

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

APR 25 2013

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	2 CA-CR 2013-0011-PR
	)	DEPARTMENT B
Respondent,	)	
	)	<u>MEMORANDUM DECISION</u>
v.	)	Not for Publication
	)	Rule 111, Rules of
EARL BALL,	)	the Supreme Court
	)	
Petitioner.	)	
_____	)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR99000131

Honorable Ann R. Littrell, Judge

REVIEW GRANTED; RELIEF DENIED

Earl Ball

Florence  
In Propria Persona

K E L L Y, Judge.

¶1 Petitioner Earl Ball seeks review of the trial court's December 2012 order dismissing the notice of post-conviction relief he filed in May 2012 pursuant to Rule 32, Ariz. R. Crim. P., and denying his motion for rehearing of the court's denial of a previous petition for post-conviction relief Ball had filed in November 2011. We will not disturb

the trial court's ruling unless that court clearly abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 Ball was convicted of one count of sexual conduct with a minor after a jury trial and sentenced to an aggravated prison term of 1.5 years, which was to be served consecutively to sentences imposed in two other cases.<sup>1</sup> This court affirmed the conviction and sentence on appeal. *State v. Ball*, No. 2 CA-CR 1999-0480 (memorandum decision filed Apr. 29, 2004). Ball has sought relief from the conviction and sentence in numerous post-conviction proceedings; although some have been asserted pursuant to Rule 32, Ariz. R. Crim. P., he also has filed a petition for writ of habeas corpus and various post-judgment motions. Ball has filed similar petitions and motions in two other cases, CR98000296 and CR98000345, which have overlapped with the challenges to the conviction and sentence in this case. The other two cases, which were tried together, had resulted in convictions of twelve counts of sexual exploitation of a minor.

¶3 We have denied relief on review of at least two prior post-conviction proceedings in this case. *See State v. Ball*, No. 2 CA-CR 2004-0355-PR (decision order filed Jul. 29, 2005) (denying relief on review of denial of relief under Rule 32 and requested in habeas corpus petition); *State v. Ball*, No. 2 CA-CR 2005-0025-PR (decision

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<sup>1</sup>Ball was resentenced in August 2011 to a one-year prison term after the trial court found his initial sentence had been improperly aggravated and therefore granted Ball's August 2010 petition for post-conviction relief based on *Blakely v. Washington*, 542 U.S. 296 (2004).

order filed Jul. 13, 2005) (treating special action petition as petition for review but denying review; finding Ball failed to present trial court with anything it could review, leaving nothing for appellate court review). As he did in No. 2 CA-CR 2005-0025, Ball again has filed a special-action petition despite stating he is seeking review pursuant to Rule 32.9 of the trial court's December 2012 order dismissing his May 2012 notice of post-conviction relief. We regard the special action petition as a petition for review.

¶4 In a petition for post-conviction relief Ball filed in November 2011, he argued the trial court abused its discretion “by allowing defendant’s counsel to plead him guilty” to count three of the indictment during trial and that trial counsel had been ineffective and unethical in this regard. Ball did not request counsel for that post-conviction proceeding. The court denied the petition in January 2012, and confirmed that dismissal in a second, amended order in August. Ball then filed a motion for rehearing, claiming the court had “misread [his] pleadings” and “misapplied the law,” and apparently adding a claim of newly discovered evidence related to his claim of ineffective assistance of counsel. In May 2012, Ball filed another notice of post-conviction relief in which he claimed that, although he had pursued post-conviction relief in a number of prior proceedings, he has never been “provided with effective assistance [o]f counsel, to raise his issue of ineffective assistance of counsel.” He argued, as he does on review, that he is entitled to the appointment of counsel based on the “new rule” announced in the following recent Supreme Court decisions: *Martinez v. Ryan*, \_\_\_ U.S.

\_\_\_, 132 S. Ct. 1309 (2012), *Lafler v. Cooper*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 1376 (2012), and *Missouri v. Frye*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 1399 (2012).

¶5 In its twelve-page ruling, the trial court reviewed the history of this case and discussed some of the post-conviction proceedings involving CR98000296 and CR98000345. Addressing the pending notice and Rule 32 petition, the court concluded any claim of ineffective assistance of counsel was precluded, *see* Ariz. R. Crim. P. 32.2, and the notice was subject to summary dismissal in any event because Ball had failed to “set forth the substance of the specific exception and the reason for not raising the claim in the previous petition or in a timely manner’ as required by Rule 32.2(b).” The court further found Ball had not raised a colorable claim of ineffective assistance of counsel. The petition for special action, which we treat as a petition for review, followed. Ball again claims he was entitled to appointed counsel based on recent Supreme Court cases and essentially restates some of the claims he had raised below.

