

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

AUG 15 2013

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2013-0122-PR
)	DEPARTMENT A
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
DANIEL LUGO PEREZ,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20042382001

Honorable Paul E. Tang, Judge

REVIEW GRANTED; RELIEF DENIED

Daniel L. Perez

Florence
In Propria Persona

H O W A R D, Chief Judge.

¶1 Daniel Perez petitions this court for review of the trial court's order dismissing his 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). Perez has not sustained his burden of establishing such abuse here.

¶2 Perez was convicted after a jury trial of two counts of sexual abuse and five counts of sexual assault and sentenced to a total of 57.5 years' imprisonment. On appeal, we affirmed his convictions and sentences as modified, ordering that the sentences for three of his counts of sexual assault be reduced to presumptive, seven-year terms, for a total prison term of 36.5 years. *State v. Perez*, No. 2 CA-CR 2005-0083 (memorandum decision filed Nov. 25, 2008). Before his appeal, he had filed a notice of post-conviction relief, which was stayed pending the outcome of that appeal. After we issued our mandate in February 2009, appointed counsel filed a notice stating he had reviewed the record and found "no tenable issue for review." Despite being afforded numerous extensions, Perez did not file a pro se petition for post-conviction relief, and the trial court dismissed Perez's notice in June 2010. Perez did not seek review of that ruling.

¶3 In January 2012, Perez then filed a notice of post-conviction relief raising, inter alia, claims of actual innocence and newly discovered evidence. The trial court appointed counsel, who subsequently filed a notice stating he had reviewed the record and consulted with Perez but had found no "meritorious issue of law or fact which can be raised as a basis for relief." Perez filed a pro se petition for post-conviction relief arguing the trial court had violated his due process rights by amending the indictment to change several offense dates, that the prosecutor had committed misconduct by allowing perjured testimony, and that certain medical records constituted newly discovered material facts showing that a witness had committed perjury by claiming she had been a nurse for all three victims.

¶4 The trial court summarily denied relief, concluding Perez’s claim regarding the indictment was precluded because he did not raise it in his previous Rule 32 proceeding and, in any event, the claim would not entitle him to relief. It further determined the medical records did not constitute newly discovered material facts because, inter alia, Perez had not shown any likelihood those records would have altered the verdicts or sentences.

¶5 On review, Perez repeats his claim that the amendment to the indictment violated his due process rights.¹ But he fails to address the trial court’s conclusion that this claim is precluded because Perez had the opportunity to raise it in his first post-conviction proceeding by filing a pro se petition and failed to do so. And we find no error in the court’s conclusion. *See* Ariz. R. Crim. P. 32.2(a)(3). Thus, although review is granted, relief is denied.

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Garye L. Vásquez

GARYE L. VÁSQUEZ, Presiding Judge

/s/ Peter J. Eckerstrom

PETER J. ECKERSTROM, Judge

¹Perez lists as an “issue presented for review” the nurse’s purported perjury, but does not develop any argument or otherwise suggest the trial court erred in rejecting that claim. Nor does he argue the court erred in rejecting his claim of prosecutorial misconduct. We therefore do not address these claims. *See* Ariz. R. Crim. P. 32.9(c)(1) (“Failure to raise any issue that could be raised in the petition or the cross-petition for review shall constitute waiver of appellate review of that issue.”); *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (insufficient argument waives claim on review).