

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 16 2013

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	2 CA-CR 2013-0176-PR
	)	DEPARTMENT A
Respondent,	)	
	)	<u>MEMORANDUM DECISION</u>
v.	)	Not for Publication
	)	Rule 111, Rules of
MICHAEL JAMES RICH,	)	the Supreme Court
	)	
Petitioner.	)	
_____	)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF YAVAPAI COUNTY

Cause No. P1300CR20070458

Honorable Celé Hancock, Judge

REVIEW GRANTED; RELIEF DENIED

Sheila Sullivan Polk, Yavapai County Attorney  
By Bill R. Hughes

Prescott  
Attorneys for Respondent

C. Kenneth Ray II, P.C.  
By C. Kenneth Ray II

Prescott  
Attorney for Petitioner

M I L L E R, Judge.

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

¶2 Rich was convicted after a jury trial of conspiracy to transport and transportation of methamphetamine and cocaine for sale, possession of methamphetamine and ecstasy, and possession of drug paraphernalia. He was sentenced to concurrent, mitigated prison terms, the longest of which was five years. This court affirmed his convictions and sentences on appeal. *State v. Rich*, No. 1 CA-CR 08-0239 (memorandum decision filed Feb. 25, 2010).

¶3 Rich filed a notice of post-conviction relief in October 2010 and in February 2011, appointed counsel filed a notice stating he had reviewed the record and could “find no colorable claim which can be raised on [Rich]’s behalf.” Rich filed a pro se petition for post-conviction relief, arguing that his trial counsel had been ineffective, the state had presented perjured testimony at trial, the prosecutor had committed misconduct in recommending his sentence, and the trial court had erred in denying his motion to sever his case from that of his codefendant. The trial court summarily dismissed the petition, and Rich did not seek review of the court’s ruling.

¶4 In October 2011, Rich filed a successive notice of post-conviction relief and the trial court appointed counsel. Counsel filed a petition for post-conviction relief arguing pursuant to Rule 32.1(g) that *State v. Sweeney*, 224 Ariz. 107, 227 P.3d 868 (App. 2010), constituted a significant change in the law relevant to the court’s denial of Rich’s motion to suppress. He additionally claimed that the “failure to bring *Sweeney* . . . to the attention of this Court, the Arizona Court of Appeals . . . , and the Arizona

Supreme Court” was not Rich’s fault because “[h]e was entitled to rely upon the services of counsel provided to him [or] otherwise engaged by him.” The court summarily denied relief, concluding the claim was precluded pursuant to Rule 32.2(a)(2) because he had raised the claim that the trial court had erred in denying his motion to suppress on appeal and this court had rejected it.

¶5 On review, Rich asserts the trial court erred in finding his claim precluded, again asserting that *Sweeney* constitutes a significant change in the law not subject to preclusive effect of Rule 32.2(b). Even assuming, without deciding, that *Sweeney* represents a significant change in the law applicable to Rich’s case, Rich’s claim still fails. Although Rich is correct that a claim pursuant to Rule 32.1(g) may be excepted from the rule of preclusion, before that exception applies, Rich was required to show “why the claim was not stated in the previous petition or in a timely manner.” Ariz. R. Crim. P. 32.2(b). He has not done so. Rich acknowledges that he has had several opportunities to raise an argument based on *Sweeney* since that decision was issued on March 30, 2010. Although Rich challenged the court’s denial of his motion to suppress on appeal, he did not raise an argument based on *Sweeney* in his May 2010 petition for review by the supreme court of this court’s memorandum decision affirming his convictions and sentences. Further, the Notice of No Colorable Claims did not raise *Sweeney* and Rich did not raise it in his pro se petition for post-conviction relief filed in June 2011—more than a year after *Sweeney* was decided.

¶6 Rich repeats his argument that he “cannot be personally faulted” for previously failing to raise an argument based on *Sweeney*. But he cites no authority

suggesting a previously available argument is excepted from the preclusive effect of Rule 32.2 merely because previous counsel chose not make that argument. And in any event, as a pro se litigant in his first post-conviction proceeding, Rich was held to the same standards as an attorney. *See State v. Cornell*, 179 Ariz. 314, 331, 878 P.2d 1352, 1369 (1994). His pro se status therefore does not excuse his failure to raise this claim in his first post-conviction proceeding. And, to the extent Rich implies his appellate counsel and his first Rule 32 counsel were ineffective because neither identified and/or raised an argument based on *Sweeney*, he does not adequately develop or support such a claim, even assuming it would be cognizable. *See State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (insufficient argument waives claim on review). Accordingly, we do not address it further.

¶7 For the reasons stated, although review is granted, relief is denied.

/s/ Michael Miller

MICHAEL MILLER, Judge

CONCURRING:

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

/s/ Garye L. Vásquez

GARYE L. VÁSQUEZ, Presiding Judge