

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Respondent*,

v.

LUIS ENRIQUE ORTEGA-HERNANDEZ, *Petitioner*.

No. 1 CA-CR 16-0228 PRPC
FILED 8-22-2017

Petition for Review from the Superior Court in Maricopa County
No. CR2007-143543-001
The Honorable Kristin C. Hoffman, Judge (Retired)

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Maricopa County Attorney's Office, Phoenix
By Diane Meloche
Counsel for Respondent

Luis Enrique Ortega-Hernandez, Florence
Petitioner

MEMORANDUM DECISION

Chief Judge Samuel A. Thumma delivered the decision of the Court, in
which Judge Lawrence F. Winthrop and Judge James P. Beene joined.

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T H U M M A, Chief Judge:

¶1 Petitioner Luis Enrique Ortega-Hernandez seeks review of the superior court’s dismissal of his notice of post-conviction relief, filed pursuant to Arizona Rule of Criminal Procedure 32.1 (2017).¹ Absent an abuse of discretion or error of law, this court will not disturb a superior court’s ruling on a request for post-conviction relief. *State v. Gutierrez*, 229 Ariz. 573, 577 ¶ 19 (2012). Because Ortega-Hernandez has shown no such error, this court grants review but denies relief.

¶2 Ortega-Hernandez pled guilty to one count of sexual abuse and three counts of attempted child molestation, all Class 3 felonies, committed on dates or date ranges in 2005 and 2006. In July 2008, the superior court sentenced him in accordance with the terms of the plea agreement to consecutive presumptive prison terms totaling 25 years for sexual abuse and two attempted child molestation convictions and suspended sentencing and placed him on lifetime probation on the third attempted child molestation conviction.

¶3 In November 2015, Ortega-Hernandez filed a notice of post-conviction relief, indicating an intent to raise claims of ineffective assistance of counsel, breach of plea agreement regarding sentencing, newly discovered evidence, significant change in the law, violation of due process and other constitutional rights, and alleging that the untimely filing was without fault on his part. Finding the notice untimely and that Ortega-Hernandez failed to meet his burden to show his claims could be raised in an untimely proceeding, the superior court summarily dismissed the notice. This petition for review followed.

¶4 Ortega-Hernandez limits the issues in his petition to review to claims for ineffective assistance of counsel and breach of the plea agreement. The superior court correctly ruled that Ortega-Hernandez was precluded from obtaining relief on these claims. Because his notice of post-conviction relief was filed more than 90 days after entry of judgment and sentence, it was untimely. Ariz. R. Crim. P. 32.4(a). An untimely notice of post-conviction relief may only raise claims pursuant to Rule 32.1(d), (e), (f), (g) or (h). *Id.*; see also *State v. Shrum*, 220 Ariz. 115, 118 ¶ 13 (2009) (noting “few exceptions” to “general rule of preclusion” for claims in untimely or successive petitions). Claims of ineffective assistance of counsel do not fall within Rule 32.1(d), (e), (f), (g) or (h) because they are “cognizable under

¹ Absent material revisions after the relevant dates, statutes and rules cited refer to the current version unless otherwise indicated.

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Rule 32.1(a).” *State v. Petty*, 225 Ariz. 369, 373 ¶ 11 (App. 2010). The claim of breach of plea agreement likewise does not fall within Rule 32.1(d), (e), (f), (g) or (h). See *State v. Cazares*, 205 Ariz. 425, 426 ¶ 4 (App. 2003) (holding claims regarding sentencing are encompassed within Rule 32.1(c)). Thus, there was no error by the superior court in denying relief on these claims.

¶5 The superior court did not abuse its discretion in dismissing Ortega-Hernandez’ notice of petition for post-conviction relief. Accordingly, this court grants review but denies relief.



AMY M. WOOD • Clerk of the Court
FILED: AA