

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

OCT 30 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2012-0370-PR
)	DEPARTMENT A
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
JOSE LUIS GASTELUM-RABAGO,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF MARICOPA COUNTY

Cause No. CR2009106923002DT

Honorable Paul J. McMurdie, Judge

REVIEW GRANTED; RELIEF DENIED

William G. Montgomery, Maricopa County Attorney
By Gerald R. Grant

Phoenix
Attorneys for Respondent

Jose L. Gastelum-Rabago

Douglas
In Propria Persona

ECKERSTROM, Presiding Judge.

¶1 Petitioner Jose Gastelum-Rabago seeks review of the trial court's order dismissing his 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). Gastelum-Rabago has not sustained his burden of establishing such abuse here.

¶2 Pursuant to a plea agreement, Gastelum-Rabago was convicted of two counts each of conspiracy to commit burglary, burglary, and kidnapping. The trial court imposed concurrent, slightly aggravated, twelve-year prison terms on the conspiracy and kidnapping counts, followed by concurrent, three-year terms of probation to begin upon his discharge from prison for the burglary counts. Thereafter, Gastelum-Rabago initiated a proceeding for post-conviction relief, and appointed counsel filed a notice stating she had reviewed the record and was “unable to find any claims for relief to raise in post-conviction relief proceedings.” The court granted Gastelum-Rabago forty-five days to file a pro se petition.

¶3 Gastelum-Rabago filed his petition, raising claims of ineffective assistance of counsel and sentencing error. On March 28, 2011, the trial court struck the petition because it did not comply with Rule 32.5 and gave Gastelum-Rabago thirty days to file an amended petition, after which time the proceeding would be dismissed “with no further extensions without a showing of extraordinary circumstances.” The court’s order apparently was returned to the court and mailed again on May 4, 2011. On October 28, 2011, when nothing had been filed, the court dismissed the proceeding. Gastelum-Rabago then filed the instant petition for review.

¶4 On review, Gastelum-Rabago asserts that he did not receive the trial court’s order stating he had failed to comply with Rule 32.5 until after May 3, 2011. And, he

states, “Due to the [thirty] day time limits sent in the order . . . and [his] not having access to any help, as [he] is a[n] Illegal Alien, and does not understand the l[a]nguage . . . due to [his] non-understanding of the laws,” he believed that since he had not met the thirty-day deadline he could not correct the errors in his petition. He avers that on November 19, 2011 he was told he could file a “motion for reconsideration” or a petition for review and decided to file the instant petition because the thirty-day time period under Rule 32.9(c) had not yet passed.

¶5 In view of the record before the trial court when it ruled, we cannot say the court abused its discretion. Rule 32.5 provides that if a petition fails to comply with its requirements, the court is to return the petition to the petitioner for amendment. If the petitioner does not revise and return the petition within thirty days, the rule states that the court “shall dismiss the proceedings with prejudice.” Ariz. R. Crim. P. 32.5. That is exactly what the court did here. Although Gastelum-Rabago now provides reasons for his failure to revise and return the petition, he did not present those reasons to the trial court. *See, e.g.*, Ariz. R. Crim. P. 32.6(d) (petitioner may seek leave to amend petition upon showing of good cause). And this court will not consider issues raised for the first time on review. *See* Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review shall contain “[t]he issues which were decided by the trial court and which the defendant wishes to present to the appellate court for review”); *see also State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (issues may not be raised for first time in petition for review); *cf. State v. Youngblood*, 173 Ariz. 502, 504, 844 P.2d 1152, 1154 (1993) (“Even on direct appeal, we generally refuse to consider claims that are not raised below.”). A

trial court should have a “meaningful opportunity to consider” an issue before it is addressed by this court. *State v. Lichon*, 163 Ariz. 186, 189, 786 P.2d 1037, 1040 (App. 1989).

¶6 In any event, as the state points out, Gastelum-Rabago has not adequately explained why he failed to seek advice as to what he should do, as he apparently has done now, in the months between May 2011, when he avers he received the trial court’s order to revise the petition, and October 2011, when the court ultimately ruled. Although Gastelum-Rabago claims to have been without any assistance, the court ordered his appointed Rule 32 counsel to remain in an advisory capacity after she filed her notice. Gastelum-Rabago has not asserted that counsel was unavailable to him or unable to communicate with him or that there was any other cause for his failing to contact her if he needed assistance in understanding the court’s order or in revising his petition. For all these reasons, although we grant the petition for review, relief is denied.

/s/ *Peter J. Eckerstrom*
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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

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