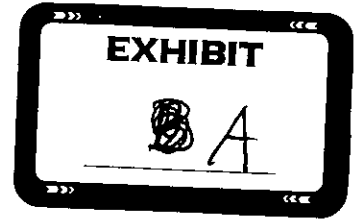


NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.



IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Respondent*,

v.

FOX JOSEPH SALERNO, *Petitioner*.

No. 1 CA-CR 21-0285 PRPC
1 CA-CR 21-0402 PRPC
FILED 1-20-2022

Petition for Review from the Superior Court in Maricopa County
No. CR2000-017362

The Honorable Peter A. Thompson, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Maricopa County Attorney's Office, Phoenix
By Daniel Strange
Counsel for Respondent

Fox Joseph Salerno, Sterling, Colorado
Petitioner

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Decision of the Court



MEMORANDUM DECISION

Presiding Judge Maria Elena Cruz, Judge Samuel A. Thumma, and Judge Michael J. Brown delivered the decision of the Court.

PER CURIAM:

¶1 Petitioner Fox Joseph Salerno seeks review of the superior court's order denying his petition for post-conviction relief. This is petitioner's tenth successive 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, ¶ 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 We grant review and deny relief.



AMY M. WOOD • Clerk of the Court
FILED: AA

STATE v. SALERNO
Decision of the Court



MEMORANDUM DECISION

Chief Judge Vásquez authored the decision of the Court, in which Presiding Judge Staring and Judge Brearcliffe concurred.

V Á S Q U E Z, Chief Judge:

¶1 Fox Salerno seeks review of the trial court's order summarily dismissing his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P.¹ We review a court's denial of post-conviction relief for an abuse of discretion. *State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). Salerno has not met his burden of establishing such abuse here.

¶2 Following a jury trial, Salerno was convicted of theft and sentenced in 2001 to a twenty-year prison term and community supervision "to be served consecutively to the actual period of imprisonment." We affirmed Salerno's convictions and sentences on appeal. *State v. Salerno*, No. 1 CA-CR 01-0693, ¶¶ 1, 27 (Ariz. App. Oct. 15, 2002) (mem. decision). Salerno sought post-conviction relief multiple times between 2003 and 2017, followed by his most recent notice and petition in 2019, apparently his ninth such proceeding. Pursuant to Rule 32.1(d), Salerno argued he was being held beyond the expiration of his sentence and he should have been released on community supervision before serving the five sentences in another matter, which are concurrent with each other but consecutive to the sentence in this case. He asserted the Arizona Department of Corrections (ADOC) violated his due process rights by failing to release him to community supervision on his earned release date of June 25, 2018, thereby impermissibly "split[ting]" his sentence in this matter.

¹ Our supreme court amended the post-conviction relief rules, effective January 1, 2020. Ariz. Sup. Ct. Order R-19-0012 (Aug. 29, 2019). "The amendments apply to all cases pending on the effective date unless a court determines that 'applying the rule or amendment would be infeasible or work an injustice.'" *State v. Mendoza*, 249 Ariz. 180, n.1 (App. 2020) (quoting Ariz. Sup. Ct. Order R-19-0012). "Because it is neither infeasible nor works an injustice here, we cite to and apply the current version of the rules." *Id.*

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A

¶3 The trial court summarily dismissed Salerno's notice and petition, which it treated as a single notice.² The court concluded that Salerno's community supervision in this matter should not begin until after his release in the other matter, in "approximately 11 years."³ In support of its ruling, the court relied on A.R.S. § 13-105(5), which defines community supervision as that portion of a sentence imposed by the court pursuant to A.R.S. § 13-603(I), and served in the community "after completing a period of imprisonment."⁴ Section 13-603(I) further provides that at the time of sentencing a court shall impose a term of community supervision, which "shall be served consecutively to the actual period of imprisonment." The court also found unavailing Salerno's attempt to distinguish *State v. Cowles*, 207 Ariz. 8 (App. 2004), discussed below.⁵

¶4 On review, Salerno reasserts that ADOC has violated his due process rights by refusing to immediately release him on community supervision and later reincarcerate him, so that he can complete his sentence in this matter and then serve his consecutive sentences in the other matter. Arguing that community supervision is part of his "sentence" in this matter, Salerno asserts, without meaningful support, that he cannot begin serving his consecutive terms in the other matter until he has completed community supervision in this case. He also maintains that although § 13-105(5) provides that community supervision is served "after

²To the extent the trial court also considered Salerno's petition as having raised a claim pursuant to Rule 32.1(a), we note that although the court ultimately found his claim untimely, it nonetheless addressed it on the merits. See Ariz. R. Crim. P. 32.4(b)(3)(A), (D).

