

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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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

MICHAEL ANGELO APODACA, III, *Petitioner*.

No. 1 CA-CR 16-0897 PRPC
FILED 9-12-2017

Petition for Review from the Superior Court in Coconino County
No. S0300CR20020038
The Honorable Mark R. Moran, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Coconino County Attorney's Office, Flagstaff
By William P. Ring
Counsel for Respondent

Michael Angelo Apodaca, III, Florence
Petitioner

STATE v. APODACA
Decision of the Court

MEMORANDUM DECISION

Judge Jon W. Thompson delivered the decision of the Court, in which Presiding Judge Kent E. Cattani and Judge Paul J. McMurdie joined.

T H O M P S O N, Judge:

¶1 Petitioner Michael Angelo Apodaca, III, petitions this court for review from the summary dismissal of his third petition for post-conviction relief. We have considered the petition for review and, for the reasons stated, grant review and deny relief.

¶2 A jury found Apodaca guilty of sexual assault, molestation of a child and sexual conduct with a minor in 2002. The trial court sentenced him to an aggregate term of twenty-seven years' imprisonment and this court affirmed his convictions and sentences on direct appeal. Twelve years later, Apodaca filed his third petition for post-conviction relief and argued his trial counsel was ineffective for a variety of reasons; counsel in his first post-conviction relief proceeding was ineffective when counsel failed to raise those same claims against trial counsel; and that his appellate counsel was ineffective for failing to raise two issues. The trial court summarily dismissed the petition and Apodaca now presents the same issues for review.

¶3 We deny relief. Apodaca could have raised these claims in a prior post-conviction relief proceeding. Any claim a defendant could have raised in an earlier post-conviction relief proceeding is precluded. Ariz. R. Crim. P. 32.2(a). None of the exceptions under Rule 32.2(b) that would allow Apodaca to seek untimely relief apply. Further, regarding the claims against Apodaca's first post-conviction relief counsel, ineffective assistance of post-conviction relief counsel is not a valid claim under Rule 32 unless made against counsel who provided representation in an "of-right" post-conviction relief proceeding. *State v. Pruett*, 185 Ariz. 128, 130-31, 912 P.2d 1357, 1359-60 (App. 1995). Because Apodaca's convictions and sentences resulted from a jury trial, his first post-conviction relief proceeding was not an "of-right" proceeding. *See* Ariz. R. Crim. P. 32.1.

STATE v. APODACA
Decision of the Court

¶4

We grant review but deny relief.



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