¶6 The trial court correctly dismissed the notice of post-conviction relief, finding Ball had failed to satisfy the requirements of Rule 32.2(b), which requires the defendant to specify, *inter alia*, “the meritorious reasons . . . why the claim was not stated in the previous petition or in a timely manner.” The court noted Ball simply asserted prior Rule 32 counsel had been ineffective. The court also correctly concluded *Frye*, *Lafler* and *Martinez* do not constitute significant changes in the law that apply to Ball and entitle him to relief. *See* Ariz. R. Crim. P. 32.1(g).

¶7 In *Lafler*, the Supreme Court acknowledged a defendant has a right to effective representation during plea negotiations and examined the prejudice portion of the test under *Strickland v. Washington*, 466 U.S. 668 (1984), in that context. \_\_\_ U.S. at \_\_\_, 132 S. Ct. at 1384, 1387-88. The Court reached the same conclusion in *Frye*, \_\_\_ U.S. at \_\_\_, 132 S. Ct. at 1407-08. Even assuming, without deciding, these cases would apply to Ball’s clearly final case, *see* Ariz. R. Crim. P. 32.1(g); *State v. Febles*, 210 Ariz. 589, ¶¶ 7-8 & n.4, 115 P.3d 629, 632 & n.4 (App. 2005), they do not establish significant changes in the law as contemplated by the rule because it has long been the law in Arizona that a defendant is entitled to effective representation in the plea context, *see State v. Donald*, 198 Ariz. 406, ¶ 14, 10 P.3d 1193, 1200 (App. 2000). And a significant change in the law “requires some transformative event, a clear break from the past.” *State v. Poblete*, 227 Ariz. 537, ¶ 8, 260 P.3d 1102, 1105 (App. 2011), *quoting State v. Shrum*, 220 Ariz. 115, ¶ 15, 203 P.3d 1175, 1178 (2009). Ball could have raised such a claim in previous post-conviction proceedings. *See* Ariz. R. Crim. P. 32.1(g); *Febles*, 210 Ariz. 589, ¶¶ 7, 14-15, & n.4, 115 P.3d at 632, 634 & n.4 (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).

¶8 Similarly, even assuming *Martinez* could be applied to Ball’s case, it does not provide him with a basis for relief. There, the Court acknowledged the general rule under Arizona law that a non-pleading defendant does not have the right to effective representation in post-conviction proceedings and may not, therefore, assert a claim of

ineffective assistance of Rule 32 counsel in a successive post-conviction proceeding based on counsel's allegedly deficient performance in the post-conviction proceeding. \_\_\_ U.S. at \_\_\_, 132 S. Ct. at 1313; *see also State v. Mata*, 185 Ariz. 319, 336-37, 916 P.2d 1035, 1052-53 (1996). The Court addressed the narrow issue whether the ineffectiveness of Rule 32 counsel in failing to assert a claim of ineffective assistance of trial counsel can be cause for a defendant's procedural default for federal habeas purposes. *Martinez*, \_\_\_ U.S. at \_\_\_, 132 S. Ct. at 1315. The Court thereby qualified its holding in *Coleman v. Thompson*, 501 U.S. 722, 753-54 (1991). *Id.* It expressly stated that it was not deciding the question it had left open in *Coleman*—whether a defendant is entitled to effective assistance of counsel in the first collateral proceeding in which the defendant may assert a claim of ineffective assistance of trial counsel. *Id.*

¶9 Because Ball has failed to establish he would have been entitled to relief under *Lafler*, *Frye* or *Martinez* or on any other basis that he had raised below and raises on review, he has not sustained his burden of establishing the trial court abused its discretion by summarily dismissing his notice of petition for post-conviction relief. With respect to the claims he raised in the November 2012 petition and his motion for rehearing of the court's denial of that petition, he has not established the court abused its discretion. Rather, the court's minute entry in which it addressed those claims, finding them precluded or lacking in merit, is correct and we adopt it. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993).

¶10 Although we grant the petition for review, we deny relief for the reasons stated in this decision.

/s/ Virginia C. Kelly  
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez  
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Philip G. Espinosa  
PHILIP G. ESPINOSA, Judge