

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

JEFFREY NOEM VETA,
Petitioner.

No. 2 CA-CR 2013-0386-PR
Filed June 30, 2014

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NOT FOR PUBLICATION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); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Pima County

No. CR052826

The Honorable Christopher Browning, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Barbara LaWall, Pima County Attorney

By Jacob R. Lines, Deputy County Attorney, Tucson

Counsel for Respondent

STATE v. VETA
Decision of the Court

Jeffrey Veta, Florence
In Propria Persona

MEMORANDUM DECISION

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

H O W A R D, Chief Judge:

¶1 Jeffrey Veta seeks review of the trial court's order summarily denying his successive petition for post-conviction relief. We will not disturb that ruling unless the court clearly has abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). For the reasons that follow, we grant review but deny relief.

¶2 Veta was convicted after a jury trial of continuous sexual abuse of a child, involving minors in drug offenses, and two counts of sexual conduct with a minor. He was sentenced to consecutive, twenty-year prison terms for each count. Veta appealed, filing a brief in propria persona, and we affirmed his convictions and sentences. *State v. Veta*, No. 2 CA-CR 2004-0251 (memorandum decision filed June 30, 2008).

¶3 Veta sought post-conviction relief, again proceeding in propria persona, claiming his trial counsel had been ineffective in waiving his speedy trial rights and at sentencing. Pursuant to Veta's petition for review, we granted review but denied relief. *State v. Veta*, No. 2 CA-CR 2006-0069-PR (memorandum decision filed Sept. 26, 2007).

¶4 In January 2013, Veta filed a notice of post-conviction relief claiming that *Lafler v. Cooper*, ___ U.S. ___, 132 S. Ct. 1376 (2012), was a "new constitutional rule" retroactively applicable to his case and that his trial counsel had failed to adequately advise

STATE v. VETA
Decision of the Court

him about the sentencing consequences of a plea offer. The trial court, treating that notice as a petition for post-conviction relief, summarily denied relief.

¶5 A few months later, Veta filed in this court a motion to vacate our decision on appeal and recall the mandate, claiming that he had been denied the right to counsel on appeal. He explained that his trial counsel had withdrawn after filing the notice of appeal, but that appellate counsel had never been appointed.¹ We denied the motion, noting that Veta could raise the claim in a Rule 32 proceeding.

¶6 Veta then filed a petition for post-conviction relief in the trial court raising the same claim and asserting “[t]his issue was discovered in January 2013.” The court summarily denied relief. It determined the claim was precluded because Veta had waived it by failing to request that counsel be appointed for his appeal or to raise the issue in any of his previous Rule 32 proceedings despite having been informed of his right to counsel. It also found “completely

¹The failure to appoint Veta appellate counsel appears to have been an oversight. *See* Ariz. R. Crim. P. 6.6 (placing duty on trial or appellate court to appoint “new counsel for a defendant legally entitled to such representation on appeal, when prior counsel is permitted to withdraw”). On August 6, 2004, we issued an order stating that it appeared “that this appeal is taken from the entry of a plea of guilty or no contest in a non-capital case” and stating the appeal would be dismissed in ten days if Veta did not “show why this appeal should not be dismissed.” Neither Veta nor counsel took any action, and we dismissed the appeal on August 18. One day later, Veta’s trial counsel filed a motion to withdraw. In September 2004, Veta—personally and not through counsel—sought reinstatement of his appeal, including with his letter documents showing he had been convicted after a jury trial. This court then granted counsel’s motion to withdraw and ordered that counsel transmit the record on appeal to Veta. We later reinstated the appeal, and Veta continued in propria persona.

STATE v. VETA
Decision of the Court

devoid of credibility” Veta’s claim that he had only recently discovered the denial of his right to appellate counsel.

