

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

TONY CRUZ SR.,
Petitioner.

No. 2 CA-CR 2015-0269-PR
Filed October 26, 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NOT FOR PUBLICATION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 Gila County
Nos. CR201100461 and CR201100434
The Honorable Timothy M. Wright, Judge

REVIEW GRANTED; RELIEF GRANTED

Tony Cruz Sr., Florence
In Propria Persona

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MEMORANDUM DECISION

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

ECKERSTROM, Chief Judge:

¶1 Tony Cruz Sr. seeks review of the trial court's orders dismissing his post-conviction relief proceeding filed pursuant to Rule 32, Ariz. R. Crim. P., and denying his motion for rehearing. We grant review and relief.

¶2 After jury trials in two cause numbers, Cruz was convicted of third-degree burglary, three counts of aggravated assault, and one count each of weapons misconduct, criminal damage, and cruelty to animals. The trial court imposed consecutive and concurrent prison terms totaling thirty-two years. We affirmed Cruz's convictions and sentences on appeal. *State v. Cruz*, No. 2 CA-CR 2012-0085 (memorandum decision filed Mar. 5, 2013); *State v. Cruz*, No. 2 CA-CR 2012-0084 (memorandum decision filed Oct. 30, 2012). He was represented in both appeals by attorney Emily Danies.

¶3 Cruz filed an untimely notice of post-conviction relief listing both cause numbers, stating that he wished to raise a claim of ineffective assistance of counsel, actual innocence, and that his failure to timely seek post-conviction relief was without fault on his part. *See* Ariz. R. Crim. P. 32.4(a). The trial court appointed Danies to represent him, and she filed a notice in each cause stating she had reviewed the record but had "found no viable legal issues which could be raised under Rule 32."

¶4 The trial court granted Cruz leave to file a pro se petition. However, he instead filed a motion seeking new counsel, asserting Danies had a "conflict" because she had represented him on appeal and thus could not evaluate whether he had a viable claim

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of ineffective assistance of appellate counsel. He additionally claimed he only learned of this court's decisions rejecting his direct appeals in late January 2014 and did not timely file his notice of post-conviction relief because he did not receive the appellate mandates from Danies. The court denied Cruz's motion seeking new counsel, stating that Danies had no conflict because she "would not have a conflict arguing that trial counsel was ineffective" and, in any event, "no longer is counsel of record" in the proceeding. The court dismissed the post-conviction relief proceeding because Cruz had not filed his pro se petition within the allotted time. This petition for review followed the court's denial of Cruz's motion for rehearing.

¶5 On review, Cruz again claims he is entitled to different counsel in his post-conviction proceeding because Danies represented him on direct appeal. We agree. Post-conviction counsel cannot identify and argue his or her own ineffectiveness on appeal, and a defendant therefore is entitled to different counsel to raise such a claim. *State v. Bennett*, 213 Ariz. 562, ¶¶ 14-15, 146 P.3d 63, 67 (2006).

¶6 Cruz's notice of post-conviction relief, however, was untimely filed. *See* Ariz. R. Crim. P. 32.4(a). A claim of ineffective assistance of appellate counsel cannot be raised in an untimely proceeding. Ariz. R. Crim. P. 32.1(a), 32.4(a). But, as we have noted, Cruz asserted in his notice that his failure to timely seek post-conviction relief was without fault on his part. *See* Ariz. R. Crim. P. 32.1(f). Cruz claimed in his motion seeking new counsel that his untimeliness was grounded in Danies's failure to advise him about the status of his appeals and provide him with the appellate mandates so he could determine the due date for his notice of post-conviction relief. As with a claim of ineffective assistance of appellate counsel, it would have proved "difficult for [Danies] to objectively review h[er] own performance" in apprising Cruz of the status of his appeals, and thus equally difficult for her "to argue any [possible] inadequacies in that performance" supported a claim for relief pursuant to Rule 32.1(f). *Bennett*, 213 Ariz. 562, ¶ 14, 146 P.3d

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at 67. Thus, Cruz is entitled to have new counsel evaluate whether he can raise a non-frivolous claim.¹

¶7 We therefore grant review and relief. We remand the case to the trial court to appoint counsel and for further proceedings consistent with this decision.

¹We observe, however, that the plain language of Rule 32.1(f) appears to exclude non-pleading defendants, like Cruz, from obtaining relief for the untimely filing of a notice of post-conviction relief. But, because the trial court here did not rule on that ground but instead appointed counsel for Cruz – without objection from the state – we express no opinion whether Cruz is eligible for relief for his untimely filing of his notice of post-conviction relief.