IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

DANIEL LEE BAKER,
Petitioner.

No. 2 CA-CR 2015-0343-PR
Filed December 9, 2015

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NOT FOR PUBLICATION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.

Petition for Review from the Superior Court in Pima County
No. CR20042647
The Honorable Howard Fell, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

COUNSEL

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

Daniel Lee Baker, Florence
In Propria Persona

MEMORANDUM DECISION

Presiding Judge Miller authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Espinosa concurred.

M I L L E R, Presiding Judge:

¶1 Daniel Baker seeks review of the trial court's order denying his successive and untimely 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. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Baker has not met his burden of demonstrating such abuse here.

¶2 After a jury trial, Baker was convicted of aggravated driving while under the influence of an intoxicant (DUI) while his license was suspended, revoked, or restricted; aggravated driving with an alcohol concentration (AC) of .08 or greater while his license was suspended, revoked, or restricted; aggravated DUI with two or more prior DUI convictions within the sixty months preceding the offense; aggravated DUI with an AC of .08 or greater with two or more prior DUI convictions during the sixty months preceding the offense; and criminal damage. He was sentenced to concurrent prison terms, the longer of which are ten years. We affirmed his convictions and sentences on appeal. *State v. Baker*, No. 2 CA-CR 2005-0066 (memorandum decision filed Feb. 15, 2007). Baker then sought and was denied post-conviction relief relating to Rule 11 competency and sentence mitigation, and we denied relief on review. *State v. Baker*, No. 2 CA-CR 2009-0388-PR (memorandum decision filed Mar. 26, 2010).

¶3 In March 2014, Baker again sought post-conviction relief, arguing based in part on *Missouri v. McNeely*, ___ U.S. ___, 133 S. Ct. 1552 (2013), that the trial court erred in denying his motion to suppress test results stemming from a warrantless blood draw, and that *McNeely* constitutes a significant change in the law. The trial

court summarily denied relief. It determined Baker's claim that the motion to suppress should have been granted was precluded because it could have been raised on appeal and *McNeely* did not apply to his case. This petition for review followed.

¶4 On review, Baker again argues the blood draw was improper and he is entitled to relief under *McNeely*, which he characterizes as a "new decision" applicable to his case. We agree with the trial court that Baker cannot challenge the denial of his motion to suppress in this successive and untimely proceeding. *See* Ariz. R. Crim. P. 32.2(a), 32.4(a). Although Baker suggests he can raise this claim because any error was fundamental, he is mistaken; fundamental error is subject to preclusion. *See Swoopes*, 216 Ariz. 390, ¶ 42, 166 P.3d at 958. And we do not address Baker's argument, made for the first time in his petition for review, that appellate counsel was ineffective for failing to raise the argument on appeal. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (declining to address issues not presented to trial court); *see also* Ariz. R. Crim. P. 32.9(c)(1)(ii).

¶5 Baker's claim that *McNeely* is a significant change in the law, however, may be raised in an untimely proceeding like this one. *See* Ariz. R. Crim. P. 32.1(g); 32.4(a). In *McNeely*, the United States Supreme Court concluded "the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant." ___ U.S. at ___, 133 S. Ct. at 1568. As the trial court correctly pointed out, however, Baker's blood draw was not permitted due to an exigency; indeed, in the ruling denying Baker's motion to suppress at trial, the court determined no exigency had existed and officers had ample time to procure a warrant. The court instead denied the motion to suppress because Baker's blood sample had not been obtained as a result of state action. Although Baker now seeks to challenge that conclusion, *McNeely* does not address that issue and the time for Baker to challenge the court's determination has long passed. Thus, we agree with the trial court that *McNeely* does not apply to Baker's case and does not entitle him to relief under Rule 32.1(g).

¶6 Although we grant review, we deny relief.