

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

AMY KAY GUSTAFSON,
Petitioner.

No. 2 CA-CR 2016-0024-PR
Filed May 9, 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NOT FOR PUBLICATION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. CR20113700001
The Honorable Richard D. Nichols, Judge

REVIEW GRANTED; RELIEF GRANTED

COUNSEL

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

Amy Gustafson, Goodyear
In Propria Persona

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MEMORANDUM DECISION

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

V Á S Q U E Z, Presiding Judge:

¶1 Petitioner Amy Gustafson seeks review of the trial court's order denying her petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. "We will not disturb a trial court's ruling on a petition for post-conviction relief absent a clear abuse of discretion." *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Gustafson has established such abuse here, and we therefore grant relief.

¶2 After a jury trial, Gustafson was convicted of aggravated robbery, kidnapping, assault, second-degree burglary, aggravated assault on an incapacitated victim, and theft of a credit card. The trial court imposed concurrent sentences, the longest of which is 10.5 years. This court affirmed the convictions and sentences on appeal. *State v. Gustafson*, 233 Ariz. 236, 311 P.3d 258 (App. 2013).

¶3 Gustafson thereafter initiated a proceeding for post-conviction relief, and appointed counsel filed a notice stating she had reviewed the record and was "unable to find any arguably meritorious legal issues to raise in a Petition for Post-Conviction Relief." The trial court granted Gustafson an extension of time in which to file a supplemental pro se petition, ordering it due on October 12, 2015. Gustafson filed a pro se petition, signing it on October 9; it was file-stamped by the clerk of the court on October 19. The court denied Gustafson's petition "as untimely and for failing to cite any exception under Rule 32." It determined her claims of ineffective assistance of counsel were precluded because she made "no claim cognizable" under the exceptions for "an untimely appeal."

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¶4 Gustafson filed a motion for rehearing, arguing that under the “prison mailbox rule” a document sent through the prison mail service is deemed filed on the day it is given to the prison officials. She attached a copy of the Arizona Department of Corrections’ mail log that showed she had given her petition to the officials on October 9. The trial court denied the motion, stating Gustafson had “point[ed] to no authority or rule allowing for such a filing permitting an untimely filed petition” and again stating Gustafson’s claims did not fall “under the timeliness exceptions” of Rule 32.

¶5 On review, Gustafson again argues her petition was timely filed based on the prison mailbox rule and contends at least one of her claims was exempt from being precluded as untimely. We agree with Gustafson that her petition was timely filed. Generally, under the “prisoner mailbox rule,” a pro se prisoner is deemed to have filed a document when he or she delivers it, “properly addressed, to the proper prison authorities to be forwarded to the clerk of the superior court.” *State v. Goracke*, 210 Ariz. 20, ¶¶ 5-6, 8, 13, 106 P.3d 1035, 1037-38 (App. 2005) (applying prisoner mailbox rule to petition for review; citing cases applying rule in other contexts), quoting *Mayer v. State*, 184 Ariz. 242, 245, 908 P.2d 56, 59 (App. 1995). We have applied this rule to notices of appeal, notices of a petition for post-conviction relief, and petitions for review. *Id.* ¶¶ 6, 13. We see no reason to depart from the rule in regard to the filing of a petition for post-conviction relief. *Cf. State v. Rosario*, 195 Ariz. 264, ¶ 10, 987 P.2d 226, 228 (App. 1999) (“A pro se prisoner is not in a position to make sure that his notice of appeal is timely filed. [Sh]e cannot personally file the notice with the clerk of the court nor can [s]he directly place the notice in the hands of the United States Postal Service.”).

¶6 Furthermore, although the trial court, in its discretion, could have dismissed the proceeding had Gustafson not timely filed her petition, *see State v. Diaz*, 228 Ariz. 541, ¶ 9, 269 P.3d 717, 720 (App. 2012), its apparent conclusion that the proceeding was untimely under Rule 32.4, and therefore her claims were subject to preclusion under Rule 32.2, was incorrect. Gustafson filed her notice of post-conviction relief within thirty days of the mandate of her

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appeal, making the proceeding timely within the meaning of Rule 32.4. *See* Ariz. R. Crim. P. 32.4(a).

¶7 For these reasons, we grant the petition for review and grant relief, remanding this matter to the trial court for consideration of Gustafson's petition.