

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

RONALD DALE BIRDWELL,
Petitioner.

No. 2 CA-CR 2014-0026-PR
Filed April 28, 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NOT FOR PUBLICATION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 Mohave County
No. CR9787

The Honorable Rick A. Williams, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

The Nolan Law Firm, P.L.L.C., Mesa
By Cari McConeghy Nolan
Counsel for Petitioner

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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 Ronald Birdwell petitions this court for review of the trial court's order summarily dismissing his 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). Birdwell has not met his burden of demonstrating such abuse here.

¶2 After a jury trial, Birdwell was convicted of possession of dangerous drugs, possession of dangerous drugs for sale, and manufacture of dangerous drugs. The trial court sentenced him to life imprisonment without the possibility of release for twenty-five years. We affirmed his convictions and sentences as modified to reflect that the court was permitted to impose only one felony assessment at sentencing. *State v. Birdwell*, 1 CA-CR 90-736 (memorandum decision filed Sept. 8, 1992). Before this proceeding, Birdwell has sought and been denied post-conviction relief on numerous occasions.

¶3 In his most recent post-conviction proceeding, initiated in 2012, Birdwell argued his claims "cannot be precluded" based on the procedural rules applicable to his case and contended there has been a significant change in the law applicable to his case. He argued that the statutes governing his sentence had changed and, that had he been sentenced under the current version of the statutes, he would not have been sentenced to life in prison. Thus, he reasoned, his current sentence violated the Eighth Amendment prohibition against cruel and unusual punishment and was disproportionate.

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¶4 Birdwell additionally claimed he was denied the opportunity to seek relief under the Disproportionality Review Act¹ because he was not incarcerated in Arizona during the time that act was in effect and was instead serving the remainder of his sentence in California before beginning his sentence in Arizona. Birdwell further asserted that his sentence was improper pursuant to *Blakely v. Washington*, 542 U.S. 296 (2004), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), because he did not “voluntarily, knowingly, and intelligently waive his right to the fact-finding for aggravation being made beyond a reasonable doubt and all by the jury.” Finally, he asserted that he had not raised his “constitutional claims” in a previous proceeding because he “was never made aware of his right until recently,” that his trial and Rule 32 counsel had been ineffective in failing to raise these claims, and that they are not subject to preclusion pursuant to *Stewart v. Smith*, 202 Ariz. 446, 46 P.3d 1067 (2002).

¶5 Although the trial court noted that it found Birdwell’s arguments “compelling,” it summarily dismissed the proceeding. It found Birdwell’s claims “precluded” because they had “previously been raised and denied or are untimely.” This petition for review followed the court’s denial of Birdwell’s motion for rehearing.

¶6 On review, Birdwell repeats his claims, including that his “conviction and sentence occurred prior to the change in the law regarding Rule 32, so that he is not limited in the number of Post-Conviction Relief Petitions he may file, nor is he limited in the type of claim raised at this stage.” Prior to the 1992 amendment to Rule 32, Ariz. R. Crim. P., former Rule 32.4(a) provided that a petition for

¹The Disproportionality Review Act was intended to remedy the problem that “[t]hose convicted of violating certain laws before 1994 were treated much more harshly than those convicted of the same violations after the effective date of [extensive] amendments” to Arizona’s sentencing laws. *McDonald v. Thomas*, 202 Ariz. 35, ¶ 3, 40 P.3d 819, 822 (2002). “The Act went into effect in July 1994 and was repealed on June 30, 1996.” *Id.*

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post-conviction relief “may be filed at any time after entry of judgment and sentence.” 170 Ariz. LXVIII. The 1992 amendment to Rule 32.4(a) and the current version of the rule require, however, 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.” Ariz. R. Crim. P. 32.4(a); 170 Ariz. LXVIII.

¶7 Although the current timeliness rules were adopted after Birdwell’s crimes, the “order promulgating the 1992 amendments made them ‘applicable to all post-conviction relief petitions filed on and after September 30, 1992, except that the time limits of 90 and 30 days imposed by Rule 32.4 shall be inapplicable to a defendant sentenced prior to September 30, 1992, who is filing his first petition for post-conviction relief.’” *Moreno v. Gonzalez*, 192 Ariz. 131, ¶ 22, 962 P.2d 205, 209 (1998), quoting 171 Ariz. XLIV (1992). As noted above, this is not Birdwell’s first petition. Accordingly, his notice and petition are patently untimely, and he may only raise claims for relief “pursuant to Rule 32.1(d), (e), (f), (g) or (h).” Ariz. R. Crim. P. 32.4(a).

¶8 Birdwell claims that there has been a significant change in the law pursuant Rule 32.1(g). That rule provides relief if “[t]here has been a significant change in the law that if determined to apply to defendant’s case would probably overturn the defendant’s conviction or sentence.” But Birdwell has identified no change in the law conceivably applicable to him. He has cited no authority suggesting the various changes to the sentencing statutes were intended to apply retroactively. See A.R.S. § 1-244 (“No statute is retroactive unless expressly declared therein.”). And, to the extent he argues that *Blakely* and *Apprendi* constitute a change in the law, those cases do not apply retroactively to Birdwell’s long-final convictions. See *State v. Febles*, 210 Ariz. 589, ¶¶ 7, 9 & n.4, 115 P.3d 629, 632 & n.4 (App. 2005).

¶9 Citing *Stewart*, Birdwell further argues he is permitted to raise some of his claims because they involve rights of sufficient constitutional magnitude to require knowing, voluntary, and intelligent waiver. But our supreme court’s decision in *Stewart* was

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limited to preclusion based on waiver pursuant to Rule 32.2(a)(3). 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) is not based on waiver, but instead on the defendant's timeliness in seeking relief. Thus, whether the underlying claim is of a sufficient constitutional magnitude to require a knowing, voluntary, and intelligent waiver is immaterial and *Stewart* does not apply. See *State v. Lopez*, No. 2 CA-CR 2013-0506-PR, ¶¶ 6-8, 2014 WL 1592969 (Ariz. Ct. App. Apr. 21, 2014).

¶10 Finally, Birdwell repeats his claim that he is entitled to relief because he did not seek relief under the Disproportionality Review Act before it was repealed. He has identified no provision of Rule 32.1 or any other authority suggesting that a defendant may obtain post-conviction relief on the basis that he failed to seek relief under a now-repealed statute, even assuming such a claim could be raised in an untimely proceeding like this one. See Ariz. R. Crim. P. 32.1.

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