (appellate court will affirm trial court's ruling if legally correct for any reason).

¶8 In any event, even considering the merits of Bell's argument on review, he has not sustained his burden of demonstrating the trial court abused its discretion. Bell acknowledges his claim hinges on the court's finding that his trial counsel's testimony at

the evidentiary hearing was more credible than Bell's. Bell's assertion that his "testimony is just as credible" as his trial counsel's notwithstanding, the trial court, not this court, determines the credibility of witnesses, *State v. Ossana*, 199 Ariz. 459, ¶ 7, 18 P.3d 1258, 1260 (App. 2001), and we defer to its determinations, *State v. Moody*, 208 Ariz. 424, ¶ 81, 94 P.3d 1119, 1144 (2004).

¶9 For the reasons stated, although we grant review, we deny relief.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge