

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

JUL 11 2013

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2013-0076-PR
)	DEPARTMENT B
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
JACK HUBERT HUMMER,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR039162

Honorable Richard D. Nichols, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
Attorneys for Respondent

Jack Hummer

Buckeye
In Propria Persona

ESPINOSA, Judge.

¶1 Jack Hummer petitions this court for review of the trial court's summary dismissal of his successive petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that ruling unless the court clearly has abused its

discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We grant review but deny relief.

¶2 Hummer was convicted after a jury trial of one count of molestation of a minor, two counts of sexual conduct with a minor, and three counts of furnishing obscene material. *State v. Hummer*, 184 Ariz. 603, 605, 911 P.2d 609, 611 (App. 1995). He was sentenced to three consecutive life prison terms for his sexual conduct and molestation convictions, to be followed by concurrent twelve-year prison terms for his convictions of furnishing obscene materials to a minor. *Id.* We affirmed Hummer’s convictions and sentences on appeal. *Id.* at 609-10, 911 P.2d at 615-16. In 2003, Hummer filed a notice of post-conviction relief, and appointed counsel filed a notice stating she had reviewed the record and had been “unable to find any claims for relief to raise in Rule 32 post-conviction proceedings.” Hummer did not file a pro se petition, despite being given leave to do so, and the trial court dismissed the proceeding.

¶3 In 2012, Hummer filed a notice of and petition for post-conviction relief claiming that *Missouri v. Frye*, ___ U.S. ___, 132 S. Ct. 1399 (2012), and *Lafler v. Cooper*, ___ U.S. ___, 132 S. Ct. 1376 (2012), constituted a significant change in the law, *see* Ariz. R. Crim. P. 32.1(g), “extend[ing] the . . . right to effective assistance of counsel to the plea bargaining process” and that his trial counsel had failed to properly advise him of the potential sentencing consequences following conviction after trial, causing him to reject a favorable plea offer. The trial court summarily dismissed the petition, concluding *Frye* was not a significant change in the law in light of *State v. Donald*, 198 Ariz. 406, 10 P.3d 1193 (App. 2000) and finding Hummer’s claim precluded pursuant to Rule 32.2(a)(3). This petition for review followed the trial court’s denial of Hummer’s motion for reconsideration.

¶4 On review, Hummer repeats his claim that *Frye* and *Lafler* constitute a significant change in the law, permitting him to now raise a claim that his counsel had been ineffective during plea negotiations. Hummer is correct that, in *Lafler* and *Frye*, the Supreme Court acknowledged a defendant has a right to effective representation by counsel during plea negotiations. See *Lafler*, ___ U.S. at ___, 132 S. Ct. at 1384; *Frye*, ___ U.S. at ___, 132 S. Ct. at 1407-08. But it has long been the law in Arizona that a defendant is entitled to effective representation in the plea context, see *Donald*, 198 Ariz. 406, ¶¶ 9, 14, 10 P.3d at 1198, 1200. Accordingly, any such claim of ineffective assistance of trial counsel is precluded because it could have been raised in a previous post-conviction proceeding, see Ariz. R. Crim. P. 32.1(g), 32.2(a)(3). See also *State v. Poblete*, 227 Ariz. 537, ¶ 8, 260 P.3d 1102, 1105 (App. 2011) (significant change in law “requires some transformative event, a clear break from the past”), quoting *State v. Shrum*, 220 Ariz. 115, ¶ 15, 203 P.3d 1175, 1178 (2009).

¶5 Although review is granted, relief is denied.

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

CONCURRING:

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

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