

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Respondent*,

v.

JOSEPH JOHN VIOLA, *Petitioner*.

No. 1 CA-CR 17-0660 PRPC
FILED 4-19-2018

Appeal from the Superior Court in Maricopa County

No. CR 1990-010323

The Honorable Daniel G. Martin, Judge

REVIEW GRANTED AND RELIEF DENIED

COUNSEL

Maricopa County Attorney's Office, Phoenix
By Diane Meloche
Counsel for Respondent

Joseph John Viola, San Luis
Petitioner

MEMORANDUM DECISION

Presiding Judge Randall M. Howe, Judge Kenton D. Jones, and Judge James
B. Morse Jr. delivered the decision of the Court.

A 2
STATE v. VIOLA
Decision of the Court

PER CURIAM:

¶1 Petitioner Joseph John Viola seeks review of the superior court's order denying his petition for post-conviction relief, filed pursuant to Arizona Rule of Criminal Procedure 32.1. This is petitioner's first, untimely petition.

¶2 Absent an abuse of discretion or error of law, this court will not disturb a superior court's ruling on a petition for post-conviction relief. *State v. Gutierrez*, 229 Ariz. 573, 577 ¶ 19 (2012). It is petitioner's burden to show that the superior court abused its discretion by denying the petition for post-conviction relief. *See State v. Poblete*, 227 Ariz. 537, 538 ¶ 1 (App. 2011) (petitioner has burden of establishing abuse of discretion on review).

¶3 We have reviewed the record in this matter, the superior court's order denying the petition for post-conviction relief, and the petition for review. We find that petitioner has not established an abuse of discretion.

¶4 For the foregoing reasons, we grant review and deny relief.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 1990-010323

08/29/2017

HON. DANIEL G. MARTIN

CLERK OF THE COURT
K. Sotello-Stevenson
Deputy

STATE OF ARIZONA

DIANE M MELOCHE

v.

JOSEPH JOHN VIOLA (A)

JOSEPH JOHN VIOLA
050936 ASPC YUMA CIBOLA UNIT
PO BOX 8909
SAN LUIS AZ 85349

COURT ADMIN-CRIMINAL-PCR

PETITION FOR POST-CONVICTION RELIEF DISMISSED

Pending before the Court are Defendant's Notice of Post-Conviction Relief and Petition for Post-Conviction Relief, both filed on July 31, 2017. The Court deems these submissions a single Notice of Post-Conviction Relief. This is Defendant's first Rule 32 proceeding.

After a 15-day trial, a jury found Defendant guilty of five counts of fraudulent schemes and artifices, all class 2 felonies. Defendant represented himself at trial with assistance from advisory counsel. The Court found that Defendant had two prior historical felony convictions and denied Defendant's ensuing motions for a judgment of acquittal and a new trial. On May 3, 2011, the Court entered judgment and sentenced Defendant to four concurrent 18-year terms of imprisonment and one consecutive 18-year term of imprisonment. At sentencing Defendant received a form titled "Notice of Rights of Review After Conviction and Procedure." Defendant acknowledged receipt by signing the form. Division One of the Arizona Court of Appeals subsequently affirmed Defendant's convictions and sentences on direct appeal, issuing its order and mandate on December 30, 2013. *State v. Viola*, 1 CA-CR 11-0338 (App. Oct. 2, 2012) (mem. filed).

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UNTIMELY FILING

Under Rule 32.4(a) of the Arizona Rules of Criminal Procedure, the Notice of Post-Conviction Relief must be filed within 90 days of the entry of judgment and sentencing, or within 30 days of the issuance of the order and mandate by the appellate court, whichever is later. These dates are clearly stated in the "Notice of Rights of Review After Conviction and Procedure" form that Defendant received at sentencing. Because the order and mandate issued on December 30, 2013, the deadline for Defendant's Notice of Post-Conviction Relief was January 29, 2014. His Rule 32 proceeding is thus untimely by more than three years. Nevertheless, Defendant contends that he is exempt from the timeliness requirements in Rule 32.4(a) because his indictment preceded the 1992 amendments to the rule. Defendant is wrong. A defendant's first Rule 32 proceeding will not be untimely if he or she was sentenced before September 30, 1992. *See Moreno v. Gonzalez*, 192 Ariz. 131, 135, ¶ 22, 962 P.2d 205, 209 (1998) (holding the 1992 amendments shall be "applicable to all post-conviction relief petitions filed on or after September 30, 1992, except that the time limits of 90 and 30 days imposed by Rule 32.4 shall be inapplicable to a defendant sentenced prior to September 30, 1992, who is filing his first petition for post-conviction relief"). Because Defendant was sentenced on May 3, 2011, well after September 30, 1992, the Rule 32.4(a) requirements apply.

