

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

LOUIS MORENO,
Petitioner.

No. 2 CA-CR 2016-0139-PR
Filed June 6, 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NOT FOR PUBLICATION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. CR2010142512001SE
The Honorable Susan M. Brnovich, Judge

REVIEW GRANTED; RELIEF DENIED

Louis Moreno, Florence
In Propria Persona

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MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Howard and Judge Staring concurred.

ESPINOSA, Judge:

¶1 Louis Moreno seeks review of the trial court's ruling summarily dismissing his notice of post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that order unless the court clearly abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Moreno has not met his burden of demonstrating such abuse here.

¶2 After a jury trial, Moreno was convicted of second-degree trafficking in stolen property and theft. The trial court sentenced him to concurrent, presumptive prison terms of 11.75 years for each offense. We affirmed his convictions and sentences on appeal. *State v. Moreno*, No. 1 CA-CR 11-0192 (memorandum decision filed Nov. 8, 2011). Moreno then sought post-conviction relief, and appointed counsel filed a notice stating he had reviewed the record but found no "meritorious issue" to raise in a Rule 32 proceeding. Moreno filed a pro se petition, which the trial court summarily denied. This court denied relief on review. *State v. Moreno*, No. 1 CA-CR 12-0816 PRPC (memorandum decision filed April 8, 2014).

¶3 In April 2014, Moreno filed another notice of post-conviction relief in which he claimed that his failure to file a timely notice was without fault on his part. He further asserted his failure to raise a claim of ineffective assistance in his previous proceeding had not been knowing, voluntary, and intelligent, citing *Stewart v. Smith*, 202 Ariz. 446, 46 P.3d 1067 (2002). Moreno also claimed his post-conviction counsel had been ineffective. The trial court summarily dismissed the notice and denied Moreno's subsequent motion for rehearing. This petition for review followed.

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¶4 On review, Moreno reasserts that he is entitled to raise claims of ineffective assistance of trial and Rule 32 counsel. As Moreno acknowledges, however, his most recent notice of post-conviction relief is untimely; therefore, he may only raise claims pursuant to Rule 32.1(d) through (h). *See* Ariz. R. Crim. P. 32.4(a). Those subsections do not encompass a claim of ineffective assistance of trial counsel, which falls under Rule 32.1(a). *See State v. Petty*, 225 Ariz. 369, ¶ 11, 238 P.3d 637, 641 (App. 2010). And, despite Moreno’s assertion to the contrary, Rule 32.1(f) does not allow him to now raise a claim of ineffective assistance. Because he was convicted after a jury trial, Rule 32.1(f) would apply only if he had failed to timely file a notice of appeal; the rule does not apply to untimely notices of post-conviction relief filed by non-pleading defendants. And we agree with the trial court that Moreno cannot raise a claim of ineffective assistance of Rule 32 counsel. *State v. Escareno-Meraz*, 232 Ariz. 586, ¶¶ 4-6, 307 P.3d 1013, 1014 (App. 2013) (non-pleading defendants “have no constitutional right to counsel in post-conviction proceedings”).

¶5 Moreno also repeats his contention based on *Stewart* that he is entitled to raise a claim of ineffective assistance because he did not knowingly, voluntarily, and intelligently waive that claim by failing to raise it in his first Rule 32 proceeding. But the waiver principles discussed in *Stewart* do not apply to an untimely proceeding like this one. *See State v. Lopez*, 234 Ariz. 513, ¶¶ 7-8, 323 P.3d 1164, 1166 (App. 2014); *see also* Ariz. R. Crim. P. 32.4(a).

¶6 Finally, for the first time in his petition for review, Moreno states he is “also claiming actual innocen[c]e.” But we do not consider claims raised for the first time on review. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980); *see also* Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review shall contain “issues which were decided by the trial court and which the defendant wishes to present to the appellate court for review”). Thus, we do not address that issue.

¶7 Although we grant review, relief is denied.