

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

RAYMOND RICHARD GONZALES,
Petitioner.

No. 2 CA-CR 2015-0426-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NOT FOR PUBLICATION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 Mohave County
Nos. CR201100223 and CR201100919
The Honorable Derek Carlisle, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Ronald S. Gilleo, Mohave County Legal Defender
By Diane S. McCoy, Deputy Legal Defender, Kingman
Counsel for Petitioner

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MEMORANDUM DECISION

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

ECKERSTROM, Chief Judge:

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

¶2 Pursuant to a plea agreement, Gonzales was convicted in November 2011 of child abuse and two counts of possession of a dangerous drug for sale. In December 2011, the court sentenced Gonzales to consecutive and concurrent sentences totaling twenty years, as stipulated in the plea agreement. In April 2013, Gonzales simultaneously filed his first, untimely notice of and petition for post-conviction relief, in which he challenged his sentences, stated that his failure to file a timely notice was without fault on his part pursuant to Rule 32.1(f), and requested that counsel be appointed to represent him.

¶3 The trial court struck Gonzales’s pro se petition for post-conviction relief, appointed counsel to represent him, and permitted appointed counsel to file a petition addressing the sole issue of “whether [Gonzales] has the right to file a delayed notice of post[-]conviction relief.” Counsel filed such a petition in June 2013, arguing that Gonzales had asked trial counsel, Brad Rideout, to file or assist him to file a notice of post-conviction relief and that although Rideout had “responded,” he did not file a notice or advise Gonzales of the time frame for doing so. At the conclusion of an evidentiary hearing held in December 2013, during which Rideout,

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Gonzales, and Gonzales's mother testified, the court determined Gonzales had not demonstrated that his failure to timely seek post-conviction relief was without fault on his part and thus denied relief. *See* Rule 32.1(f).

¶4 “In a Rule 32 of-right proceeding, the notice [of post-conviction relief] must be filed within ninety days after the entry of judgment and sentence. . . . Any notice not timely filed may only raise claims pursuant to Rule 32.1(d), (e), (f), (g) or (h).” *See* Ariz. R. Crim. P. 32.4(a). Gonzales's purported challenge to his sentences 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 . . . 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). “Relief should be granted under [Rule 32.1(f)] if . . . the defendant intended to seek post-conviction relief in an of-right proceeding and had believed mistakenly his counsel had filed a timely notice or request.” *State v. Poblete*, 227 Ariz. 537, ¶ 6, 260 P.3d 1102, 1104 (App. 2011), *citing* Ariz. R. Crim. P. 32.1(f) 2007 cmt.

¶5 On review, Gonzales asserts the trial court incorrectly determined he was at fault for failing to file a timely notice of post-conviction relief. Relying on several letters between Gonzales and Rideout written after Gonzales was sentenced in December 2011, Gonzales maintains he established he had asked Rideout to file or assist him to file a notice of post-conviction relief and that Rideout had told him he would do so. Relying on *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), and *Strickland v. Washington*, 466 U.S. 668 (1984), Gonzales asserts Rideout's conduct in failing to file a timely notice was deficient and thus argues he is entitled to file a delayed notice pursuant to Rule 32.1(f).

¶6 In support of his claim, Gonzales asserts Rideout failed to: notify him he was not representing him in the Rule 32 proceeding, clarify the time limits to file the notice and petition and explain that a notice must be filed before a petition, or correct

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Gonzales's mistaken belief that "'according to Arizona [statutes] there is no time deadline to challenge a sentence.'" Gonzales points to his own testimony at the evidentiary hearing to establish he did not "have any idea what he [was] doing" in the Rule 32 proceeding below.

¶7 In denying relief, the trial court concluded Gonzales did not sustain his burden of showing his late filing was not his fault, to wit, Gonzales did not establish he believed Rideout represented him in the Rule 32 proceeding or that Rideout had filed a notice on his behalf. Referring to a January 5, 2012, letter written by Gonzales to Rideout, the court stated, "And then [Gonzales] asks if there is a chance he can go back on post-conviction for resentencing, and he says: I will need your [Rideout's] assistance and will have to retain you somehow. So, again, he recognizes that Mr. Rideout doesn't represent him, that he's going to have to hire him."

¶8 In addition, letters from Gonzales to Rideout dated December 31, 2011, January 16, 2012, March 20, 2012, and April 2, 2012, which were admitted at the evidentiary hearing, further established Gonzales did not believe Rideout represented him. Moreover, in a January 13, 2012 letter, Gonzales asked Rideout to "see if possible I may stand a chance [to challenge the sentences]. If not I close out the idea [of proceeding with a Rule 32 claim] and do my time." The trial court also apparently found persuasive Gonzales's statement in a January 17, 2012, letter to Rideout that Gonzales did not, in any event, want Rideout to file anything on his behalf at that time.

