

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

SEP 13 2012

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	2 CA-CR 2012-0235-PR
	)	DEPARTMENT B
Respondent,	)	
	)	<u>MEMORANDUM DECISION</u>
v.	)	Not for Publication
	)	Rule 111, Rules of
RICHARD MARTINEZ,	)	the Supreme Court
	)	
Petitioner.	)	
_____	)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20080065

Honorable Jane L. Eikleberry, Judge

REVIEW GRANTED; RELIEF DENIED

Richard Martinez

Florence  
In Propria Persona

K E L L Y, Judge.

¶1 Petitioner Richard Martinez seeks review of the trial court’s order denying his successive petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. “We will not disturb a trial court’s ruling on a petition for post-conviction relief absent a clear abuse of discretion.” *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Martinez has not sustained his burden of establishing such abuse here.

¶2 After pleading guilty to the charges against him, Martinez was convicted of four counts of armed robbery and seven counts of aggravated assault, all dangerous-nature offenses, and two counts of weapons misconduct. The rest of the factual and procedural history of this case has been set forth by this court in Martinez’s previous proceedings, most recently in our March 2012 decision denying relief on Martinez’s last petition for review. *See State v. Martinez*, No. 2 CA-CR 2011-0358-PR (memorandum decision filed Mar. 15, 2012).

¶3 Before this court issued its decision on that petition, however, Martinez filed another notice of post-conviction relief. In his pro se petition filed shortly after our decision issued, Martinez argued he should be allowed to withdraw from his plea agreement because the trial court had “deviated from the stipulated terms of the plea agreement” and had “improperly imposed restitution.” The trial court concluded Martinez’s arguments were precluded and summarily denied relief.

¶4 On review, Martinez maintains his claims are not precluded and essentially repeats the arguments he made below. First, we agree with the trial court that Martinez’s claims relating to the state’s failure to timely dismiss another indictment against him and the court’s decision to dismiss the indictment and order resentencing are precluded. *See Ariz. R. Crim. P. 32.2(a)(2)*; *see also State v. Martinez*, 226 Ariz. 464, ¶ 7, 250 P.3d 241, 243 (App. 2011).

¶5 We agree with Martinez, however, that he is not precluded from raising a claim about the propriety of the trial court’s imposition of restitution at his resentencing. *Cf. State v. Rosales*, 205 Ariz. 86, ¶ 8, 66 P.3d 1263, 1266 (App. 2003) (claim of ineffective assistance of counsel at resentencing “separate” and “independent” of claim of ineffective assistance of appellate counsel). But his claim is without merit. At the

resentencing, as it had at Martinez's original sentencing, the court ordered Martinez to pay \$6,622 in restitution to the bank he had robbed. Martinez objected, stating he could not "afford to pay the restitution" and citing, as he does on review, *State v. Crowder*, 155 Ariz. 477, 747 P.2d 1176 (1987).

¶6 In *Crowder*, our supreme court determined that, in relation to a defendant who pled guilty without knowledge of the amount of restitution, a court should "vacate the entire plea in those cases in which the amount of restitution was unknown to the defendant, and it was a relevant and material factor in the defendant's decision to plead." *State v. Grijalba*, 157 Ariz. 112, 115, 755 P.2d 417, 420 (1988). In determining whether a defendant knowingly agreed to restitution, we consider "the whole record—'what [the defendant] knew from any source.'" *State v. Adams*, 159 Ariz. 168, 171, 765 P.2d 992, 995 (1988), *quoting Crowder*, 155 Ariz. at 479, 747 P.2d at 1178. Then "we determine whether restitution was relevant to defendant's decision to plead." *Id.*

¶7 In this case, the restitution to be paid to the bank was apparently the money Martinez took during the robbery. Indeed, the interim complaint includes an assertion that the various tellers at the bank gave him a total of about \$6000. Thus, Martinez had knowledge of the amount of losses the bank sustained. *See id.* (noting defendant knew he received \$100 in "buy money" from undercover officer). And, contrary to his assertions in his petition for post-conviction relief, Martinez was informed he would have to pay restitution to the bank at the change of plea hearing.

¶8 As to whether this \$6000 in restitution was relevant and material to his decision to plead guilty, Martinez has not claimed, either in his petition for post-conviction relief or in his petition for review, that he would not have entered into the plea agreement had he known about the restitution. Furthermore, he did not object to that

amount of restitution being ordered at his original sentencing, in response to its inclusion in the presentence report, or in his of-right petition for post-conviction relief. In view of Martinez's failure to assert he would not have pled guilty had he known the restitution amount; his failure to object to the amount until this successive petition for post-conviction relief; the fact it was a small amount compared to the \$270,000 in fines he faced; and the benefits he accrued as a result of his plea agreement, including the dismissal of other charges and the state's allegation of prior convictions, we conclude there is no basis in the record to allow Martinez to withdraw his plea. *See Grijalba*, 157 Ariz. at 115, 755 P.2d at 420 (reviewing court can determine if record supports conclusion that restitution was material factor in plea decision). Therefore, although we grant the petition for review, relief is denied.

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

CONCURRING:

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

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