

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

OCT 22 2013

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2013-0217-PR
)	DEPARTMENT B
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
FERNANDO RODRIGUEZ GUTIERREZ,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20093864001

Honorable James E. Marner, Judge

REVIEW GRANTED; RELIEF DENIED

Fernando R. Gutierrez

Florence
In Propria Persona

ESPINOSA, Judge.

¶1 Petitioner Fernando Gutierrez seeks review of the trial court's summary dismissal of his successive proceeding for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. For the following reasons, we grant review but deny relief.

¶2 Pursuant to a plea agreement, Gutierrez was convicted of preparatory offenses involving sexual conduct with a minor under fifteen and child molestation, both second-degree, dangerous crimes against children. The trial court sentenced him to a

presumptive, ten-year prison term, to be followed by lifetime probation. In February 2010, Gutierrez initiated his first Rule 32 proceeding, in which appointed counsel challenged monetary assessments imposed by the court. In a second proceeding, Rule 32 counsel notified the court she could find no colorable claim to raise under Rule 32. The court granted Gutierrez leave to file a pro se petition, and, at Gutierrez's request, granted him an extension of time in which to do so. When Gutierrez failed to file a petition by the extended deadline, the court dismissed the proceeding in January 2011.

¶3 More than a year later, Gutierrez filed a third notice of post-conviction relief in which he claimed trial counsel had rendered ineffective assistance during the plea process. In the pro se petition that followed in May 2012, he appears also to have alleged ineffective assistance of Rule 32 counsel and sentencing error. He also claimed his post-arrest statements to detectives had been involuntary. The trial court found these claims precluded by his failure to raise them in his previous Rule 32 proceedings. Gutierrez did not petition this court for review of that decision, but, nearly two months later, filed an untimely motion for reconsideration. *See* Ariz. R. Crim. P. 32.9(a) (motion for rehearing alleging error to be filed “within fifteen days after the ruling of the court”).

¶4 In March 2013, Gutierrez filed a fourth petition for post-conviction relief in which he appeared to raise the same claims asserted in his third petition. He stated he had just been informed by the Pima County Superior Court that his May 2012 petition “had been lost” and that no decision had been entered in that proceeding. The trial court dismissed Gutierrez's fourth petition, noting it contained “the same claims” already found precluded by waiver in August 2012 and finding no basis to reconsider that ruling.

¶5 In his petition for review, Gutierrez acknowledges his fourth post-conviction relief petition contained the same claims he alleged in his third proceeding,

asserting this was “due to the fact the court had misplaced the third” petition. The correspondence Gutierrez attaches to his petition does not support this claim, however. Much of it predates the filing of his May 2012 petition or the trial court’s August 2012 ruling. Moreover, the clerk of court’s inability to respond to Gutierrez’s broadly worded request for copies of his “Discovery” does not suggest his third petition for post-conviction relief had been “misplaced.” Instead, the trial court’s detailed denial of relief in August 2012, and Gutierrez’s October 2012 motion to reconsider that ruling, belie Gutierrez’s argument on review.

¶6 The trial court did not abuse its discretion in summarily dismissing Gutierrez’s petition on the ground that his claims have been waived and are precluded pursuant to Rule 32.2(a)(3). *See State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006) (summary denial reviewed for abuse of discretion). Accordingly, although review is granted, relief is denied.

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

CONCURRING:

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

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