

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

GEORGE FRANKLIN APOLINAR,
Petitioner.

No. 2 CA-CR 2014-0305-PR
Filed November 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NOT FOR PUBLICATION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 Pima County

No. CR062991

The Honorable Richard S. Fields, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Lori J. Lefferts, Pima County Public Defender
By Abigail Jensen, Assistant Public Defender, Tucson
Counsel for Petitioner

STATE v. APOLINAR
Decision of the Court

MEMORANDUM DECISION

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Miller and Judge Espinosa concurred.

ECKERSTROM, Chief Judge:

¶1 Petitioner George Apolinar seeks review of the trial court's order dismissing his notice of post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. We will not reverse a trial court's ruling in a post-conviction relief proceeding "absent a clear abuse of discretion." *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Apolinar has not sustained his burden of establishing such abuse here.

¶2 After a jury trial in absentia, Apolinar was convicted of transferring marijuana, offering to sell a dangerous drug, possession of a dangerous drug for sale, possession of drug paraphernalia, possession of marijuana, and two counts of sale of a dangerous drug. The trial court imposed mitigated, concurrent prison sentences, the longest of which was four years. Appointed counsel on appeal filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), and this court affirmed his convictions and sentences, as amended. *State v. Apolinar*, No. 2 CA-CR 2012-0395, ¶¶ 4-5 (memorandum decision filed Sept. 13, 2013). Although we had granted Apolinar until August 7, 2013, to file a supplemental brief, no such brief was received. Our mandate was issued on November 4, 2013.

¶3 In January 2014, Apolinar moved this court to vacate our mandate and memorandum decision, arguing that he had given his supplemental brief to prison officials for mailing on August 6, 2013. That motion was denied.

¶4 On February 11, 2014, Apolinar filed a notice of post-conviction relief, seeking relief pursuant to Rule 32.1(f). In the

STATE v. APOLINAR
Decision of the Court

notice, he explained the above timeline relating to his supplemental brief on appeal and argued that this court had improperly denied his motion to vacate our mandate and decision and that “his inability to remedy th[e] error and restore his rights under *Anders* more quickly due to conflicting schedules, has resulted in the passing of the original due date for commencing a Rule 32 proceeding through no fault of his own.” The trial court summarily dismissed the notice, deeming it untimely.

¶5 On review, Apolinar acknowledges that Rule 32.1(f) only allows relief when a defendant is without fault in relation to the failure to file a notice of appeal or an “of-right” notice of post-conviction relief and that his request therefore “does not fall within the literal terms of that rule.” He urges us, however, to apply “equitable principles,” ignore the express terms of the rule, allow him “to file a delayed notice of post-conviction relief,” and permit him “to raise any and all issues available to him under Rule 32.1 as if his notice was timely filed.”

¶6 We are generally bound, however, “to follow the rules promulgated” by our supreme court. *State v. Superior Court*, 102 Ariz. 388, 392, 430 P.2d 408, 412 (1967). In any event, our memorandum decision indicated that we had not received a supplemental brief from Apolinar. Upon receipt of that decision, Apolinar could have filed a timely motion for reconsideration of our decision explaining that a petition had been given to prison officials. *See* Ariz. R. Crim. P. 31.18(b), (d). And had Apolinar believed our order denying his request to vacate our decision and mandate on appeal was in error, his remedy was to seek review of that order by our supreme court. *See* Ariz. Const. art. VI, § 5. Furthermore, as to any claims cognizable in a Rule 32 proceeding, Apolinar has not explained how the confusion relating to his supplemental appellate brief prevented him from timely filing a notice of post-conviction relief after our mandate on appeal issued.

¶7 For these reasons, although we grant the petition for review, we deny relief.