³Salerno's anticipated release date in the other matter is April 14, 2031.

⁴We cite the current version of the applicable statutes because no revisions material to this decision have occurred since Salerno's offenses. And, insofar as Salerno obliquely suggests that some of the statutes in effect when he was sentenced require a different outcome here, we note that he did not expressly raise this argument in his petition below. We thus do not address it. See *State v. Ramirez*, 126 Ariz. 464, 468 (App. 1980) (issues raised for first time in petition for review not addressed). In any event, he has not developed such an argument in a meaningful way. See *State v. Stefanovich*, 232 Ariz. 154, ¶ 16 (App. 2013) (insufficient argument waives claim).

⁵The trial court also denied Salerno's request that counsel be appointed to represent him, which he does not challenge on review.

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A

completing a period of imprisonment," it does not require that it follow "all" terms of imprisonment. He similarly asserts that § 13-603(I) provides that community supervision be served consecutively to "the actual period of imprisonment," rather than "period(s) o[f] future imprisonment." He also points out that A.R.S. § 41-1604.07(E) states that "[a] prisoner who has reached the prisoner's earned release date or sentence expiration date shall be released to begin the prisoner's term of community supervision."

¶5 Section 13-603(I) unambiguously contemplates that community supervision will extend past the end of the entire aggregate prison term. Notably absent from that statute or from § 13-105(5) is any provision providing for the repeated release and reincarceration scenario Salerno urges us to adopt. We additionally note, as Salerno has correctly pointed out, that § 41-1604.07(E) provides that a prisoner who has reached the prisoner's earned release or sentence expiration date be released to community supervision. However, we also note that § 41-1604.07(J) "authorize[s] the release of any prisoner on the prisoner's earned release credit date to serve any consecutive term imposed on the prisoner," and notably provides "[t]he prisoner shall remain under the custody and control of the department." The language in subsection (J) is consistent with the view that the relevant statutes do not contemplate, much less require, releasing incarcerated individuals between consecutive sentences.

¶6 Salerno also again attempts to distinguish *Cowles*, suggesting it stands "only" for the proposition that community supervision cannot be served while incarcerated. But that has no bearing on his case.⁶ 207 Ariz. 8, ¶ 13. In *Cowles*, after completing his term of imprisonment on his sentence in one matter, the defendant was released ninety days before the expiration of his 2.5-year consecutive sentence in another matter to serve community supervision, which had been ordered in both matters. *Id.* ¶¶ 4-6. He absconded from community supervision, was reincarcerated, and was subsequently released pursuant to a writ of habeas corpus. *Id.* ¶ 6. On appeal, we vacated the writ of habeas corpus, concluding that *Cowles* could not have served community supervision in his first case while incarcerated pursuant to the consecutive sentence in his second case. *Id.* ¶¶ 13, 15. As we noted in *Cowles*, although "[c]ommunity supervision is not equivalent to imprisonment," it is "part of the sentence that has to be

⁶In addition, to the extent Salerno intends to challenge ADOC's denial of his request for a commutation hearing, we agree with the trial court that such a claim is not cognizable under Rule 32, and we thus do not address it further.

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served in the community after completion of a period of imprisonment." *Id.* ¶¶ 9, 14. Importantly, we also concluded that "the community supervision terms began after [Cowles] was released from ADOC," which in that case, unlike this one, occurred after Cowles had served most of his consecutive sentence. *Id.* ¶¶ 13-14.

¶7

Accordingly, we grant review but deny relief.



SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 2000-017362

09/09/2021

HONORABLE PETER A. THOMPSON

CLERK OF THE COURT

J. Hogue
Deputy



STATE OF ARIZONA

DOUGLAS W JANN

v.

