

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

SEP 13 2013

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2013-0259-PR
)	DEPARTMENT B
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
MICHAEL CHRIS BOLTER,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF MARICOPA COUNTY

Cause No. CR2003006994001DT

Honorable Robert E. Miles, Judge

REVIEW GRANTED; RELIEF DENIED

Michael C. Bolter

Buckeye
In Propria Persona

ECKERSTROM, Judge.

¶1 Petitioner Michael Bolter seeks review of the trial court’s order denying his petition for post-conviction relief, filed 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). Bolter has not sustained his burden of establishing such abuse here.

¶2 After a 2003 jury trial, Bolter was convicted of weapons misconduct, unlawful flight from a law enforcement vehicle, and two counts each of aggravated assault and disorderly conduct. The trial court imposed a combination of concurrent and consecutive, enhanced, presumptive sentences totaling 20.7 years' imprisonment. Bolter's convictions and sentences were affirmed on appeal. *State v. Bolter*, No. 1 CA-CR 05-0300 (memorandum decision filed Mar. 30, 2006).

¶3 In March 2012, Bolter initiated a proceeding for post-conviction relief, raising claims of sentencing error and ineffective assistance of counsel. The trial court concluded that pursuant to Rule 32.4(a), the claims could not be raised in an untimely petition and dismissed Bolter's notice. In May 2012, Bolter filed a second notice of post-conviction relief, raising the same claims. The court again dismissed the notice, concluding Bolter's claims were precluded.

¶4 On review, Bolter reasserts his claim of sentencing error and alleges the trial court erred in dismissing his notices. He states he "can no where [sic] find in state statute or Rule 32 the authorization for the Court to summarily dismiss a Notice" of post-conviction relief. And, citing Rule 32.4, he claims the court was required to appoint counsel, order transcript preparation, and allow him to file a petition. Bolter cannot now, however, challenge the dismissal of his first notice of post-conviction relief, as that proceeding became final when Bolter failed to timely file a petition for review from the court's final ruling dismissing that notice. *See* Ariz. R. Crim. P. 32.9(c); *cf. State v. Diaz*, 228 Ariz. 541, ¶¶ 4-5, 269 P.3d 717, 719 (App. 2012) (stating petitioner could not challenge result of final, first proceeding in second proceeding).

¶5 As to Bolter’s second notice, Bolter claimed in a supporting affidavit that he had only recently become aware “that the sentence imposed . . . is in fact an illegal sentence,” apparently asserting he was entitled to relief under Rule 32.1(e) based on this ‘newly discovered evidence.’ But, Rule 32.1(e) creates an exception to the rule of preclusion based only on “newly discovered material facts” not new legal theories of which a defendant previously was unaware. As the trial court correctly concluded, Bolter’s claims properly fall under Rule 32.1(a) and (b), and because the same claims were raised in his first proceeding, which was dismissed, they are precluded. *See* Ariz. R. Crim. P. 32.2(a)(2),(3). Bolter’s notice did not establish that his claims fall under any exception to preclusion. We therefore cannot say the court abused its discretion in dismissing his notice. Thus, although we grant the petition for review, relief is denied.

/s/ Peter J. Eckerstrom

PETER J. ECKERSTROM, Judge

CONCURRING:

/s/ Virginia C. Kelly

VIRGINIA C. KELLY, Presiding Judge

/s/ Philip G. Espinosa

PHILIP G. ESPINOSA, Judge