

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
*See* Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

DEC 14 2011

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	2 CA-CR 2011-0253-PR
	)	DEPARTMENT B
Respondent,	)	
	)	<u>MEMORANDUM DECISION</u>
v.	)	Not for Publication
	)	Rule 111, Rules of
DAVID RICARDO TORRES,	)	the Supreme Court
	)	
Petitioner.	)	
_____	)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20074891

Honorable John S. Leonardo, Judge

REVIEW GRANTED, RELIEF GRANTED IN PART

Barbara LaWall, Pima County Attorney  
By Jacob R. Lines

Tucson  
Attorneys for Respondent

David R. Torres

Buckeye  
In Propria Persona

ESPINOSA, Judge.

¶1 After a 2008 jury trial, petitioner David Torres was convicted of aggravated assault causing serious physical injury. The trial court found Torres was a repetitive offender and sentenced him to a mitigated, 4.5-year prison term. We affirmed his conviction and sentence on appeal. *State v. Torres*, No. 2 CA-CR 2008-0337 (memorandum decision filed Nov. 20, 2009).

¶2 The trial court denied relief on Torres's first petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P., and this court denied relief on review. *State v. Torres*, No. 2 CA-CR 2010-0328-PR (memorandum decision filed Feb. 16, 2011). Torres now seeks review of the court's denial of his second Rule 32 proceeding, filed in propria persona.

¶3 In his second petition for post-conviction relief, Torres claimed that testimony given by the assault victim, Arturo R., and his wife, Veronica R., in a 2009 civil trial against Torres, constituted "Newly Discovered Evidence," pursuant to Rule 32.1(e), that "substantially undermines" the couple's testimony at Torres's criminal trial. The state responded that the trial court had examined the same evidence previously when Torres included it in a motion for reconsideration of his first Rule 32 petition. The court dismissed this claim as precluded, finding it had "already ruled that no relief may be granted based on that evidence." The court also dismissed Torres's claim that his Rule 32 counsel had been ineffective in filing a notice of post-conviction relief before the civil trial transcripts became available, finding Torres had failed to establish his counsel's performance had been deficient or prejudicial, adding,

Assuming that the omission of the transcripts from the civil trial was vital to the court's consideration of the merits of the original petition, the court was able to examine those transcripts when it considered Torres' motion for reconsideration. After considering these transcripts, the court affirmed its previous decision to dismiss the first petition.

¶4 On review, Torres maintains the trial court ruled prematurely, without considering his reply.<sup>1</sup> In support of this argument, Torres cites the court's denial of his request for additional time to file "A Delayed Rule 32.6(b) Reply Brief." Although Torres had already filed a reply on July 11, he filed this request for leave to file a "Delayed . . . Reply" on August 1, the same day the court had filed its ruling on Torres's petition. The court denied the request, stating the final due date for Torres's reply had been July 12, 2011, and "[t]he court, having received no reply from defendant, entered an order dismissing defendant's Petition for Post Conviction Relief on August 1, 2011." Although the court's ruling on Torres's petition reflects that it had "reviewed the filings submitted by the Petitioner and the State, as well as the supporting documents," it appears the court did not consider the reply because it believed a reply had not been filed.<sup>2</sup>

---

<sup>1</sup>In his reply filed July 11, 2011, Torres argued the state had mistakenly asserted that the transcripts of the civil trial had been examined by the trial court during his first Rule 32 proceeding. He cited the court's ruling on his motion for reconsideration in that proceeding, in which the court had declined to consider those materials as outside the scope of his first petition for post-conviction relief, citing *State v. Ramirez*, 126 Ariz. 464, 467, 616 P.2d 924, 927 (App. 1980).

<sup>2</sup>The record indicates Torres's reply was docketed merely as incoming mail, not a reply as it should have been, and no courtesy copy was provided to the judge as required by local rules. See *Pima Cnty. Super. Ct. Loc. R. P. 3.1*. Thus, there was no indication a reply had been filed upon reviewing the docket in this proceeding.

¶5 We review a trial court’s denial of post-conviction relief for an abuse of discretion. *State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006). Rule 32.6(c) provides for summary dismissal if the trial court, “[o]n reviewing the petition, response, reply, files and records,” determines that a petitioner’s claims are either procedurally precluded or fail to present “a material issue of fact or law which would entitle the defendant to relief under [Rule 32] and that no purpose would be served by any further proceedings.” Here, it appears the court did not consider Torres’s timely filed reply before dismissing his petition. We agree the court should have the opportunity to consider the reply before ruling that Torres’s claim of newly discovered evidence was subject to summary dismissal.

¶6 We reach a different result, however, with respect to Torres’s claim of ineffective assistance of Rule 32 counsel. As a non-pleading defendant, Torres has no “valid, substantive claim under Rule 32” for “ineffective assistance on a prior [post-conviction relief] petition.” *State v. Krum*, 183 Ariz. 288, 292 & n.5, 903 P.2d 596, 600 & n.5 (1995); *see also State v. Mata*, 185 Ariz. 319, 336, 916 P.2d 1035, 1052 (1996) (non-pleading defendant has no constitutional right to effective assistance of counsel in post-conviction proceeding, notwithstanding state-created right to representation). Torres’s claim of ineffective assistance of Rule 32 counsel is simply not cognizable under Rule 32, regardless of anything that might be contained in his reply brief.

¶7 For the foregoing reasons, we grant review and grant relief in part. We remand the case to the trial court for reconsideration of Torres’s claim of newly discovered evidence under Rule 32.1(e), including consideration of Torres’s timely filed

reply. We express no opinion on whether Torres's claim is colorable, and so requires an evidentiary hearing, or is subject to summary dismissal. *See* Ariz. R. Crim. P. 32.6(c); *Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d at 67 (petitioner entitled to hearing on colorable claim). Pursuant to Rule 32.6(c), those determinations are left to the trial court after consideration of all materials filed. In all other respects, we deny relief.

/s/ Philip G. Espinosa  
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Garye L. Vásquez  
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly  
VIRGINIA C. KELLY, Judge