

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 31 2013

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2013-0181-PR
)	DEPARTMENT B
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
JUAN MANUEL RODRIGUEZ,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF MARICOPA COUNTY

Cause No. CR2010166710003DT

Honorable Kristin Hoffman, Judge

REVIEW GRANTED; RELIEF DENIED

William G. Montgomery, Maricopa County Attorney
By Linda Van Brakel

Phoenix
Attorneys for Respondent

Juan Manuel Rodriguez

Buckeye
In Propria Persona

K E L L Y, Presiding Judge.

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

¶2 Rodriguez pled guilty to armed robbery and, in June 2011, the trial court sentenced him to a six-year prison term. In February 2012, several months past the ninety-day deadline provided in Rule 32.4, Rodriguez filed a form notice of post-conviction relief indicating he was raising claims of newly discovered material facts, actual innocence, and his failure to timely file the notice was without fault on his part. He did not offer any explanation of or basis for those claims, instead attaching to his notice an “opening brief” arguing his trial counsel had been ineffective during plea negotiations and at sentencing. The trial court dismissed Rodriguez’s notice, stating he had not complied with Rule 32.2(b) because he had not provided “any facts, argument, or law to support” his claims, and his claim of ineffective assistance of counsel could not be raised in an untimely notice. Rodriguez then filed a motion for rehearing stating he had been “relying on court appointed counsel to file the notice/petition for [his] Rule 32” and he had filed the notice “upon [his] finding out counsel” had not done so. The court denied that motion, noting Rodriguez had “received and signed [a] Notice of Rights of Review After Conviction and Procedure on July 21, 2011.”

¶3 On review, Rodriguez raises various claims related to his plea and sentence, and argues that his trial counsel had been ineffective. He additionally repeats that his failure to timely file his notice of post-conviction relief “was not his fault” because he was “depend[e]nt on court appointed counsel for this filing” and notes that the notice

form provided to him by the Department of Corrections contains “no time fram[e]s” explaining when the notice was to have been filed.

¶4 We can identify no abuse of discretion in the trial court’s dismissal of Rodriguez’s untimely notice.¹ A claim made pursuant to Rule 32.1(f) that a pleading defendant’s failure to file a notice of post-conviction relief “was without fault on the defendant’s part” may be raised in an untimely post-conviction proceeding. *See* Ariz. R. Crim. P. 32.2(b), 32.4(a). But a notice making such a claim is nonetheless subject to summary dismissal if the defendant does not provide “meritorious reasons . . . substantiating the claim and indicating why the claim was not stated . . . in a timely manner.” Ariz. R. Crim. P. 32.2(b). Despite the fact that the form notice used by Rodriguez expressly required him to “[s]tate the facts that support the claim and the reasons for not raising the claim . . . in a timely manner,” Rodriguez left that portion of the form blank, and he did not provide the necessary information in his attached materials. Thus, the court was required to summarily dismiss his notice pursuant to Rule 32.2(b). And the court was not required to consider Rodriguez’s belated attempt to comply with Rule 32.2(b) in his motion for rehearing, even if we concluded his cursory and unsupported explanation that he had believed counsel would do so was sufficient. *See State v. Ramirez*, 126 Ariz. 464, 467, 616 P.2d 924, 927 (App. 1980) (court not required to address argument first raised in motion for rehearing); *see also* Ariz. R. Crim.

¹We therefore need not address the various substantive claims Rodriguez has raised below or on review.

P. 32.9(a); *State v. Stice*, 23 Ariz. App. 97, 99, 530 P.2d 1130, 1132 (1975) (“Petitioner has the burden of establishing the absence of any fault on his part.”).

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

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

CONCURRING:

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

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge