

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

JOSEPH C. STUART,
Petitioner.

No. 2 CA-CR 2015-0362-PR
Filed January 12, 2016

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NOT FOR PUBLICATION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 Pima County
No. CR20112796001
The Honorable Javier Chon-Lopez, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Barbara LaWall, Pima County Attorney
By Jacob R. Lines, Deputy County Attorney, Tucson
Counsel for Respondent

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Joseph C. Stuart, Buckeye
In Propria Persona

MEMORANDUM DECISION

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

M I L L E R, Judge:

¶1 Joseph Stuart seeks review of the trial court’s order summarily dismissing his untimely petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that order unless the court clearly abused its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Stuart has not met his burden of demonstrating such abuse here.

¶2 Stuart pled guilty to second-degree murder and was sentenced in June 2013 to a mitigated, twelve-year prison term. In July 2015, Stuart sought post-conviction relief for the first time, claiming he had “just learned of” authority, including *Blakely v. Washington*, 542 U.S. 296 (2004), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), supporting a claim that, absent a jury finding of aggravating factors, his sentence was illegal because the prison term imposed was greater than the shortest mitigated term available. He additionally asserted that *Alleyne v. United States*, ___ U.S. ___, ___, 133 S. Ct. 2151, 2155 (2013), was a change in the law further supporting his sentencing claim. Stuart further argued that his trial counsel was ineffective for failing to object “to the illegal sentence,” and that the failure of the Department of Corrections (DOC) to treat his Hepatitis C infection warranted a lesser sentence. The trial court summarily denied relief, and this petition for review followed.

¶3 On review, Stuart again claims he is entitled to relief pursuant to *Blakely* and *Apprendi*. But, even if this argument had merit, it cannot be raised in an untimely proceeding like this one, even if any error might constitute fundamental error. Ariz. R. Crim.

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P. 32.1(c), 32.4(a); *see also State v. Shrum*, 220 Ariz. 115, ¶¶ 6-7, 23, 203 P.3d 1175, 1177, 1180 (2009) (illegal sentence claim precluded); *Swoopes*, 216 Ariz. 390, ¶ 42, 166 P.3d at 958 (fundamental error not excepted from preclusion). And, to the extent Stuart asserts he is entitled to relief pursuant to Rule 32.1(e), the recent discovery of a purported legal error is not newly discovered evidence pursuant to that provision. Thus, the trial court was correct to summarily deny this claim and, for the same reason, to summarily deny his claim of ineffective assistance of counsel.

¶4 Stuart also repeats his claim that *Alleyne* constitutes a significant change in the law. *See* Ariz. R. Crim. P. 32.1(g). In *Alleyne*, the United States Supreme Court applied its holdings in *Blakely* and *Apprendi* to statutes that increase the mandatory minimum sentence for offenses, concluding that any fact relevant to that determination had to be found by a jury. *See Alleyne*, ___ U.S. at ___, 133 S. Ct. at 2163; *State v. Flores*, 236 Ariz. 33, ¶ 4, 335 P.3d 555, 557 (App. 2014). But Stuart’s twelve-year sentence was not imposed due to an increase in the statutory mandatory minimum; it was imposed in the exercise of the trial court’s discretion after consideration of various sentencing factors, as permitted by A.R.S. § 13-710. Thus, even if Stuart had not waived in his plea agreement his “right to all trials” including the determination of aggravating factors by a jury, *Alleyne* does not apply.

¶5 Although we grant review,¹ we deny relief.

¹Stuart again asserts in his petition for review that DOC has failed to treat his Hepatitis C infection. But he makes no legal claim on review in conjunction with this assertion. Accordingly, we do not address it further. *See State v. Stefanovich*, 232 Ariz. 154, ¶ 16, 302 P.3d 679, 683 (App. 2013) (failure to develop claim or cite legal authority constitutes waiver).