

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

ROBERT LEWIS TURNER,
Petitioner.

No. 2 CA-CR 2014-0058-PR
Filed May 16, 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NOT FOR PUBLICATION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 Maricopa County
No. CR2008173003001DT
The Honorable Christopher Whitten, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

William G. Montgomery, Maricopa County Attorney
By Gerald R. Grant, Deputy County Attorney, Phoenix
Counsel for Respondent

Law Offices of Thomas Jacobs, Tucson
By Thomas Jacobs
Counsel for Petitioner

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MEMORANDUM DECISION

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

M I L L E R, Judge:

¶1 Petitioner Robert Turner seeks review of the trial court’s dismissal of his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. Following a jury trial, Turner was convicted of misconduct involving weapons and possession of drug paraphernalia. The court imposed concurrent, presumptive sentences, the longer of which was ten years. This court affirmed Turner’s convictions and sentences on appeal. *State v. Turner*, No. 1 CA-CR 09-0660 (memorandum decision filed Dec. 7, 2010). The Arizona Supreme Court denied Turner’s petition for review on September 6, 2011, and we issued the mandate on appeal on October 7, 2011. On December 6, 2011, Turner filed an untimely notice of post-conviction relief, followed by a petition for post-conviction relief asserting that trial and appellate counsel had been ineffective. *See* Ariz. R. Crim. P. 32.4(a) (notice of post-conviction relief in noncapital case “must be filed within . . . thirty days after the issuance of the order and mandate in the direct appeal”).

¶2 In its November 2012 ruling dismissing Turner’s petition, the trial court found his claims of ineffective assistance of counsel to be untimely, but nonetheless elected to address them on the merits. On January 15, 2013, Turner filed a motion to extend the time to file a petition for review of the court’s dismissal of his Rule 32 petition, asking the court to review his admittedly untimely motion for rehearing before he filed his petition for review “so that as many issues as possible may be resolved before the matter is appealed.”¹ *See* Ariz. R. Crim. P. 32.9(a) (party aggrieved by

¹Although the trial court apparently did not rule on Turner’s motion for rehearing, he does not address that fact on review.

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decision of trial court may file motion for rehearing within fifteen days after court's ruling).

¶3 In his motion for rehearing, Turner argued that the Arizona Supreme Court's November 2011 denial of his pro se "appeal of Supreme Court Decision," which the Arizona Supreme Court treated as a motion for reconsideration,² rendered incorrect the trial court's ruling that his notice of post-conviction relief was untimely. Asserting that the Court of Appeals' October 2011 mandate "should have been recalled and reissued"³ based on the Arizona Supreme Court's November 2011 ruling, Turner argued his December 2011 notice of post-conviction relief was therefore timely. Turner then filed this petition for review of the trial court's November 2012 ruling dismissing his Rule 32 petition. We review a trial court's denial of post-conviction relief for an abuse of discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). We find no such abuse here.

¶4 On review, Turner argues the trial court erred in finding his notice of post-conviction relief untimely. He asserts that if the Arizona Supreme Court's order denying his motion for reconsideration had been sent to the clerk of this court, we would have recalled our October 2011 mandate and reissued a new one, rendering his December 2011 notice of post-conviction relief timely. Notably, Turner has failed to provide any legal support for the proposition that this court necessarily would have recalled and reissued its previous mandate or that the Arizona Supreme Court's

² Turner's motion, which essentially was a motion for reconsideration of the Supreme Court's denial of his petition for review of this court's decision on appeal is not permitted pursuant to Rule 31.18(e)(2), Ariz. R. Crim. P. (motion for reconsideration from order denying petition for review not permitted).

³Although Turner stated in both his motion for rehearing and on review that he had "filed a Motion with the Court of Appeals requesting that the Mandate be recalled and reissued, *nunc pro tunc*, with an amended date of December 26, 2011," that motion is not part of the record before us.

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brief order denying his motion for reconsideration somehow extended the time for filing a notice of post-conviction relief.

¶5 More importantly, Turner did not present this argument to the trial court in his Rule 32 petition, rather, he improperly raised it for the first time in his motion for rehearing. *See* Ariz. R. Crim. P. 32.9(a) (party aggrieved by final decision of trial court may file motion for rehearing “setting forth in detail the grounds wherein it is believed the court erred”). Accordingly, because Turner did not include this claim in his petition, it was never properly before the court; simply put, the court could not be asked to reconsider a ruling it had never made on a claim Turner had not presented.

¶6 Turner further argues that “[e]ven if the Notice [of post-conviction relief] were untimely . . . the trial court should have deemed such failure excusable under Rule 32.2(b),” presumably because he “was not at fault for the failure to submit the Notice, as he had instructed his appellate counsel to do so.” However, noticeably missing from Turner’s notice of post-conviction relief and petition is any explanation for his untimely filing. *See* Ariz. R. Crim. P. 32.4(a) (“Any notice [of post-conviction relief] not timely filed may only raise claims pursuant to Rule 32.1(d), (e), (f), (g) or (h).”); *see also* Ariz. R. Crim. P. 32.2(b) (notice in untimely post-conviction proceeding must “set forth the substance of the specific exception [to timeliness] and the reasons for not raising the claim in . . . a timely manner”). Only after the state asserted in its response to the petition for post-conviction relief that Turner’s notice was untimely did Turner address the timeliness issue. In his reply to the state’s response, Turner acknowledged his notice “was late, but submit[ted] that such failure is excusable under Rule 32.2(b).” To the extent Turner intended to rely on Rule 32.1(f), a rule he never mentioned specifically, to assert that the untimely filing of his notice of post-conviction relief was not his fault, he did not provide sufficient, necessary facts for the trial court to evaluate the request.⁴ Moreover,

⁴The document on which Turner relies is unsigned, undated, and unverified.

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because Turner raised this argument for the first time in his reply to the state's response to his petition, the trial court was not required to consider it. See *State v. Lopez*, 223 Ariz. 238, ¶¶ 5-7, 221 P.3d 1052, 1053-54 (App. 2009); cf. *State v. Ruggiero*, 211 Ariz. 262, n. 2, 120 P.3d 690, 695 n. 2 (App. 2005) (issues first raised in reply brief generally waived).

¶7 Turner also contends “[t]he court is authorized to excuse the untimely filing, and consider the merits of Defendant’s arguments under . . . Rule 1.2, [Ariz. R. Crim. P.], where such untimely filing denies the defendant a fundamental right of constitutional magnitude, such as the right to counsel at trial or on appeal.” Because Turner did not present this argument below, we do not address it on review. *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 trial court and which the defendant wishes to present to appellate court for review”).

¶8 Turner further argues the trial court erred by summarily dismissing his claims of ineffective assistance of counsel. However, once the court found Turner’s petition untimely, it was not required to address these claims, although it did so in any event. Because we agree with the court that these claims are barred as untimely, we need not address the propriety of the court’s denial of them on the merits.

¶9 Accordingly, although we grant the petition for review, we deny relief.