FOX JOSEPH SALERNO (A)

FOX JOSEPH SALERNO
CDOC 164490 -SCF
PO BOX 6000
STERLING CO 80751
CONSUELO M OHANESIAN

COURT ADMIN-CRIMINAL-PCR
JUDGE THOMPSON

MOTION TO RECONSIDER DENIED

On April 21, 2021, this Court denied Defendant's tenth consecutive Petition For Post-Conviction Relief pursuant to Rule 32, Arizona Rules of Criminal Procedure. Defendant then filed a Motion For Reconsideration on May 11, 2021 and requests for a ruling on the Motion For Reconsideration on June 29, 2021 and September 7, 2021. During these dates Defendant has also had an appeal pending at the Arizona Court of Appeals, Division One. That Court has now entered its mandate on September 8, 2021 affirming the dismissal of Defendant's Petition For Post-Conviction Relief. The Court now has jurisdiction to deal with the pending motions which are rendered moot by the ruling of the Arizona Court of Appeals. Furthermore, the Court set forth in detail the reasons for dismissal of Defendant's tenth PCR in its order of April 21, 2021.

Motions for Reconsideration are to be granted only in highly unusual circumstances. *See e.g., Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003). Such motions will be denied unless there is a showing of new facts or legal authority that, despite reasonable diligence, could not have been brought to the Court's attention before its decision. *Motorola*, 215 F.R.D. at 586. They are

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not to be used to ask the Court to rethink what it has already thought, rightly or wrongly. *United States v. Rezzonico*, 32 F.Supp.2d 1112, 1116 (D. Ariz. 1998). Therefore,

IT IS ORDERED granting Defendant's requests dated June 29, 2021 and September 7, 2021 seeking a ruling on his Motion For Reconsideration.

IT IS FURTHER ORDERED denying Defendant's Motion for Reconsideration filed May 11, 2021.

DATED this ____ day of September 2021.

HONORABLE PETER A. THOMPSON
JUDICIAL OFFICER OF THE SUPERIOR COURT

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

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04/22/2021

~~HONORABLE PETER A. THOMPSON~~

CLERK OF THE COURT

J. Matla
Deputy

EXHIBIT

B

STATE OF ARIZONA

DANIEL STRANGE
AMANDA MONCAYO PARKER

v.

FOX JOSEPH SALERNO (A)

FOX JOSEPH SALERNO
49030 STATE HWY 71
CDOC # 164490-LCF
LIMON CO 80826

COURT ADMIN-CRIMINAL-PCR
JUDGE THOMPSON

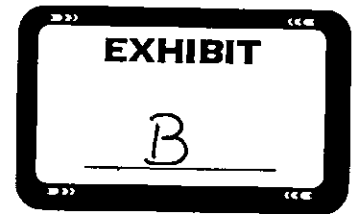
RULE 32 PROCEEDING DISMISSED

Pending before the Court are the Notice Requesting Post-Conviction Relief filed on October 5, 2020, Petition for Post-Conviction Relief filed on October 5, 2020, the Response filed on January 13, 2021, and the Reply filed on February 9, 2021. This is Defendant's tenth Rule 32 proceeding. ~~It is successive.~~

A jury found Defendant guilty of theft, a class 3 felony, in CR2000-017362-A. On July 18, 2001 the Court entered judgment and sentenced him to an aggravated 20-year term of imprisonment with 75 days of pre-sentence incarceration credit. The Arizona Court of Appeals affirmed the conviction and sentence on direct appeal, issuing the order and mandate on March 10, 2003. *State v. Salerno*, 1 CA-CR 01-0693 (App. Oct. 15, 2002) (mem. filed). The Arizona Court of Appeals remanded one of his ensuing Rule 32.1(e) proceedings, finding Defendant had stated a colorable claim. *State v. Salerno*, 1 CA-CR 14-0728 PRPC (App. May 18, 2017) (mem. filed). On remand, this Court conducted an evidentiary hearing and dismissed in an order filed on December 22, 2017.

Meanwhile, a jury found Defendant guilty in CR2001-006753 of: one count of fraudulent schemes and artifices, a class 2 felony; two counts of trafficking in stolen property, both class 2

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felonies; and two counts of burglary, both class 4 felonies. On January 14, 2002, the Court entered judgment and sentenced him to five concurrent and presumptive terms of imprisonment, the longest of which is 15.75 years.

