IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

LEWIS EDWARD VICTERY,
Petitioner.

No. 2 CA-CR 2015-0196-PR
Filed July 1, 2015

Petition for Review from the Superior Court in Coconino County
No. CR20040185
The Honorable Mark R. Moran, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

David Rozema, Coconino County Attorney
By Heather Mosher, Deputy County Attorney, Flagstaff
Counsel for Respondent

Lewis E. Victery, Eloy
In Propria Persona

MEMORANDUM DECISION

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

H O W A R D, Judge:

¶1 Petitioner Lewis Victery seeks review of the trial court's order denying his untimely, successive 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). Victery has not sustained his burden of establishing such abuse here.

¶2 After a jury trial, Victery was convicted of four counts each of sexual conduct with a minor, sexual assault, child molestation, and kidnapping of a minor. Victery's convictions and sentences were affirmed on appeal. *State v. Victery*, No. 1 CA-CR 05-0483 (memorandum decision filed Mar. 23, 2006). He thereafter sought and was denied post-conviction relief. His petitions for review to this court, *see State v. Victery*, No. 1 CA-CR 07-0570 PRPC (memorandum decision filed Mar. 18, 2008), and our supreme court were denied.

¶3 In October 2012, Victery filed a second notice of post-conviction relief. He argued newly discovered evidence entitled him to relief and he had received ineffective assistance of trial, appellate, and Rule 32 counsel. Citing *State v. Bennett*, 213 Ariz. 562, 146 P.3d 63 (2006), he argued that because the same attorney had represented him on appeal and in his first Rule 32 proceeding, his claim that he received ineffective assistance of counsel on appeal was not precluded. The trial court summarily denied relief, and denied Victery's subsequent motion for rehearing as well.

¶4 On review, Victery argues the trial court abused its discretion in rejecting his request for appointment of new counsel to raise a claim of ineffective assistance of appellate counsel, in "proceeding with a post-conviction relief review without a complete and accurate record of appeal," by concluding he had no right to effective assistance of counsel in his first Rule 32 proceeding, by concluding his claim of ineffective assistance of trial counsel was precluded, and by rejecting his claim of newly discovered evidence.

¶5 We first address Victery's assertion that the trial court proceeded to consider his petition for post-conviction relief "without a complete and accurate record of appeal." This claim appears to arise from the state's request for an extension of time in which to file its response to Victery's petition for post-conviction relief. In that document, the attorney for the state in the Coconino County Attorney's Office indicated that "much of the State's file was sent to the Attorney General's office during the Appeals process" and he was therefore "collect[ing] copies of pleading from both the Superior Court and the Court of Appeals in order to recreate the appellate record." This statement does not, however, as Victery apparently believes, suggest that the court's records were sent to the Attorney General's office, but rather that the County Attorney's Office file had been forwarded to that office for Victery's appeal. Nothing in the record before us suggests that the trial court did not have a correct, complete record before it in ruling on Victery's petition.

¶6 Further, Victery raised or could have raised a claim of ineffective assistance of trial counsel in his first proceeding for post-conviction relief. Therefore, we agree with the trial court that any such claim is precluded in this successive proceeding. *See* Ariz. R. Crim. P. 32.2(a)(2),(3); *Swoopes*, 216 Ariz. 390, ¶¶ 23-24, 166 P.3d at 952-53.

¶7 Concerning Victery's claim that he received ineffective assistance of appellate counsel, we likewise agree generally with the trial court that our supreme court's holding in *Bennett* is more limited than Victery urges. In *Bennett*, the court concluded that because an attorney cannot raise a claim of his or her own ineffectiveness, Rule 32.2(a)(3) does not preclude a claim of

ineffective assistance of appellate counsel when raised in a second petition for post-conviction relief if he or she was represented by the same attorney on appeal and in the first Rule 32 proceeding. 213 Ariz. 562, ¶¶ 1, 16, 146 P.3d at 65, 67. But *Bennett* does not apply here because Victery's second notice of post-conviction relief was untimely—it was filed some four years after review was denied in his first proceeding; accordingly, Victery may only raise claims pursuant to Rule 32.1(d) through (h). *See* Ariz. R. Crim. P. 32.4(a). And Victery has not established his claim arises under one of those subsections. Thus, although the claim is not precluded, it is barred as untimely, and the trial court could have rejected Victery's claims relating to appellate counsel's performance on that ground alone. *Cf. State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984) (appellate court will affirm trial court's ruling if result legally correct for any reason).

¶8 The trial court also was correct in ruling that, as a non-pleading defendant, Victery was not entitled to effective representation in his first Rule 32 proceeding. *See State v. Escareno–Meraz*, 232 Ariz. 586, ¶ 4, 307 P.3d 1013, 1014 (App. 2013) (non-pleading defendants "have no constitutional right to counsel in post-conviction proceedings"). The United States Supreme Court's decision in *Martinez v. Ryan*, ___ U.S. ___, 132 S.Ct. 1309 (2012), on which Victery relies, does not "alter established Arizona law" on that point. *Escareno–Meraz*, 232 Ariz. 586, ¶ 6, 307 P.3d at 1014.

¶9 Finally, the trial court correctly addressed Victery's claim of newly discovered evidence in a detailed and extensive manner, and we therefore need not repeat its analysis here. Rather we adopt that portion of its decision. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993) (when trial court has correctly ruled on issues raised "in a fashion that will allow any court in the future to understand the resolution[, n]o useful purpose would be served by this court rehashing the trial court's correct ruling in a written decision").

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