

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

SANTIAGO ALBERTO ALTAMIRANO SR.,
Petitioner.

No. 2 CA-CR 2013-0213-PR
Filed November 7, 2013

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

See Ariz. R. Sup. Ct. 111(c); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Pima County
Nos. CR20040875, CR20042130, CR20044278 (Consolidated)
The Honorable Kyle Bryson, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Barbara LaWall, Pima County Attorney
by Jacob R. Lines, Deputy County Attorney, Tucson

Counsel for Respondent

Santiago Alberto Altamirano, Florence

In Propria Persona

STATE v. ALTAMIRANO
Decision of the Court

MEMORANDUM DECISION

Chief Judge Howard authored the decision of the Court, in which Presiding Judge Vásquez and Judge Miller concurred.

H O W A R D, Chief Judge:

¶1 Petitioner Santiago Altamirano Sr. seeks review of the trial court's order denying his petition for a writ of habeas corpus, which the court deemed a petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P. "We will not disturb a trial court's ruling on a petition for post-conviction relief absent a clear abuse of discretion." *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Altamirano has not sustained his burden of establishing such abuse here.

¶2 Pursuant to a plea agreement, Altamirano was convicted in three separate cause numbers of aggravated driving under the influence (DUI) while his license was suspended, the latter two offenses having been committed with two prior DUI convictions. The trial court imposed presumptive, consecutive and concurrent terms totaling twenty years' imprisonment. Altamirano sought and was denied post-conviction relief three times, and this court granted review, but denied relief, on each occasion. *State v. Altamirano*, No. 2 CA-CR 2010-0027-PR (memorandum decision filed June 25, 2010); *State v. Altamirano*, No. 2 CA-CR 2008-0395-PR (memorandum decision filed Apr. 29, 2009); *State v. Altamirano*, No. 2 CA-CR 2006-0161-PR (memorandum decision filed Jan. 31, 2007).

¶3 In November 2012, Altamirano filed a petition for writ of habeas corpus asserting that trial counsel had been ineffective. The trial court properly treated the petition as one for post-conviction relief, *see* Ariz. R. Crim. P. 32.3, and denied relief.

¶4 On review, Altamirano repeats his claim that counsel was ineffective and asserts the claim is exempt from preclusion because it is based on a significant change in the law and because

STATE v. ALTAMIRANO
Decision of the Court

the claim is of sufficient constitutional magnitude that a personal waiver of the claim was required. Altamirano did not, however, expressly argue the claim was exempt from preclusion on either of these grounds below. Any such argument is therefore waived. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (appellate court will not consider arguments not raised in or ruled on by trial court); *see also* Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review shall contain “[t]he issues which were decided by the trial court and which the defendant wishes to present” for review).

¶5 To the extent that Altamirano’s argument below could be read to encompass a claim of a significant change in the law based on his citation to the United States Supreme Court’s decision in *Missouri v. Frye*, ___ U.S. ___, 132 S. Ct. 1399 (2012), any such argument fails. In companion cases decided in 2012, the Court acknowledged a defendant has a right to effective representation by counsel during plea negotiations. *See Lafler v. Cooper*, ___ U.S. at ___, 132 S. Ct. 1376, 1384 (2012); *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 State v. Donald*, 198 Ariz. 406, ¶¶ 9, 14, 10 P.3d 1193, 1198, 1200 (App. 2000).

¶6 Therefore, as the trial court correctly concluded, any such claim could have been raised in a previous collateral proceeding and is precluded. *See* Ariz. R. Crim. P. 32.1(g), 32.2(a); *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). Indeed, Altamirano raised a claim of ineffective assistance in his first Rule 32 proceeding. *See Swoopes*, 216 Ariz. 390, ¶¶ 23-25, 166 P.3d at 952-53 (when any claim of ineffective assistance raised in previous proceeding, subsequent claim precluded).

¶7 For these reasons, although we grant the petition for review, we deny relief.