A. Rule 32.1(b) Claim

In his current submission, Defendant contends that the Court lacks subject matter jurisdiction and consequently he is entitled to relief pursuant to Ariz. R. Crim. P. 32.1(b). (Petition at 2) The Court disagrees. Subject matter jurisdiction refers to a court's power to hear a case. Article 6, Section 14(4) of the Arizona Constitution vests original jurisdiction in the Arizona Superior Courts over "[c]riminal cases amounting to a felony." A.R.S. § 12-123(A). Moreover, as the State points out, "subject matter jurisdiction is established when the indictment is filed, and, once established, cannot be lost as the result of later events." *State v. Fimbres*, 222 Ariz. 293, 302, ¶ 33, 213 P.3d 1020, 1029 (App. 2009) (citations omitted). (Response at 10) "The propriety of amendment or aggravating factors would not change jurisdiction." (*Id.* at 11) "Accordingly, this Court had subject matter jurisdiction to adjudicate Defendant's felonies."

B. Rule 32.4(b)(3)(D) Claim

He also contends that any untimeliness of this proceeding is without fault on his part. (Reply at 4; Petition at 5) This claim arises under Ariz. R. Crim. P. 32.4(b)(3)(D). He attributes the untimeliness to ineffective assistance of counsel and his previous lack of access to Lexis/Nexis research. (Notice at 3; Reply at 4; Petition at 5) "He provide no legal authority for applying the rule to a tenth Rule 32 proceeding, however."

C. Rule 32.1(a) and Rule 32.1(c) Claims

Defendant also claims his conviction and sentence were obtained in violation of his rights under the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution and Article 2, Section 30, of the Arizona Constitution, thereby entitling him to relief under Ariz. R. Crim. P. 32.1(a). (Petition at 1-2, 7; Reply at 9-10) Specifically, Defendant claims that the Court violated his due process rights under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the amendment of the indictment was improper, his trial and appellate attorneys provided ineffective assistance, Rule 11.3.5 is unconstitutional, the court misapplied A.R.S. § 41-1604.07, and an unspecified statutory or constitutional right was abridged. (*Id.* at 1-2, 5-13) Because Defendant raised ineffective assistance and *Apprendi* claims in previous Rule 32 proceedings, relief is precluded. See Ariz. R. Crim. P. 32.2(a)(2); *State v. Spreitz*, 202 Ariz. 1, 2, ¶ 4, 39 P.3d 525, 526 (2002) ("Our basic rule is that where ineffective assistance of counsel claims are raised, or could have been raised, in a post-conviction relief proceeding, subsequent claims of ineffective assistance will be deemed waived and precluded.") (emphasis in original). Furthermore, A.R.S. § 41-1604.07 was analyzed.

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in his most recent review proceeding in the Arizona Court of Appeals. Even if he is raising new Rule 32.1(a) claims, relief is still precluded. See Ariz. R. Crim. P. 32.2(a)(3).

He also argues that his sentence is illegal pursuant to Ariz. R. Crim. P. 32.1(c). (Petition at 2; Reply at 7) Rule 32.1(c) claims are "not subject to preclusion under Rule 32.2(a)(3)." Ariz. R. Crim. P. 32.2(b). The Rule 32.1(c) claim must be filed "within a reasonable time after discovering the basis for the claim." Ariz. R. Crim. P. 32.4(b)(3)(B). Defendant does not explain when he discovered the issue. To the extent this claim is based upon Apprendi, it fails for reasons previously explained.

D. Rule 32.1(d) Claim

Alternatively, Defendant claims that his sentences have expired and he is being held beyond the expiration of sentence pursuant to Ariz. R. Crim. P. 32.1(d). (Petition at 2, 11; Reply 13-14) As this Court explained in 2019: "Defendant's sentences will not expire and community supervision will not begin for approximately 11 years. Consequently, he is not entitled to relief pursuant to Rule 32.1(d) or any other Rule 32.1 provision." (Aug. 13, 2019 Minute Entry at 2) The Arizona Court of Appeals granted review but denied relief. *State v. Salerno*, 2 CA-CR 2020-0226-PR (App. Dec. 31, 2020) (mem. filed). The appellate decision states that Defendant's "anticipated release date" is in 2031. *Id.* at ¶ 3 n.3. That decision is final.

