

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

MILOVAN UROSEVIC,
Petitioner.

No. 2 CA-CR 2015-0173-PR
Filed June 19, 2015

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NOT FOR PUBLICATION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)(1); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Maricopa County
No. CR2005123523001DT
The Honorable Carolyn K. Passamonte, Judge Pro Tempore

REVIEW GRANTED; RELIEF GRANTED

COUNSEL

William G. Montgomery, Maricopa County Attorney
By Catherine Leisch, Deputy County Attorney, Phoenix
Counsel for Respondent

James J. Haas, Maricopa County Public Defender
By Louise Stark, Deputy Public Defender, Phoenix
Counsel for Petitioner

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MEMORANDUM DECISION

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

ESPINOSA, Judge:

¶1 Milovan Urosevic seeks review of the trial court's orders denying his petition for post-conviction relief and motion for rehearing, filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb those rulings unless the court abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We grant review and, for the reasons that follow, we grant relief.

¶2 Urosevic pled guilty to aggravated driving under the influence and was sentenced to a 2.5-year prison term. More than a year later, he filed a notice of post-conviction relief stating that his failure to file a timely notice was without fault on his part. The trial court, finding Urosevic had raised a "colorable" claim pursuant to Rule 32.1(f), allowed him to file a petition for post-conviction relief.

¶3 In that petition, Urosevic argued in support of his claim pursuant to Rule 32.1(f) that his trial counsel had assured him "a Notice of Appeal would be filed in his cases" and had failed to ensure he received a letter from her office instructing him to file a notice of post-conviction relief. He additionally argued counsel had been ineffective because she failed to object to the imposition of a sentence that violated his plea agreement, which provided for probation instead of prison. Urosevic contended he therefore should be entitled to withdraw from the plea.¹ He also claimed he was entitled to additional presentence incarceration credit. The state

¹Although Urosevic initially suggested that the trial court could remedy any error by imposing probation, he later clarified that he sought only the right to withdraw from the plea.

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conceded Urosevic had been sentenced improperly, but did not address his remaining arguments.

¶4 The trial court agreed Urosevic's sentence was improper, but declined to allow him to withdraw from the plea. It granted relief on his claim regarding presentence incarceration credit and set the matter for resentencing.² It thereafter denied Urosevic's motion for rehearing, and this petition for review followed.

¶5 On review, Urosevic argues the trial court erred in concluding he was not entitled to withdraw from his plea. But, as the court recognized, Urosevic's notice of post-conviction relief was patently untimely. Under Rule 32.4(a), only claims pursuant to Rule 32.1(d), (e), (f), (g), or (h), may be raised in an untimely proceeding for post-conviction relief. Urosevic's claim that he is entitled to withdraw from his plea and his related claim of ineffective assistance of counsel does not fall within those subsections. *See* Ariz. R. Crim. P. 32.1. When raising a claim barred by Rule 32.4(a), a defendant who files an untimely notice of post-conviction relief, "has no remedy unless [he] can demonstrate, pursuant to Rule 32.1(f), that the 'failure to file a notice of post-conviction relief of-right or notice of appeal within the prescribed time was without fault on [his] part.'" *State v. Lopez*, 234 Ariz. 513, ¶ 9, 323 P.3d 1164, 1166 (App. 2014), *quoting* Ariz. R. Crim. P. 32.1(f).

¶6 In both his notice of and petition for post-conviction relief, Urosevic provided facts relating to the untimely filing of the notice, but the trial court did not make a finding as to whether his failure to timely file the notice "was without fault on the defendant's part." Ariz. R. Crim. P. 32.1(f); *see also* Ariz. R. Crim. P. 32.8(d) (court required to "make specific findings of fact, and state expressly its conclusions of law relating to each issue presented"). Nor did the court hold an evidentiary hearing to evaluate whether Urosevic's factual allegations related to that claim were credible or whether his

²At resentencing, the trial court suspended the imposition of sentence and imposed a one-day probation term.

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extraordinary delay in seeking relief was reasonable under the circumstances. *See* Ariz. R. Crim. P. 32.8(a) (defendant entitled to hearing “to determine issues of material fact”), 32.2(b) (defendant must demonstrate why claim was not raised “in a timely manner”). The court instead permitted Urosevic to file an of-right petition based only on its determination that his claim pursuant to Rule 32.1(f) was “colorable.”

¶7 Before the trial court could address Urosevic’s other claims, it was required to first decide the Rule 32.1(f) claim. We therefore vacate the court’s ruling and remand this matter for its determination whether Urosevic was entitled to file a delayed, of-right petition for post-conviction relief.