

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

JUL 31 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2012-0097-PR
)	DEPARTMENT B
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
OMAR JESUS JIMENEZ,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20092136004

Honorable Jane L. Eikleberry, Judge

REVIEW GRANTED; RELIEF DENIED

The Law Offices of Ronald Zack
By Ronald Zack

Tucson
Attorney for Petitioner

V Á S Q U E Z, Presiding Judge.

¶1 Omar Jimenez petitions for review of the trial court's summary dismissal of his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. We grant review but, for the following reasons, we deny relief.

¶2 Pursuant to a plea agreement, Jimenez was convicted of one count of first-degree burglary and five counts of aggravated assault. On January 5, 2010, the trial court sentenced him to presumptive terms of imprisonment, one concurrent and the others consecutive, for a total of 17.5 years. Two weeks later, Jimenez filed his first notice of post-conviction relief. After appointed counsel notified the court that she could find no issues for review pursuant to Rule 32, the court afforded Jimenez the opportunity to file a pro se petition and extensions of time to do so. On December 7, 2010, the court dismissed Jimenez's first Rule 32 proceeding after he had failed to file a pro se petition.

¶3 In August 2011, Jimenez filed his second notice of post-conviction relief. In the petition that followed, filed by appointed counsel, he alleged his trial counsel and counsel in his first, of-right Rule 32 proceeding had rendered ineffective assistance. The trial court summarily denied relief, finding Jimenez's claims were barred as untimely. This petition for review followed.

¶4 Relying on *State v. Petty*, 225 Ariz. 369, 238 P.3d 637 (App. 2010), Jimenez contends on review that the trial court abused its discretion in finding his claims precluded because they were untimely. We disagree.

¶5 In *Petty*, we concluded that, notwithstanding the limitations on successive claims found in Rule 32.2(b), a pleading defendant, who is constitutionally entitled to effective assistance of counsel in his first, of-right Rule 32 proceeding, may challenge

that counsel's performance in a timely filed second proceeding, because the second Rule 32 proceeding provides the first opportunity to raise such a claim. 225 Ariz. 369, ¶ 11, 238 P.3d at 641. As we discussed in *Osterkamp v. Browning*, 226 Ariz. 485, ¶ 21, 250 P.3d 551, 557 (App. 2011), this conclusion is consistent with Rule 32.4(a), which provides that a pleading defendant's Rule 32 of-right proceeding is timely if "filed within ninety days after the entry of judgment and sentence or within thirty days after the issuance of the final order or mandate by the appellate court" in his first petition for post-conviction relief proceeding. *See also* Ariz. R. Crim. P. 32.4, cmt. 2000 amend. (rule amended "to allow the pleading defendant thirty days within which to file a second notice if the defendant seeks to challenge counsel's effectiveness in the [first] Rule 32 of-right proceeding.")

¶6 But nothing in *Petty*, *Osterkamp*, or Rule 32 suggests a pleading defendant is relieved from Rule 32.4(a)'s mandate that "[a]ny notice not timely filed may only raise claims pursuant to Rule 32.1(d), (e), (f), (g) or (h)." *See State v. Shrum*, 220 Ariz. 115, ¶ 13, 203 P.3d 1175, 1178 (2009) (noting "few exceptions" to "general rule of preclusion" for claims in untimely or successive petitions). Claims of ineffective assistance of counsel are "cognizable under Rule 32.1(a)." *Petty*, 225 Ariz. 369, ¶ 11, 238 P.3d at 641. As the trial court correctly concluded, Jimenez's claims of ineffective assistance of counsel "do not fall under any exception to the timeliness requirements of Rule 32.4(a)."

¶7 *Petty* makes clear that as a pleading defendant, Jimenez could have asserted in a second, timely post-conviction proceeding that counsel who had represented

him in his first, of-right proceeding had rendered ineffective assistance, *see id.*, but he failed to do so within the time limits prescribed by Rule 32.4(a). Consequently, his claims are barred by the provisions of that rule, and the trial court did not abuse its discretion in summarily dismissing his petition. *See* Ariz. R. Crim. P. 32.6(c) (court shall summarily dismiss petition that raises only precluded claims).

¶8 Accordingly, we grant the petition for review, but relief is denied.

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

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

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