E. Rule 32.1(g) Claim

Defendant also contends that a significant change in law occurred that would alter his conviction or sentence if applicable retroactively under Ariz. R. Crim. P. 32.1(g). (Petition at 2) Rule 32.1(g) claims are "not subject to preclusion under Rule 32.2(a)(3)." Ariz. R. Crim. P. 32.2(b). The Rule 32.1(g) claims must be filed "within a reasonable time after discovering the basis for the claim." Ariz. R. Crim. P. 32.4(b)(3)(B). Rule 32.1(g) does not define "a significant change in the law." *State v. Shrum*, 220 Ariz. 115, 118, ¶ 15, 203 P.3d 1175, 1178 (2009). The Arizona Supreme Court construes the rule to require "some transformative event; a 'clear break from the past.'" *Id.* (quoting *State v. Slemmer*, 170 Ariz. 174, 182, 823 P.2d 41, 49 (1991)). This change occurs, for example, when an appellate court overrules previously binding authority. *Id.* at ¶ 16. Defendant fails to clearly identify a case to support this claim.

F. Rule 32.1(e) Claim

He further claims relief based upon newly discovered material facts pursuant to Ariz. R. Crim. P. 32.1(e). (Petition at 2) The Rule 32.1(e) claim must be filed "within a reasonable time after discovering the basis for the claim." Ariz. R. Crim. P. 32.4(b)(3)(B). To be entitled to Rule 32.1(e) relief, Defendant must show that the facts were discovered after trial although existed before trial; the facts could not have been discovered and produced at trial or on appeal through

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reasonable diligence; the facts are neither solely cumulative nor impeaching; the facts are material; and the facts probably would have changed the verdict or sentence. *See State v. Saenz*, 197 Ariz. 487, 489, ¶ 7, 4 P.3d 1030, 1032 (App. 2000); *see also* Ariz. R. Crim. P. 32.1(e). Defendant does not provide any newly discovered facts or any information to support the other elements of a Rule 32.1(e) claim. Instead, he refers to his discovery of A.R.S. § 41-1604.07. (Reply at 7). Newly discovered legal authorities do not support Rule 32.1(e) relief based upon newly discovered material facts.

G. Rule 32.1(h) Claim

In addition, Defendant contends that he is innocent pursuant to Ariz. R. Crim. P. 32.1(h). (Petition at 2) The rule requires, in relevant part, that Defendant demonstrate "by clear and convincing evidence that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would find the defendant guilty of the offense beyond a reasonable doubt." Ariz. R. Crim. P. 32.1(h). He fails to allege facts that would meet the Rule 32.1(h) standard.

In sum, Defendant has failed to state a claim for which relief can be granted in a successive Rule 32 proceeding. Defendant must assert substantive claims and adequately explain the reasons for their untimely assertion. Ariz. R. Crim. P. 32.2(b). He has failed to meet this standard.

IT IS THEREFORE ORDERED dismissing Defendant's Notice Requesting Post-Conviction Relief and Petition for Post-Conviction Relief pursuant to Ariz. R. Crim. P. 32.2(b) and Ariz. R. Crim. P. 32.11(a).

IT IS FURTHER ORDERED denying the request for appointment of counsel.



Supreme Court

STATE OF ARIZONA

ROBERT BRUTINEL
Chief Justice

ARIZONA STATE COURTS BUILDING
1501 WEST WASHINGTON STREET, SUITE 402
PHOENIX, ARIZONA 85007
TELEPHONE: (602) 452-3396

TRACIE K. LINDEMAN
Clerk of the Court

May 9, 2022

RE: STATE OF ARIZONA v FOX JOSEPH SALERNO

Arizona Supreme Court No. CR-22-0051-PR

Court of Appeals, Division One No. 1 CA-CR 21-0285 PRPC

Maricopa County Superior Court No. CR2000-017362

Court of Appeals, Division One No. 1 CA-CR 21-0402 PRPC

Maricopa County Superior Court No. CR2000-017362

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on May 9, 2022, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED.

A panel composed of Chief Justice Brutinel, Justice Bolick, Justice Beene and Justice King participated in the determination of this matter.

Tracie K. Lindeman, Clerk

TO:

Daniel Strange

Linley Wilson

Fox Joseph Salerno, CDOC 164490, Colorado Department of
Corrections, SCF - Sterling Correctional Facility

Amy M Wood

jd