

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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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.

ADRIAN HERNANDEZ, *Petitioner*.

No. 1 CA-CR 16-0576 PRPC
FILED 10-26-2017

Petition for Review from the Superior Court in Maricopa County
No. CR2009-005152-002
The Honorable Christopher T. Whitten, Judge

REVIEW GRANTED AND RELIEF DENIED

COUNSEL

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

Adrian Hernandez, Eloy
Petitioner

MEMORANDUM DECISION

Presiding Judge Randall M. Howe delivered the decision of the Court, in
which Judge Peter B. Swann and Judge Maria Elena Cruz joined.

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HOWE, Judge:

¶1 Adrian Hernandez seeks review of the trial court's order summarily dismissing his successive and untimely notice of post-conviction relief filed pursuant to Arizona Rule of Criminal Procedure 32. We will not disturb that order unless the court clearly abused its discretion. See *State v. Gutierrez*, 229 Ariz. 573, 577 ¶ 19 (2012). Hernandez has not met his burden of demonstrating such abuse here.

¶2 A jury convicted Hernandez of first degree burglary, two counts of armed robbery, and six counts of kidnapping, three of which were dangerous crimes against children. The trial court sentenced Hernandez to an aggregate term of 37 years' imprisonment. This Court affirmed the convictions and sentences on direct appeal. *State v. Hernandez*, 1 CA-CR 10-0586 (Ariz. App. Feb. 14, 2012) (mem. decision).

¶3 In April 2012, Hernandez filed his first notice of post-conviction relief ("PCR"). After reviewing the transcripts and record, appointed counsel advised the court that counsel could find no colorable claims. Hernandez then filed a pro se PCR and raised claims of ineffective assistance of counsel ("IAC"). The trial court summarily dismissed the petition. Hernandez sought review and this Court denied relief. *State v. Hernandez*, 1 CA-CR 13-0665 (Ariz. App. Mar. 24, 2015) (mem. decision).

¶4 In May 2016, Hernandez filed a successive notice of PCR. He raised claims of IAC against trial, appellate, and previous PCR counsel. He also asserted that trial counsel had failed to strike a juror who stated that she could not be fair and impartial and that neither appellate nor PCR counsel had raised the issue. He also argued that trial counsel should not have allowed the settlement conference judge to preside over his trial. The trial court summarily dismissed the PCR, and this petition for review followed.

¶5 Initially, we note Hernandez is laboring under the mistaken belief that he has a right to effective assistance of PCR counsel. As we explained in *State v. Escareno-Meraz*, however, *Martinez v. Ryan*, 566 U.S. 1 (2012), does not apply to Arizona post-conviction proceedings. 232 Ariz. 586, 587 ¶¶ 4-6 (App. 2013). Non-pleading defendants like Hernandez "have no constitutional right to counsel in post-conviction proceedings," and his claim is therefore not cognizable under Rule 32. *Id.* ¶ 4.

¶6 Furthermore, his IAC claims against trial and appellate counsel, and his claims of trial error, are untimely and precluded.

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Hernandez's claims were, or could have been, raised in the earlier PCR proceeding and are precluded. Ariz. R. Crim. P. 32.2(a). Rule 32.1(a) and (c) specifically provide that grounds for relief exist when the conviction or sentence was in violation of the constitution or a sentence is not in accordance with the sentence authorized by law, but claims under this subsection are not exempt from preclusion. Ariz. R. Crim. P. 32.2(a), (b). Arizona Revised Statutes section 13-4234(G) provides that the time limits for filing a notice and petition for post-conviction relief "are jurisdictional, and an untimely filed notice or petition shall be dismissed with prejudice." *State v. Lopez*, 234 Ariz. 513, 515 ¶ 8 (App. 2014).

¶7 Finally, whether the other claimed errors are fundamental or structural is irrelevant. The fact that an error is fundamental does not mean it cannot be precluded. *State v. Swoopes*, 216 Ariz. 390, 403 ¶ 41 (App. 2007). If the supreme court "had intended that fundamental error be an exception to preclusion under Rule 32.2, the court presumably would have expressly said so in the rule itself." *Id.* ¶ 42.

¶8 Accordingly, we grant review but deny relief.



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