

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

AGRIPINO PENUELAS CELAYA,
Petitioner.

No. 2 CA-CR 2016-0120-PR
Filed May 17, 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NOT FOR PUBLICATION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 Maricopa County
No. CR2010124769007DT
The Honorable Peter C. Reinstein, Judge

REVIEW GRANTED; RELIEF DENIED

Agripino Penuelas Celaya, San Luis
In Propria Persona

STATE v. CELAYA
Decision of the Court

MEMORANDUM DECISION

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

ECKERSTOM, Chief Judge:

¶1 Agripino Celaya seeks review of the trial court’s ruling summarily dismissing his notice of 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. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Celaya has not met his burden of demonstrating such abuse here.

¶2 Celaya pled guilty to two counts of kidnapping and, in June 2013, was sentenced to concurrent, thirteen-year prison terms. In January 2014, Celaya filed a notice of post-conviction relief claiming his failure to timely file a notice was without fault on his part. The trial court summarily dismissed that notice in a ruling dated March 19, 2014. Celaya did not seek review of that ruling.

¶3 On April 24, 2014, Celaya then filed a second notice of post-conviction relief asserting his trial counsel had been ineffective and that he was entitled to raise that claim in a successive proceeding because he had not waived his right to counsel, citing *Stewart v. Smith*, 202 Ariz. 446, 46 P.3d 1067 (2002). He claimed his trial counsel had promised him he would receive only a 10.5-year prison term. Although Celaya did not indicate in his notice that he was raising a claim pursuant to Rule 32.1(f), he also explained, as he had in his first notice, that he had been unable to timely file a notice of post-conviction relief because he had been incarcerated in Colorado before beginning his Arizona sentences. The trial court summarily dismissed the notice, concluding it was “both untimely and successive” and his claim of ineffective assistance was therefore precluded. This petition for review followed.

STATE v. CELAYA
Decision of the Court

¶4 On review, Celaya repeats his argument that he did not waive his right to effective assistance of counsel and, thus, is entitled to raise that claim in a successive Rule 32 proceeding. We first observe that the trial court erred in characterizing Celaya's second notice as untimely. The notice was filed within thirty days of the court's final order dismissing his first notice and therefore was timely pursuant to Rule 32.4(a). In a timely, successive Rule 32 proceeding, however, a defendant is precluded from raising any claim that "has been waived at trial, on appeal, or in any previous collateral proceeding," except those claims falling within Rule 32.1(d) through (h). Ariz. R. Crim. P. 32.2(a)(3).

¶5 In *Stewart*, our supreme court determined claims of sufficient constitutional magnitude that require a knowing, voluntary, and intelligent waiver were not precluded by Rule 32.2(a)(3) absent a qualifying waiver. 202 Ariz. 446, ¶¶ 9-10, 46 P.3d at 1070-71. As he did below, Celaya asserts the right to effective counsel requires a knowing, voluntary, and intelligent waiver and that he did not waive that right. But a claim of ineffective assistance of counsel, standing alone, is not a claim of sufficient constitutional magnitude as defined by our supreme court in *Stewart*. Instead, "if petitioner asserts ineffective assistance of counsel for the first time in a successive Rule 32 petition, the question of preclusion is determined by the nature of the right allegedly affected by counsel's ineffective performance." *Stewart*, 202 Ariz. 446, ¶ 12, 46 P.3d at 1071. In his notice below,¹ Celaya identified no underlying right implicated by counsel's purported ineffectiveness; he did not assert the sentence was illegal or that he would have rejected the plea had he been properly advised. See generally *State v. Ysea*, 191 Ariz. 372, ¶¶ 15, 17, 956 P.2d 499, 504 (1998); *State v. Donald*, 198 Ariz. 406, ¶¶ 9, 14, 10 P.3d 1193, 1198, 1200 (App. 2000).

¹Celaya asserts for the first time on review that "he would not have entered" a plea had counsel advised him he could receive more than the presumptive prison term. We do not address arguments raised for the first time on review. See *State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980).

STATE v. CELAYA
Decision of the Court

¶6 Celaya also seems to assert the trial court erred by rejecting a claim that his failure to timely seek relief was without fault on his part. *See* Ariz. R. Crim. P. 32.1(f). Although that claim may be raised in a successive proceeding, Ariz. R. Crim. P. 32.2(b), Celaya did not expressly advance it in his second notice and, in any event, it was raised and rejected in his first Rule 32 proceeding. *See State v. Little*, 87 Ariz. 295, 304, 350 P.2d 756, 761-62 (1960) (doctrine of res judicata generally applies in criminal cases). We therefore do not address this issue further.

¶7 The trial court did not abuse its discretion in summarily dismissing Celaya's notice of post-conviction relief. Accordingly, although we grant review, we deny relief.