¶7 Relying on *Stewart v. Smith*, 202 Ariz. 446, 46 P.3d 1067 (2002), Veta asserts on review that his right to appellate counsel is of sufficient constitutional magnitude that it is not subject to preclusion absent his knowing, voluntary, and intelligent waiver and that his mere failure to request counsel or raise the claim in earlier post-conviction proceedings does not constitute such waiver. In *Stewart*, our supreme court determined that claims of sufficient constitutional magnitude—that is, claims involving rights that require a knowing, voluntary, and intelligent waiver—are not subject to preclusion pursuant to Rule 32.2(a)(3). 202 Ariz. 446, ¶ 12, 46 P.3d at 1071.

¶8 Also citing *Stewart*, the state initially conceded that Veta’s claim is not precluded and that he has presented a “colorable claim” that his right to counsel on appeal had been denied. However, this court ordered the parties to submit supplemental memoranda in light of our recent decision in *State v. Lopez*, 234 Ariz. 513, 323 P.3d 1164 (App. 2014). In *Lopez*, we determined that in an untimely post-conviction proceeding, a claim not falling within Rule 32.1(d) through (h) was barred irrespective of whether a defendant had knowingly, voluntarily, and intelligently waived it and, therefore, *Stewart* did not apply to claims raised in a post-conviction proceeding that had not been timely initiated pursuant to Rule 32.4(a). *Id.* ¶¶ 6-8. In its supplemental memorandum, the state withdrew its concession of error and argued that, pursuant to *Lopez*, Veta’s claim was barred because he “did not file a timely notice of post-conviction relief.” Veta argues that *Lopez* does not apply to the facts of this case and, in any event, was wrongly decided.

¶9 As we explained in *Lopez*, our supreme court’s reasoning in *Stewart* was limited to preclusion based on waiver pursuant to Rule 32.2(a)(3). *Id.* ¶¶ 7-8; see also *Stewart*, 202 Ariz. 446, ¶ 1, 46 P.3d at 1068. The court did not address the failure to file a timely notice pursuant to Rule 32.4(a) for claims outside of Rule 32.1(d) through (h). Rule 32.4(a) states that a post-conviction “proceeding is commenced by timely filing a notice of post-

STATE v. VETA
Decision of the Court

conviction relief with the court in which the conviction occurred” and that “the notice must 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.” Rule 32.4(a) further provides that “[a]ny notice not timely filed may only raise claims pursuant to Rule 32.1(d), (e), (f), (g) or (h).” Unlike Rule 32.2(a)(3) preclusion, a Rule 32.4(a) exclusion is not based on waiver, but instead on the defendant’s timeliness in seeking relief. Thus, whether the underlying claim is of sufficient constitutional magnitude to require a knowing, voluntary, and intelligent waiver is immaterial.

¶10 In his supplemental memorandum, Veta argues that Rule 32.4(a) does not apply to this proceeding because he did not file a notice of post-conviction relief, but instead initiated the proceeding by filing a petition for post-conviction relief. Thus, he concludes, our decision in *Lopez* does not govern. Veta reasons that Rule 32.4(a) permits a post-conviction proceeding to be initiated by filing a petition in lieu of a notice and that doing so bypasses the timeliness requirement of that rule.

¶11 Veta is incorrect on both counts. A rule’s plain language is the best indicator of the supreme court’s intent in promulgating the rule. *Fragoso v. Fell*, 210 Ariz. 427, ¶¶ 7, 13, 111 P.3d 1027, 1030, 1031-32 (App. 2005). Rule 32.4(a) states that a post-conviction “proceeding is commenced by timely filing a notice of post-conviction relief,” and provides no other method for doing so, nor does any other portion of Rule 32. And the language of Rule 32.4(a) is not permissive, as Veta suggests. Veta is correct that trial courts occasionally ignore the requirement that a notice be filed by addressing the merits of a petition for post-conviction relief filed without the defendant having first submitted a notice. But he cites no authority suggesting that the failure to file a notice before filing a petition obviates the requirement to initiate the proceeding in a timely manner. And we decline to interpret the governing rules to reach such an absurd result. See *Xavier R. v. Joseph R.*, 230 Ariz. 96, ¶ 3, 280 P.3d 640, 642 (App. 2012).

