

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

JEROME MASON,
Petitioner.

No. 2 CA-CR 2016-0102-PR
Filed May 20, 2016

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Maricopa County
No. CR1998005858
The Honorable Jeanne Garcia, Judge

REVIEW GRANTED; RELIEF DENIED

Jerome Mason, Douglas
In Propria Persona

STATE v. MASON
Decision of the Court

MEMORANDUM DECISION

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Vásquez and Judge Miller concurred.

ECKERSTROM, Chief Judge:

¶1 Petitioner Jerome Mason was convicted after a jury trial of first-degree murder, first-degree burglary, and endangerment. His convictions and sentences were affirmed on direct appeal. *State v. Mason*, No. 1 CA-CR 02-0635 (memorandum decision filed Sept. 23, 2003). In this petition for review, Mason challenges the trial court's order summarily dismissing the notice and petition he filed in this post-conviction proceeding pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb a trial court's order denying post-conviction relief absent a clear abuse of discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We see no such abuse here.

¶2 Mason commenced the first proceeding by filing a notice of post-conviction relief in 2002. Court-appointed counsel subsequently filed a notice stating he had found no colorable claim to raise. Mason then filed a request to withdraw the proceeding and asked the court to dismiss it without prejudice, which the court granted, stating it would permit him to file a pro se petition after the appeal was resolved. Mason filed a new notice of post-conviction relief and petition after the appeal was resolved. The trial court dismissed the petition, rejecting Mason's claims of ineffective assistance of trial and appellate counsel. Mason filed another notice in 2007, which the court also dismissed.

¶3 Mason filed the notice and petition in this post-conviction proceeding in February 2014. He requested that counsel be appointed to represent him and argued his Sixth Amendment and due process rights were violated when the court did not appoint counsel in the first Rule 32 proceeding in which he wished to raise a

STATE v. MASON
Decision of the Court

claim of ineffective assistance of counsel. He argued he was entitled to relief for his lack of counsel based on the Supreme Court's decision in *Martinez v. Ryan*, ___ U.S. ___, 132 S. Ct. 1309, 1320 (2012), which he claimed was a significant change in the law that applies retroactively. See Ariz. R. Crim. P. 32.1(g). He requested "[t]he right to file a delayed Rule 32, post-conviction petition/proceeding, with counsel." See Ariz. R. Crim. P. 32.1(f).

¶4 The trial court correctly found that because this was a successive, untimely proceeding, Mason could only raise claims pursuant to Rules 32.1(d), (e), (f), (g), or (h). See Ariz. R. Crim. P. 32.4(a). The court also correctly concluded Mason had failed to raise a claim for relief under any of these subsections and that the holding in *Martinez* does not afford him relief. The Court in *Martinez* held: "Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding," the defendant is not procedurally barred in a federal habeas proceeding from raising the claim if, "in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." ___ U.S. ___, 132 S. Ct. at 1320. See also *State v. Escareno-Meraz*, 232 Ariz. 586, ¶¶ 4-6, 307 P.3d 1013, 1014 (App. 2013). Thus, even if applicable, *Martinez* only determined whether such claims may be raised in federal habeas proceedings and did not change Arizona law with respect to a non-pleading defendant's rights in post-conviction proceedings. In any event, *Martinez* is not retroactively applicable to a defendant like Mason, whose case became final upon this court's issuance of its mandate in the appeal in December 2003. See *State v. Febles*, 210 Ariz. 589, ¶¶ 7-8 & n.4, 115 P.3d 629, 632 & n.4 (App. 2005) (new constitutionally based rule applies to cases not final on direct review when case is decided but is not retroactive unless falls within narrow exceptions).

¶5 In any event, the trial court appointed counsel to represent Mason in his first post-conviction proceeding, and counsel reviewed the record and avowed he found no claim to raise. Thus, although Mason filed his pro se petition in the continued first proceeding, raising claims of ineffective assistance of counsel, he had the benefit of appointed counsel in his first post-conviction proceeding and was not entitled to the appointment of yet another

STATE v. MASON
Decision of the Court

attorney once he recommenced the proceeding after the appeal was resolved.¹ Indeed, in the notice of post-conviction relief he filed after the appeal was resolved, Mason explained that the proceeding was a continuation of the first and checked the box on the form he had used to reflect he was not requesting that counsel be appointed to represent him.² And in acknowledging its receipt of the notice, the court expressly stated Mason did not ask that counsel be appointed to represent him “and desires to proceed without counsel.” The court summarily denied relief without appointing counsel after Mason filed a petition, finding Mason had not presented any evidence trial or appellate counsel had been ineffective. And, the court denied Mason’s motion for rehearing, in which he had argued, *inter alia*, the court had failed to address his request for the appointment of counsel.

¶6 Any challenge as to the propriety of the trial court’s order in that proceeding, including the fact that the court did not appoint counsel when the first proceeding was recommenced, had to be made in a petition for review pursuant to Rule 32.9; this court denied Mason’s petition for review. Mason cannot challenge the trial court’s ruling in that proceeding in a successive post-conviction proceeding.

¶7 We grant the petition for review. But because the trial court did not abuse its discretion in summarily dismissing Mason’s petition, we deny relief.

¹Although Mason was arguably entitled to the appointment of counsel to review appellate counsel’s performance, he was required to make that request in that proceeding and challenge the trial court’s refusal to appoint counsel in his petition for review, which this court denied.

² We acknowledge Mason then contradicted himself by checking the box on the form he used for his pro se petition indicating he was requesting that counsel be appointed to represent him. But for the reasons we stated, he was not entitled to the appointment of counsel at that point as a matter of right. *See* Ariz. R. Crim. P. 32.4(c)(2).