

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 13 2013

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2013-0220-PR
)	DEPARTMENT A
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
SIMON MARTINEZ-ROMERO,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF MARICOPA COUNTY

Cause No. CR2004020935001DT

Honorable Susan M. Brnovich, Judge

REVIEW GRANTED; RELIEF DENIED

The Nolan Law Firm, P.L.L.C.
By Cari McConeghy Nolan

Mesa
Attorneys for Petitioner

V Á S Q U E Z, Presiding Judge.

¶1 Petitioner Simon Martinez-Romero¹ seeks review of the trial court's order summarily dismissing his notice of post-conviction relief filed pursuant to Rule 32, Ariz.

¹Although many of the pleadings in the record use the name "Victoriano Mendoza," at sentencing the trial court clarified that Simon Martinez-Romero is petitioner's true name.

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). We find no abuse here.

¶2 In 2004, Martinez-Romero pled guilty to two counts of armed robbery and, in 2005, he was sentenced to concurrent, aggravated 16.5-year prison terms for each offense. The plea agreement states that Martinez-Romero “understand[s] and agree[s] that by entering into a plea agreement, [he] consents to judicial factfinding by a preponderance of the evidence as to any aspect or enhancement of sentence,” and that he agrees to waive and give up his right “to a trial by jury to determine . . . any fact used to impose a sentence within the range” provided in the plea agreement, which included the aggravated prison term. In 2012, more than seven years after he was sentenced, counsel filed a notice of post-conviction relief on Martinez-Romero’s behalf. Therein, he argues (1) the untimely filing was not Martinez-Romero’s fault; (2) his sentences were improper; (3) his right to a jury trial, as established in *Blakely v. Washington*, 542 U.S. 296 (2004), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), was violated; and, (4) he was denied the effective assistance of counsel because he was not provided with a Rule 32 attorney² and because trial counsel had failed to advise him he was waiving his right to require the state to prove aggravating factors to a jury beyond a reasonable doubt. Martinez-Romero also asserted his sentencing claim is of sufficient constitutional magnitude such that it only can be waived knowingly, voluntarily, and intelligently by him personally.

²The record does not show, nor does Martinez-Romero assert that he ever requested counsel be appointed to represent him in his post-conviction proceedings.

¶3 Although the trial court found Martinez-Romero’s notice untimely, it nonetheless addressed on the merits his claim that he did not knowingly waive his right to have a jury determine aggravating factors beyond a reasonable doubt, finding that he had, indeed, waived that right.³ On review, Martinez-Romero essentially restates the arguments he raised in his notice of post-conviction relief. However, nothing in Martinez-Romero’s petition for review persuades us the court abused its discretion in dismissing his notice as untimely. *See* Ariz. R. Crim. P. 32.4(a) (“In a Rule 32 of-right proceeding, the notice [of post-conviction relief] must be filed within ninety days after the entry of judgment and sentence Any notice not timely filed may only raise claims pursuant to Rule 32.1(d), (e), (f), (g) or (h).”). In addition, Rule 32.2(b) requires summary dismissal of an untimely notice of post-conviction relief that fails to include “meritorious reasons . . . why the claim was not stated . . . in a timely manner.”

¶4 In filing Martinez-Romero’s notice of post-conviction relief, counsel urged the trial court to consider the untimely filing pursuant to Rule 32.1(f), which excuses “failure to file a notice of post-conviction relief of-right . . . within the prescribed time” when that failure “was without fault on the defendant’s part.” Counsel argued Martinez-Romero should not be held accountable for the late filing “because [Martinez-Romero]

³A defendant can waive his Sixth Amendment right to have a jury, rather than the trial court, determine any fact, other than a prior conviction, that increases the defendant’s statutory maximum sentence, *see Apprendi*, 530 U.S. at 488-90, by “stipulating to ‘the relevant facts or consent[ing] to judicial factfinding,’” *State v. Price*, 217 Ariz. 182, ¶ 10, 171 P.3d 1223, 1226 (2007), *quoting Blakely*, 542 U.S. at 310 (alteration in *Price*).

was never made aware of his right [to a finding of aggravating factors by a jury beyond a reasonable doubt] until after his family raised sufficient money to hire an attorney to review the record” and because Martinez-Romero “is Spanish speaking only.”

¶5 In its ruling dismissing the notice of post-conviction relief, the trial court correctly found “[t]he reasons stated by the defendant are insufficient to explain why an untimely notice of post-conviction relief filed seven years after sentencing should be treated as timely filed.” The record supports the court’s reasoning, as set forth below:

The defendant had a Spanish speaking interpreter to assist the defendant and the defendant acknowledged his rights and responsibilities to file a notice of post-conviction relief within 90 days of the date of sentencing. The fact that his family was only recently able to hire a private attorney for the defendant is completely irrelevant considering the fact that the defendant would have had an attorney appointed to represent him for no cost had he filed a timely notice of post-conviction relief.

Moreover, the exception in Rule 32.1(f) does not permit a defendant to file an untimely claim because he only recently learned of the legal basis for the claim. *See State v. Poblete*, 227 Ariz. 537, ¶ 7, 260 P.3d 1102, 1104-05 (App. 2011) (rejecting claim Rule 32.1(f) permits untimely petition on basis defendant only recently learned plea had immigration consequences).

¶6 As Martinez-Romero has acknowledged, his notice was untimely. And, because his remaining claims do not fall within Rule 32.1(d), (e), (f), (g), or (h), no exception to the time limit of Rule 32.4(a) applies. *See Ariz. R. Crim. P. 32.2(b)*. Implicit in the trial court’s finding that Martinez-Romero had “failed to state any colorable claims for post-conviction relief that can be considered in a timely or

successive Rule 32 proceeding” is the court’s finding that Martinez-Romero failed to provide “meritorious reasons . . . substantiating” his claim that his untimely filing was without fault on his part, as required under Rule 32.2(b). *See* Ariz. R. Crim. P. 32.1(f). Consequently, the court did not err when it dismissed Martinez-Romero’s notice of post-conviction relief as untimely. Finally, although the court elected to address the waiver issue on the merits, based on its proper ruling that Martinez-Romero’s notice was untimely, it was not required to do so.

¶7 For all of the reasons stated, we grant review but deny relief.

/s/ Garye L. Vásquez

GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

/s/ Peter J. Eckerstrom

PETER J. ECKERSTROM, Judge