STATE v. VETA
Decision of the Court

¶12 Veta’s petition for post-conviction relief, which initiated the instant proceeding, was patently untimely.² Our mandate in his direct appeal issued in December 2008, and he did not file his petition for post-conviction relief until April 2013.³ See Ariz. R. Crim. P. 32.4(a) (Rule 32 notice must be filed “within thirty days after the issuance of the order and mandate in the direct appeal”). To the extent Veta suggests the trial court implicitly concluded he was nonetheless entitled to file a late proceeding pursuant to Rule 32.1(f), we disagree. Veta raised no such claim and, in any event, Rule 32.1(f) does not apply to a notice of post-conviction relief filed by a non-pleading defendant, but instead applies only to his or her failure to timely file a notice of appeal.

¶13 Veta further argues we are not permitted to address the timeliness of his claim because the state did not raise the issue in its response to his petition for review. He argues that, in contrast to preclusion based on Rule 32.2, nothing in Rule 32.4(a) permits a court to sua sponte raise a timeliness issue. Thus, he concludes, the state “procedurally waived” any claim that *Lopez* bars his claim.

¶14 Rule 32.2(c) provides that the state has the burden of pleading and proving preclusion pursuant to Rule 32.2(a) but notes that “any court on review of the record may determine and hold that

²Veta suggested in his petition below that he was entitled to file an untimely petition because he had only recently discovered “the issue” in January 2013. But nothing in Rule 32 permits the filing of an untimely proceeding on the basis that a defendant had only recently discovered a legal argument unless that argument is based on a significant change in the law or newly discovered material facts. See Ariz. R. Crim. P. 32.1(e), (g); 32.4(a). Veta’s claim does not fall within either category.

³Veta correctly notes that he could not have raised this claim in his first post-conviction proceeding because it was initiated and resolved while his appeal was pending. He has not explained, however, why this fact would relieve him of his obligation to raise the claim in a timely manner after we issued the mandate in his appeal.

STATE v. VETA
Decision of the Court

an issue is precluded regardless of whether the state raises preclusion.” Although Rule 32.4(a) contains no similar provision, that fact does not preclude a trial court from sua sponte determining whether a Rule 32 proceeding has been timely initiated. Determining whether a claim is precluded can require a detailed inquiry into the history of the case to determine the nature of claims raised in previous proceedings. *See generally* Ariz. R. Crim. P. 32.2(a). Consequently, the burden of demonstrating preclusion is sensibly placed on the state. In contrast, determining whether a claim is timely filed rarely requires a complex inquiry. Thus, the portion of Rule 32.2(c) providing express authority for a court’s sua sponte analysis of preclusion is best understood as clarifying that preclusion may be raised sua sponte despite the state’s burden. Because the rules do not place the burden of demonstrating a lack of timeliness on the state, no such clarification is necessary in Rule 32.4(a).

¶15 Indeed, the rules provide no procedural mechanism for the state to respond to a notice in order to raise such issues. Thus, our supreme court clearly intended that a trial court have the authority to first address the timeliness of a notice filed pursuant to Rule 32.4(a). And, although the court below grounded its decision on preclusion grounds, we may affirm a trial court’s correct ruling for any reason supported by the record. *See State v. Olquin*, 216 Ariz. 250, n.5, 165 P.3d 228, 231 n.5 (App. 2007).

¶16 In a related argument, Veta argues the state has waived any timeliness argument because it initially conceded error. Even if we agreed a finding of waiver would be appropriate given that *Lopez* had not been decided when the state filed its response, the finding of waiver is discretionary, and in the exercise of that discretion we decline to find waiver in these circumstances. *See State v. Smith*, 203 Ariz. 75, ¶ 12, 50 P.3d 825, 829 (2002).

