

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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THE STATE OF ARIZONA,  
*Respondent,*

*v.*

JESUS FEDERICO,  
*Petitioner.*

No. 2 CA-CR 2015-0256-PR  
Filed October 26, 2015

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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NOT FOR PUBLICATION  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)(1); Ariz. R. Crim. P. 31.24.*

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Petition for Review from the Superior Court in Pima County  
No. CR20130409001  
The Honorable Christopher Browning, Judge

**REVIEW GRANTED; RELIEF DENIED**

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COUNSEL

Barbara LaWall, Pima County Attorney  
By Jacob R. Lines, Deputy County Attorney, Tucson  
*Counsel for Respondent*

Jesus Federico, Florence  
*In Propria Persona*

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**MEMORANDUM DECISION**

Presiding Judge Vásquez authored the decision of the Court, in which Judge Howard and Judge Kelly<sup>1</sup> concurred.

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V Á S Q U E Z, Presiding Judge:

¶1 Jesus Federico seeks review of the trial court’s order summarily dismissing his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that order unless the court clearly abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Federico has not met his burden of demonstrating such abuse here.

¶2 Federico pled guilty to promoting prison contraband and admitted he had an historical prior felony conviction. The trial court sentenced Federico as a category-two repetitive offender, imposing a slightly aggravated 2.75-year prison term, finding as aggravating factors Federico’s “three prior felony convictions and . . . the fact that [he] committed the . . . offense within a month” of his previous sentencing for promoting prison contraband. *See* A.R.S. §§ 13-703(B), (I); 13-2505(F).

¶3 Federico sought post-conviction relief, and appointed counsel filed a notice stating she had reviewed the record and found no meritorious claims to raise in a post-conviction proceeding. The trial court granted Federico leave to file a pro se petition, due January 16, 2014. In May 2015, Federico filed a notice of and petition for post-conviction relief, contending his trial counsel had been ineffective for failing to assert that it was improper for the court to sentence him as a category-two repetitive offender and to aggravate

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<sup>1</sup>The Hon. Virginia C. Kelly, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and our supreme court.

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his sentence. Federico argued the court was not permitted to rely on his admitted prior conviction to both aggravate and enhance his sentence or rely on his other prior convictions in sentencing because he did not admit those convictions as part of his plea. Federico further argued his claims were not precluded by Rule 32.2 because any waiver was not knowing, voluntary, and intelligent and because his Rule 32 counsel was ineffective for failing to raise those claims.

¶4 In its ruling, the trial court first noted Federico’s petition was “untimely” because it had been filed well past the deadline the court had imposed for Federico to file a pro se petition and, thus, the court could summarily dismiss the petition pursuant to Rule 32.2(b). The court nonetheless addressed the merits of Federico’s claims, concluding that Federico had failed to establish counsel was ineffective because the plea agreement reflected the correct sentencing range and that Federico had been sentenced properly. The court then summarily dismissed the petition “pursuant to Rule 32.2(b).” This petition for review followed.

¶5 On review, Federico repeats the arguments raised below, including that his claims are not subject to preclusion pursuant to Rule 32.2. It appears the trial court treated his petition as part of Federico’s first post-conviction proceeding, which the court never had dismissed. But, if that were the case, Rule 32.2(b) would not apply – that provision allows the dismissal of a notice of post-conviction relief, not of an untimely petition. An untimely petition is instead subject to dismissal pursuant to A.R.S. § 13-4234(G). Federico, however, filed a new notice of post-conviction relief, thereby initiating a new post-conviction proceeding. *See* Ariz. R. Crim. P. 32.4. Thus, the court was nonetheless correct to rely on Rule 32.2 in evaluating Federico’s claims.

¶6 But we need not decide whether Federico’s claims are precluded pursuant to Rule 32.2 because we agree with the trial court that they are without merit.<sup>2</sup> “To state a colorable claim of

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<sup>2</sup>Nor need we address whether the notice was timely filed pursuant to Rule 32.4(a).

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ineffective assistance of counsel,” Federico was required to “show both that counsel’s performance fell below objectively reasonable standards and that this deficiency prejudiced [him].” *State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006), citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

¶7 To the extent the trial court did so here, it was not prohibited from relying on the prior felony conviction Federico admitted as part of his plea colloquy to both enhance and aggravate his sentence. See *State v. Bonfiglio*, 228 Ariz. 349, ¶ 21, 266 P.3d 375, 380 (App. 2011); *State v. Ritacca*, 169 Ariz. 401, 403, 819 P.2d 987, 989 (App. 1991). And Federico’s plea agreement permitted the court to find additional aggravating factors by a preponderance of the evidence without regard to the rules of evidence. Thus, the court was fully entitled to rely on the prior convictions apparently listed in Federico’s presentence report in aggravating his sentence.<sup>3</sup> Federico was sentenced properly in accordance with his plea agreement, and he has identified no meritorious basis for counsel to have objected to that sentence. Accordingly, he has demonstrated neither deficient performance by counsel nor resulting prejudice. See *Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d at 68. Thus, the court did not err in summarily dismissing his petition for post-conviction relief.<sup>4</sup>

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<sup>3</sup>Federico waived preparation of a presentence report and agreed the trial court could rely on the presentence report from Federico’s prior conviction for promoting prison contraband. That report does not appear in this record. However, Federico does not argue the presentence report contained insufficient information to support the court’s findings, only that the court was not permitted to find as aggravating factors any prior conviction Federico did not expressly admit. But that argument fails because, as we have noted, Federico agreed in his plea agreement that the court could find additional aggravating factors.

<sup>4</sup>We do not address Federico’s claim, raised for the first time on review, that counsel was ineffective “in failing to inform [him] of the effect of a presentence report.” See *State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980); see also Ariz. R. Crim. P.

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¶8 We grant review but deny relief.

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32.9(c)(1)(ii) (petition for review shall contain “issues which were decided by the trial court and which the defendant wishes to present to the appellate court for review”).