

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

MAR 29 2013

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2013-0035-PR
)	DEPARTMENT B
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
PHILBERT SHABIE,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF NAVAJO COUNTY

Cause No. S0900CR20050244

Honorable John Lamb, Judge

REVIEW GRANTED; RELIEF DENIED

Brad Carlyon, Navajo County Attorney
By Galen H. Wilkes

Holbrook
Attorneys for Respondent

Philbert Shabie

Buckeye
In Propria Persona

ESPINOSA, Judge.

¶1 Following a jury trial, petitioner Philbert Shabie was convicted of aggravated assault, attempted aggravated assault, and two counts of promoting prison contraband. The trial court found Shabie had prior felony convictions and sentenced him to concurrent prison terms, the longest of which were 15.75 years, to be served

consecutively to the sentence he was already serving. This court affirmed his convictions and sentences on appeal. *State v. Shabie*, No. 1 CA-CR 07-0026 (memorandum decision filed Nov. 27, 2007). In 2007 and 2009, the court dismissed Shabie’s first two petitions for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. In 2010, Shabie filed his third petition for post-conviction relief. This petition for review followed the court’s summary dismissal of that petition. We will not disturb that ruling unless the court has abused its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We find no such abuse here.

¶2 On review, Shabie contends the trial court “prematurely” dismissed his petition, because it had done so before he had the opportunity to file a reply to the state’s response to that petition. On December 29, 2010, before his reply was due, *see* Rule 32.6(b), Shabie filed a motion requesting additional time to reply to the state’s response to his petition. Although the trial court’s order dismissing Shabie’s petition reflects that it had “considered” the petition, the state’s response and “subsequent pleadings,” it does not appear the court ruled on his request before it dismissed his petition for post-conviction relief as untimely on January 3, 2011.

¶3 In its ruling dismissing the petition as untimely, the trial court first provided a complete procedural history of the case, and then correctly concluded that Shabie had “failed to show that he exercised due diligence in obtaining his medical and mental health records, which he argued constituted newly discovered evidence,” thereby “fail[ing] to satisfy requirements of Rule 32.1(e)(2) and *State v. Bilke*, 162 Ariz. 51, 52-53, 781 P.2d 28, 29-30 (1989)[,] for filing an untimely Rule 32 petition.” Based on our review of the

record, we conclude the court properly rejected Shabie’s claim of newly discovered evidence, the sole basis asserted for filing an untimely petition for post-conviction relief, and that it therefore correctly summarily dismissed his petition.¹ *See* Ariz. R. Crim. P. 32.2(b) (if “the specific exception [to preclusion] and meritorious reasons do not appear substantiating the claim and indicating why the claim was not stated in [a] previous petition or in a timely manner, the notice shall be summarily dismissed.”). Notably, the court alternatively dismissed all of Shabie’s claims² as precluded because he could have but did not raise them either on appeal or in one of his previous post-conviction petitions. *See* Ariz. R. Crim. P. 32.2(a). The court also correctly noted that, because Shabie was represented by counsel on appeal and in his first two post-conviction proceedings, he was “not entitled to post-conviction relief on the grounds he was denied effective assistance of post-conviction relief counsel.”³

¶4 In a related argument, Shabie contends the trial court “prematurely” dismissed his petition without having first ruled on his motion for change of judge.

¹Even had Shabie been permitted to file a reply to the state’s response to his petition, he has not suggested how he would have argued successfully that his third petition was timely.

²Those claims included ones of ineffective assistance of trial, appellate, and Rule 32 counsel; various due process violations; prosecutorial misconduct; sentencing error; and that the trial court should have granted his motion for stay and abeyance.

³“[T]he non-pleading defendant has ‘no constitutional right to counsel or effective assistance in post-conviction proceedings’; although the non-pleading defendant has the right to effective representation on appeal, he has no ‘valid, substantive claim under Rule 32’ for ‘ineffective assistance on a prior [post-conviction relief] petition.’” *Osterkamp v. Browning*, 226 Ariz. 485, ¶ 18, 250 P.3d 551, 556 (App. 2011) (alteration in *Osterkamp*), quoting *State v. Krum*, 183 Ariz. 288, 292 & n.5, 903 P.2d 596, 600 & n.5 (1995).

However, that motion, which was distinct from the petition for post-conviction relief, was not part of the post-conviction proceeding before the court and is not, therefore, properly before us on review. *See* Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review shall contain “issues which were decided by the trial court” in post-conviction proceeding).

¶5 Shabie further maintains he was entitled to a mental health examination pursuant to Rule 11, Ariz. R. Crim. P. Although it is not clear that this argument is separate from Shabie’s claim of newly discovered evidence, addressed above, it nonetheless is precluded. Because Shabie argued in his first petition for post-conviction relief that the trial court had “abuse[d] its discretion by not allowing [him] to be evaluated for mental issues pursuant to Rule 11,” he is precluded from raising this claim again. *See* Ariz. R. Crim. P. 32.2(a)(2) (defendant precluded from post-conviction relief based on ground “[f]inally adjudicated on the merits . . . in any previous collateral proceeding”).

¶6 Finally, although Shabie asserted in his petition below that trial and appellate counsel were ineffective and he is entitled to be resentenced under *Blakely v. Washington*, 542 U.S. 296 (2004), it does not appear that he challenged the trial court’s dismissal of these claims in his petition for review. Rather, he asserts these claims solely in the reply to the state’s response to the petition for review. Just as we do not address on review claims not raised properly in the defendant’s petition for post-conviction relief, by analogy we do not address claims not raised in the petition for review, to which the state had no opportunity to respond. *Cf. State v. Lopez*, 223 Ariz. 238, ¶¶ 5-7, 221 P.3d 1052, 1053-54 (App. 2009) (declining to address issue first raised in reply). Moreover, because

the court correctly dismissed Shabie's petition as untimely, we need not address these claims in any event.

¶7 Because the trial court did not abuse its discretion in dismissing the petition for post-conviction relief, the petition for review is granted but relief is denied.

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

CONCURRING:

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

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge*

*A retired judge of the Arizona Court of Appeals authorized and assigned to sit as a judge on the Court of Appeals, Division Two, pursuant to Arizona Supreme Court Order filed December 12, 2012.