

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

ANDREW JOSEPH LEFFLER,
Petitioner.

No. 2 CA-CR 2016-0284-PR
Filed October 19, 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NOT FOR PUBLICATION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 Pinal County
No. S1100CR200301179
The Honorable Joseph R. Georgini, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

M. Lando Voyles, Pinal County Attorney
By Wade C. Tanner, Deputy County Attorney, Florence
Counsel for Respondent

Andrew J. Leffler, Florence
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 Andrew Leffler seeks review of the trial court’s order denying his successive and 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. Roseberry*, 237 Ariz. 507, ¶ 7, 353 P.3d 847, 848 (2015). Leffler has not met his burden of demonstrating such abuse here.

¶2 Leffler pled guilty to sexual conduct with a minor and attempted sexual conduct with a minor, both dangerous crimes against children, and, in 2004, was sentenced to a twenty-year prison term to be followed by lifetime probation. In 2006, he sought post-conviction relief, which the trial court denied. Leffler did not seek review of that ruling.

¶3 In January 2016, Leffler filed a notice of and petition for post-conviction relief, raising a variety of constitutional and statutory claims related to his sentence. He also argued his trial and post-conviction counsel had been ineffective in failing to raise the purported sentencing defects. In his notice, he asserted he was entitled to raise these claims as “[n]ewly discovered material facts,” and that they were not subject to preclusion because his sentence constituted fundamental error. He additionally asserted there had been a significant change in the law related to his sentence, specifically *Blakely v. Washington*, 542 U.S. 296 (2004), and its predecessors. Finally, he claimed his failure to seek post-conviction relief was without fault on his part, because the state and the trial court had “collu[ded]” to impose an illegal sentence and because he lacked access to legal resources. The trial court summarily denied

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relief, finding Leffler's claims precluded; this petition for review followed.

¶4 On review, Leffler restates his claims of sentencing error and ineffective assistance of counsel. Once again, he asserts he is entitled to raise these claims because his illegal sentence is "void" and constitutes fundamental error, the error is of "sufficient constitutional magnitude," to be exempt from the rule of preclusion, and his claims are based on newly discovered evidence – that is, his recent discovery of his claims.¹

¶5 We agree with the trial court that Leffler's claims cannot be raised in this untimely proceeding. *See* Ariz. R. Crim. P. 32.4(a). Pursuant to Rule 32.4(a), only claims raised pursuant to Rule 32.1(d) through (h) may be raised in an untimely proceeding. On review, Leffler has identified only one such claim – that he is entitled to raise his arguments pursuant to Rule 32.1(e) because he only recently discovered them. But a claim of newly discovered material facts does not encompass newly discovered legal theories or authority. *See generally State v. Saenz*, 197 Ariz. 487, ¶ 7, 4 P.3d 1030, 1032 (App. 2000) (to establish claim of newly discovered evidence, defendant must show "that the evidence was discovered after trial although it existed before trial; that it could not have been discovered and produced at trial through reasonable diligence; that it is neither cumulative nor impeaching; that it is material; and that it probably would have changed the verdict").

¶6 Leffler also argues the sentencing error amounts to fundamental error and, as such, can be raised at any time. But a claim of sentencing error or ineffective assistance cannot be raised in an untimely post-conviction proceeding, even if any error might constitute fundamental error. Ariz. R. Crim. P. 32.1(a), (c), 32.4(a); *see also State v. Shrum*, 220 Ariz. 115, ¶¶ 6-7, 23, 203 P.3d 1175, 1177,

¹Leffler apparently has abandoned his claims that his failure to timely seek post-conviction relief was without fault on his part and that there has been a significant change in the law. *See* Ariz. R. Crim. P. 32.1(f), (g).

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1180 (2009) (illegal sentence claim precluded); *State v. Swoopes*, 216 Ariz. 390, ¶ 42, 166 P.3d 945, 958 (App. 2007) (fundamental error not excepted from preclusion under Rule 32.2). And, contrary to Leffler’s suggestion, an illegal sentence does not implicate the trial court’s subject matter jurisdiction and must be timely challenged. *See State v. Bryant*, 219 Ariz. 514, ¶¶ 16-17, 200 P.3d 1011, 1015 (App. 2008).

¶7 Leffler also argues his claims are of sufficient constitutional magnitude that they cannot be deemed waived by his failure to raise them previously. Certain claims that require an express, personal waiver may be raised in a successive post-conviction proceeding without being subject to preclusion pursuant to Rule 32.2(a)(3). *See Stewart v. Smith*, 202 Ariz. 446, ¶ 12, 46 P.3d 1067, 1071 (2002). But this principle does not apply to claims raised in an untimely proceeding like this one, and Leffler’s claims are barred irrespective of waiver.² *See State v. Lopez*, 234 Ariz. 513, ¶¶ 6-8, 323 P.3d 1164, 1166 (App. 2014).

¶8 We grant review but deny relief.

²In his petition for review, Leffler asserts the state “committed a crime or misconduct, conceded and waived its defense and arguments, and[] confessed and admitted to [his] allegations or challenges” because it did not comply with various civil rules. Those rules have no application to this criminal proceeding. And we categorically reject his contention that the trial court violated any judicial conduct canons or rules of professional conduct by summarily rejecting his claims.