

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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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.

JAMES MARTIN SMITH, *Petitioner*.

No. 1 CA-CR 15-0469 PRPC
FILED 6-8-2017

Petition for Review from the Superior Court in Maricopa County
No. CR2005-048196-001
The Honorable Sherry K. Stephens, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Maricopa County Attorney's Office, Phoenix
By Lisa Marie Martin
Counsel for Respondent

James Martin Smith, Florence
Petitioner

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MEMORANDUM DECISION

Judge Patricia K. Norris delivered the decision of the Court, in which Presiding Judge Diane M. Johnsen and Judge Jennifer B. Campbell joined.

NORRIS, Judge:

¶1 James Martin Smith petitions this court for review from the summary dismissal of his second petition for post-conviction relief and the denial of his “Motion for Substantive Review.” We grant review, but deny relief.

¶2 In 2006, a jury found Smith guilty of reckless manslaughter, aggravated assault, three counts of endangerment, and leaving the scene of a fatal injury accident. The superior court sentenced him to an aggregate term of 25 years’ imprisonment, and this court affirmed his convictions and sentences on direct appeal.¹

¶3 In 2008, Smith filed a notice of post-conviction relief, and the superior court appointed Smith counsel to represent him in the post-conviction proceedings. Smith’s post-conviction counsel informed the court he had “found no grounds for Rule 32 relief” and thus had “no basis upon which to file a petition.” Smith then petitioned for post-conviction relief in *propria persona*.

¶4 In his petition for post-conviction relief, Smith argued: his trial counsel had been ineffective, the prosecutor had presented false evidence at trial, the State had presented insufficient evidence to support his convictions, newly discovered evidence would have changed the jury’s verdict, the State did not present “fair and impartial evidence” to the grand jury, and his post-conviction relief counsel had been ineffective. The superior court denied Smith’s petition.

¹*State v. Smith*, 1 CA-CR 06-0551, 2008 WL 3876397, at *1, ¶ 1 (Ariz. App. Feb. 26, 2008) (mem. decision).

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¶5 Smith petitioned for post-conviction relief a second time in 2015. In his second petition for post-conviction relief, Smith alleged his trial counsel had been ineffective because they: promised him he would be exonerated at trial, improperly advised him to reject a favorable plea deal, and improperly represented him during sentencing by advising him to maintain his innocence.² Smith also asserted his second petition for post-conviction relief was not time-barred pursuant to *Trevino v. Thaler*, ___ U.S. ___, 133 S. Ct. 1911, 185 L. Ed. 2d 1044 (2013), and *Martinez v. Ryan*, 566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012).

¶6 The superior court denied Smith's second petition for post-conviction relief, explaining Smith "had an opportunity to raise the ineffective assistance of his trial counsel in his prior notice of post-conviction relief," and noted that he had, in fact, "asserted several grounds of ineffective assistance" of counsel in that proceeding, none of which the court accepted. The superior court also explained *Trevino* and *Martinez* did not entitle Smith to relief.

¶7 In his petition for review, Smith argues, first, his trial counsel was ineffective. As the superior court noted, Smith raised this argument in his first petition for post-conviction relief, *see supra* ¶ 4, and he is precluded from raising it again in a successive post-conviction proceeding. *See* Ariz. R. Crim. P. 32.2(a)(2)-(3) (defendant precluded from relief based on ground finally adjudicated in any previous collateral proceeding; defendant precluded from relief based on ground that has been waived in any prior proceeding).

¶8 Next, Smith argues his initial post-conviction relief counsel was ineffective. Ineffective assistance of post-conviction relief counsel is not a valid claim under Rule 32 unless it is made against counsel who provided representation in an "of-right" post-conviction relief proceeding. *See State v. Pruett*, 185 Ariz. 128, 130-31, 912 P.2d 1357, 1359-60 (App. 1995) (right to effective assistance of counsel only extends to first petition for post-conviction relief of right). Smith's first proceeding was not an of-right proceeding because he was represented by counsel in his direct appeal. Further, Smith did not make this argument in his second petition for post-conviction relief. Indeed, his second petition for post-conviction relief

²Although Smith had argued in his first petition for post-conviction relief that the State had presented insufficient evidence to support his convictions, in his second petition for post-conviction relief, Smith argued the "evidence of guilt was clear, overwhelming and egregious, establishing without question" he would be convicted.

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stated, “This is not a claim of [ineffective assistance of counsel] of [post-conviction counsel] as grounds for substantive relief.”

¶9 Finally, Smith argues *Martinez* constitutes a significant change in the law that allows him to raise these claims in an untimely fashion. *Martinez* held:

Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

Martinez, 566 U.S. at 17, 132 S. Ct. at 1320. This simply means Smith can seek habeas corpus relief in federal court based on ineffective assistance of counsel if he can first show either he had no counsel in his first post-conviction relief proceeding or counsel in his first post-conviction relief proceeding was ineffective. *Martinez* does not require a state court to consider all untimely claims of ineffective assistance of counsel raised in post-conviction proceedings.

¶10 We have not addressed the superior court’s denial of Smith’s “Motion for Substantive Review” because he did not file the motion pursuant to Rule 32. Therefore, it is not subject to review pursuant to Rule 32.9(c) (appellate court reviews only petition for post-conviction relief or motion for rehearing).

¶11 For the foregoing reasons, although we grant review, we deny relief.



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