¶9 Additionally, the trial court stated it had reviewed the sentencing transcript to confirm it had informed Gonzales at sentencing that in order to pursue post-conviction relief he was required "to file a separate notice with this court within 90 days of today's date or else you can forever lose that right," and that it had provided Gonzales with a document so stating. The record supports the court's finding. Rideout similarly testified that after sentencing, he "[a]bsolutely" had explained the Rule 32 deadlines to Gonzales and had reviewed the post-conviction relief form with him.

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¶10 Rideout further testified that he had viewed the letters from Gonzales knowing he previously had informed Gonzales of the relevant deadlines and had told him a Rule 32 proceeding would not benefit him. Rideout also testified he had not been retained to represent Gonzales after sentencing, a fact illustrated by the trial court's having permitted Rideout to withdraw in Gonzales's presence after sentence was imposed in December 2011. Importantly, Rideout testified that Gonzales had never actually "directly" requested that he file a Rule 32 proceeding on his behalf. When asked if Gonzales "was very highly aware of what he [Gonzales] wanted and what he needed to do [in the Rule 32 proceeding]," Rideout responded, "For sure."

¶11 In contrast, Gonzales testified that: he thought Rideout "would be looking into [his] Rule 32,"¹ Rideout never clarified he did not represent him even after Gonzales wrote to him shortly after sentencing, and he did not "recall" if Rideout had reviewed the time limits for filing a Rule 32 notice. When asked if the trial court had told him anything about post-conviction relief at sentencing, he responded, "I don't recall at this time, no"; also, when asked if he knew in July 2013 that the time limits for filing a notice had lapsed, he responded, "I don't believe so, no."

¶12 And, although Gonzales testified that he did not understand the difference between a notice and petition, that testimony was rendered less credible by his additional testimony that he "was under the assumption that [Rideout] had filed a notice already, and he [Gonzales] was investigating the second part of it, which is a petition," and that when he told Rideout he would do the "legwork," he meant he would obtain and review case law and then send it to Rideout so Rideout "could file the petition itself." Accordingly, in assessing Gonzales's credibility, the trial court noted that "even though [Gonzales] testified he didn't know the difference [between a notice, petition, and appeal], I am considering what's in

¹In the affidavit attached to his Rule 32 petition, Gonzales stated he would have filed a timely notice if he had known Rideout had not done so.

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the letter[s] as well in assessing the defendant's credibility. . . . [Gonzales] . . . cited cases . . . [and] was advised by the Court that he had to file a notice within 90 days," before "[h]e specifically told Mr. Rideout not to file anything on his behalf."

¶13 In reviewing a trial court's ruling after an evidentiary hearing, we defer to that court's assessment of the witnesses' credibility and resolution of any conflict in the evidence. *See State v. Fritz*, 157 Ariz. 139, 141, 755 P.2d 444, 446 (App. 1988). We are mindful that the trial court "'is in the best position to evaluate credibility and accuracy, as well as draw inferences [from], weigh, and balance'" the evidence presented at the evidentiary hearing. *See State v. Hoskins*, 199 Ariz. 127, ¶ 97, 14 P.3d 997, 1019 (2000), quoting *State v. Bible*, 175 Ariz. 549, 609, 858 P.2d 1152, 1212 (1993). Consequently, we do not reweigh the evidence. *See State v. Sasak*, 178 Ariz. 182, 186, 871 P.2d 729, 733 (App. 1993) (appellate court reviews evidence at post-conviction-relief hearing favorable to trial court's ruling and defers to trial court in resolving conflicts in evidence). Rather, "[w]e examine a trial court's findings of fact after an evidentiary hearing to determine if they are clearly erroneous." *State v. Berryman*, 178 Ariz. 617, 620, 875 P.2d 850, 853 (App. 1994). In view of the evidence presented at the evidentiary hearing in this case, we cannot say the trial court abused its discretion in denying relief. To the extent Gonzales's arguments on review amount to a request to reweigh the conflicting evidence presented at the hearing, we will not do so. *Sasak*, 178 Ariz. at 186, 871 P.2d at 733.

¶14 Finally, Gonzales criticizes the trial court's comment at the conclusion of the evidentiary hearing that, "[t]here was never any claim that [Gonzales] relied on Mr. Rideout in not filing the petition in the [CR 2011-]919 case, so that would be additional reason to deny relief in the [CR 2011-]919 case. But since I already ruled, I don't need to say all that."² In light of the court's correct

²The plea agreement was based on five different matters, three of which were dismissed. However, Gonzales's pro se notice of post-conviction relief only reflected the case number in one of the two remaining matters, CR 2011-223. And, although the trial court granted Rule 32 counsel's request to amend the notice of post-

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ruling that Gonzales did not establish his failure to file a timely notice was not his fault, we do not address this claim.

¶15 Accordingly, we grant review but deny relief.

conviction relief to add CR 2011-919, the court entered an order adding that cause number only to the petition and not to the notice.