¶17 Veta also contends that Rule 32.4(a) does not apply because Rule 32.1 permits “any person” to raise the enumerated claims “[s]ubject to the limitations of Rule 32.2,” without mention of the time limits in Rule 32.4(a). But we must construe the rules as a whole, and thus cannot agree that the reference in Rule 32.1 to the

STATE v. VETA
Decision of the Court

preclusive effects of Rule 32.2 renders null the timeliness requirement of Rule 32.4(a). See *State v. Aguilar*, 209 Ariz. 40, ¶ 23, 97 P.3d 865, 872 (2004) (“We interpret court rules according to the principles of statutory construction.”); *State v. Barraza*, 209 Ariz. 441, ¶ 10, 104 P.3d 172, 175 (App. 2005) (statutes related to same subject matter must be construed as one law). We will not interpret court rules in a way that renders any provision superfluous. *Balestrieri v. Balestrieri*, 232 Ariz. 25, ¶ 3, 300 P.3d 560, 561 (App. 2013). And, again, we will not adopt an interpretation that causes an absurd result. See *Xavier R.*, 230 Ariz. 96, ¶ 3, 280 P.3d at 642. In any event, we note that Rule 32.2(b) implicitly refers to Rule 32.4(a) by requiring a defendant filing an untimely notice to “set forth the substance of the specific exception [to the timeliness requirement] and the reasons for not raising the claim in the previous petition or in a timely manner.”

¶18 Veta further contends that *Lopez* is incorrectly decided because Rule 32.4(a) cannot “bar successive claims ‘of sufficient constitutional magnitude.’”⁴ In support of this argument, Veta asserts that the claims by the defendant in *Stewart* could not have complied with the time limits of Rule 32.4(a). He concludes, therefore, that our supreme court’s decision in *Stewart* applies with equal force to untimely claims, not only to claims precluded based on waiver pursuant to Rule 32.2(a)(3), and that he is entitled to raise claims requiring express waiver in an untimely proceeding. But, as we noted above, we explained in *Lopez* that the supreme court’s decision in *Stewart* was in response to a certified question from the United States Supreme Court concerning only the application of waiver under Rule 32.2(a)(3). See *Lopez*, 234 Ariz. 513, ¶ 7, 323 P.3d at 1166. The application or interpretation of Rule 32.4(a) to the defendant’s claims was not before the court and nothing in *Stewart* can reasonably be read to apply to Rule 32.4(a).

⁴Veta argues that we incorrectly concluded in *Lopez* that the time limits of Rule 32.4(c) were jurisdictional. We need not address this argument—whether the time limits implicate the trial court’s jurisdiction to hear Veta’s claim is not material.

STATE v. VETA
Decision of the Court

¶19 We last address Veta's claim in his petition for review that, because he was denied counsel on appeal, our decision on appeal is void and without effect. He relies on *Johnson v. Zerbst*, 304 U.S. 458, 468 (1938), *overruled on other grounds by Edwards v. Arizona*, 451 U.S. 477 (1981), in which the United States Supreme Court stated that a violation of the right to trial counsel "stands as a jurisdictional bar to a valid conviction and sentence," rendering a judgment "void." But we find no authority extending this rule to the deprivation of counsel on appeal, and Veta has identified no basis for us to do so. Moreover, this claim does not fit squarely into any basis for relief enumerated in Rule 32.1. Rule 32.1(a) permits a defendant to claim that his or her conviction or sentence violates the United States or Arizona constitution. Rule 32.1(b) permits a defendant to claim in post-conviction proceedings that "[t]he court was without jurisdiction to render judgment or to impose sentence." In any event, this claim cannot be raised in an untimely Rule 32 proceeding like this one. Even if we construe Rule 32.1(a) or (b) to permit a claim that an appellate court lacked jurisdiction to decide an appeal, neither falls within the timeliness exception of Rule 32.4(a).

¶20 Because Veta's petition for post-conviction relief does not raise a claim pursuant to Rule 32.1(d) through (h), his claims are barred as untimely. Thus, we grant review but deny relief.