

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

ANTONIO GANDARVILLA ANGULO,
Petitioner.

No. 2 CA-CR 2013-0420-PR
Filed December 17, 2013

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NOT FOR PUBLICATION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 Maricopa County
Nos. CR2007008989001DT and CR2007119913001DT
The Honorable Pamela D. Svoboda, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

William G. Montgomery, Maricopa County Attorney
By Shaheen P. Torgoley, Deputy County Attorney, Phoenix
Counsel for Respondent

Antonio G. Angulo, Kingman
In Propria Persona

STATE v. ANGULO
Decision of the Court

MEMORANDUM DECISION

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

V Á S Q U E Z, Presiding Judge:

¶1 Antonio Angulo petitions this court for review of the trial court's order summarily dismissing his successive petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. 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). Angulo has not met his burden of demonstrating such abuse here.

¶2 Angulo pled guilty in two cause numbers to four counts of aggravated driving under the influence. After admitting having five prior felony convictions and having been on release when committing two of the current offenses, Angulo was sentenced to aggravated, concurrent prison terms, the longest of which was seventeen years.

¶3 Angulo filed a timely notice of post-conviction relief, and appointed counsel filed a notice of completion stating she had reviewed the record but had found no "claims for relief to raise in post-conviction relief proceedings." Angulo was given leave to file a pro se petition for post-conviction relief but, despite asking for and being given an extension of the deadline to file that petition, did not do so. The trial court dismissed the proceeding and denied Angulo's subsequent motion for reconsideration.

¶4 Nearly a year later, Angulo filed a second notice of post-conviction relief, stating he was raising claims of newly discovered evidence—specifically that the minute entry from his change-of-plea hearing stated his offenses were non-repetitive—and that the failure to file a timely notice of post-conviction relief was

STATE v. ANGULO
Decision of the Court

without fault on his part. The trial court, noting that Angulo “may have a colorable claim in regards to the manner in which he was sentenced,” appointed counsel and instructed counsel to “investigate the potential claims” and file a petition or notice of completion.

¶5 After counsel filed a notice of completion, Angulo filed a pro se petition for post-conviction relief. In that petition, Angulo raised a claim of newly discovered evidence, again referring to the minute entry from his change-of-plea hearing. He additionally claimed his trial counsel was ineffective for failing to advise him “that he would be sentenced beyond the presumptive after [an] agreement was made not to use any priors to aggravate [his] sentence[s].” Finally, he argued that his failure to file his petition for post-conviction relief in his first Rule 32 proceeding was without fault on his part, claiming he had not filed his petition because of communication issues with counsel and his transfer to and from a facility in Oklahoma. The trial court summarily dismissed the petition, concluding that Angulo’s claims were time-barred and without merit.

¶6 On review, Angulo broadly contends the trial court “misidentif[ied]” his claims. His precise arguments, however, are difficult to parse. He reurges his claim of ineffective assistance of trial counsel and his claim that his failure to file his pro se petition in his first proceeding was without fault on his part.

¶7 He also raises two claims for the first time on review. First, he argues that his sentence was illegal. Although the basis for that argument is not clear, he seems to suggest his admission to having prior felony convictions was ineffective, and the court could not rely on those convictions to impose an enhanced sentence absent a jury finding. Second, Angulo appears to claim his first Rule 32 counsel was ineffective for failing to raise various arguments. We do not address the claims that were not presented to the trial court. *State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (court of appeals does not address issues raised for first time in petition for review); *see also* Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review should contain “issues which were decided by the trial

STATE v. ANGULO
Decision of the Court

court and which the defendant wishes to present to the appellate court for review”).

¶8 And Angulo’s claim that his failure to file a pro se petition in his first proceeding is not a cognizable claim in a successive Rule 32 proceeding. In support, he cites *State v. Rosales*, 205 Ariz. 86, 66 P.3d 1263 (App. 2003). But nothing in *Rosales* aids him. In that case, the court determined that an initial post-conviction proceeding raising only a claim for a delayed appeal under Rule 32.1(f) did not preclude claims raised in a later proceeding. *Rosales*, 205 Ariz. 86, ¶ 16, 66 P.3d at 1268. Rule 32.1(f) permits relief when the defendant has failed to timely file a notice of appeal or of-right notice of post-conviction relief.

¶9 Angulo, however, filed a timely notice in his first proceeding. That proceeding was dismissed because he did not file his pro se petition within the deadline set by the trial court. Except for a claim that a person is being held beyond the expiration of his or her sentence, *see* Ariz. R. Crim. P. 32.1(d), Rule 32 is limited to claims concerning the propriety of a defendant’s conviction or sentence; it contains no provision permitting a challenge in a new post-conviction proceeding to a ruling in a previous proceeding. *See* Ariz. R. Crim. P. 32.1. Angulo instead was required to seek review of the trial court’s order dismissing his first post-conviction proceeding by filing a petition for review in this court pursuant to Rule 32.9.

¶10 Angulo’s claim of ineffective assistance of trial counsel is precluded pursuant to Rule 32.2(a)(3) because he could have raised the claim in his first Rule 32 proceeding. Although his claim of newly discovered evidence related to his sentence is not necessarily subject to preclusion, *see* Ariz. R. Crim. P. 32.1(e) and 32.2(b), he does not argue on review the trial court erred in rejecting that claim.¹ Accordingly, we do not address it. *See State v.*

¹Angulo refers to “newly discovered evidence” in his petition for review in support of his argument that he is entitled to a “delayed Rule 32 proceeding.” That evidence appears to be a letter indicating he was on lockdown status during a portion of his

STATE v. ANGULO
Decision of the Court

Rodriguez, 227 Ariz. 58, n.4, 251 P.3d 1045, 1048 n.4 (App. 2010) (declining to address argument not raised in petition for review).

¶11 Review is granted; relief is denied.

incarceration. This letter does not constitute newly discovered evidence within the meaning of Rule 32.1(e) because it is not related to his conviction or sentence. And, in any event, he did not raise this claim below and we therefore do not address it further. *See Ramirez*, 126 Ariz. at 468, 616 P.2d at 928; *see also* Ariz. R. Crim. P. 32.9(c)(1)(ii).