CLAIMS

Defendant claims that his convictions and sentences were obtained in violation of his Sixth and Fourteenth Amendment rights, and that he is entitled to relief under Arizona Rule of Criminal Procedure 32.1(a). Specifically, Defendant claims that he received ineffective assistance from counsel. He also contends: (1) the Court of Appeals deprived him of the right to represent himself; (2) this Court imposed an improper sentence; (3) this Court abused its discretion in denying his Rule 20 motion; (4) this Court erroneously ruled on the pre-emption argument; (5) this Court deprived Defendant of his speedy trial rights; (6) the indictment was deficient; (7) Defendant was deprived of his confrontation clause rights; and (8) this Court generally failed to allow Defendant to present a complete defense. The sentencing claims also arise under Arizona Rule of Criminal Procedure 32.1(c).

These claims fail on a number of levels. With the exception of the ineffective assistance of counsel claim, Defendant could have raised all of these arguments on appeal. Consequently, relief is precluded. *See Ariz. R. Crim. P. 32.2(a)(3)*. To the extent Defendant is reasserting arguments presented to the Arizona Court of Appeals, including sentencing claims, relief is still precluded. *See Ariz. R. Crim. P. 32.2(a)(2)*. Furthermore, this Court has no authority to review rulings by the Arizona Court of Appeals on Defendant's right to represent himself. Because Defendant represented himself at trial, he has no cognizable claim against his advisory trial counsel. *See State v. Russell*, 175 Ariz. 529, 534-35, 858 P.2d 674, 679-80 (Ct. App. 1993).

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Moreover, Defendant cannot raise any of these Rule 32.1(a) and Rule 32.1(c) claims in an untimely Rule 32 proceeding because the notice may only raise claims pursuant to Rule 32.1(d), (e), (f), (g), or (h). Ariz. R. Crim. P. 32.4(a); *see generally State v. Petty*, 225 Ariz. 369, 373, ¶ 11, 238 P.3d 637, 641 (Ct. App. 2010) (holding ineffective assistance of counsel claims are "cognizable under Rule 32.1(a)"). The Rule 32.1(a) and Rule 32.1(c) claims the defendant has asserted were required to be raised in a timely Rule 32 proceeding.

In sum, Defendant fails to state a claim for which relief can be granted in an untimely Rule 32 proceeding. In post-conviction proceedings, a defendant must assert substantive claims supported by specific facts and adequately explain the reasons for their untimely assertion. Ariz. R. Crim. P. 32.2(b). Defendant has failed to meet this standard. The Court finds that no purpose would be served by further proceedings.

Based on the foregoing,

IT IS ORDERED dismissing Defendant's Notice of Post-Conviction Relief and Petition for Post-Conviction Relief, which the Court deems a single Notice of Post-Conviction Relief, pursuant to Arizona Rule of Criminal Procedure 32.2(b).

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 1990-010323

09/19/2017

HON. DANIEL G. MARTIN

CLERK OF THE COURT

K. Sotello-Stevenson

Deputy

STATE OF ARIZONA

DIANE M MELOCHE

v.

JOSEPH JOHN VIOLA (A)

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COURT ADMIN-CRIMINAL-PCR

MOTION FOR REHEARING DENIED

Pending before the Court is Defendant's Motion for Rehearing, filed on September 15, 2017, pursuant to which Defendant seeks reconsideration of the Court's August 29, 2017 Order dismissing his July 31, 2017 Notice of Post-Conviction Relief and Petition for Post-Conviction Relief.

Having considered the arguments presented, no good cause having been shown,

IT IS ORDERED denying Defendant's Motion for Rehearing.



SCOTT BALES
CHIEF JUSTICE

JANET JOHNSON
CLERK OF THE COURT

Supreme Court

STATE OF ARIZONA
ARIZONA STATE COURTS BUILDING
1501 WEST WASHINGTON STREET, SUITE 402
PHOENIX, ARIZONA 85007-3231

TELEPHONE: (602) 452-3396

December 31, 2018

RE: STATE OF ARIZONA v JOSEPH JOHN VIOLA
Arizona Supreme Court No. CR-18-0268-PR
Court of Appeals, Division One No. 1 CA-CR 17-0660 PRPC
Maricopa County Superior Court No. CR 1990-010323

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on December 31, 2018, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED.

A panel composed of Chief Justice Bales, Justice Bolick, Justice Gould and Justice Lopez participated in the determination of this matter.

Janet Johnson, Clerk

TO:

Joseph T Maziarz

Diane Meloche

Joseph John Viola, ADOC 050936, Arizona State Prison,

Yuma - Cibola Unit

**** *

bp

**Additional material
from this filing is
available in the
Clerk's Office.**