

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

AUSTIN JAMES BONFIGLIO,
Petitioner.

No. 2 CA-CR 2016-0087-PR
Filed May 9, 2016

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NOT FOR PUBLICATION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 Maricopa County
No. CR2009122982001SE
The Honorable Lisa Ann Vandenberg, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

Austin Bonfiglio, Tucson
In Propria Persona

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MEMORANDUM DECISION

Judge Staring authored the decision of the Court, in which Presiding Judge Howard and Judge Espinosa concurred.

STARING, Judge:

¶1 Austin Bonfiglio seeks review of the trial court’s ruling summarily dismissing his successive 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). Bonfiglio has not met his burden of demonstrating such abuse here.

¶2 After a jury trial, Bonfiglio was found guilty of aggravated assault and sentenced to a thirteen-year prison term. *State v. Bonfiglio*, 231 Ariz. 371, ¶¶ 2-3, 295 P.3d 948, 949 (2013). His conviction and sentence were affirmed on appeal. *State v. Bonfiglio*, 228 Ariz. 349, ¶ 25, 266 P.3d 375, 381 (App. 2011), *aff’d*, 231 Ariz. 371, 295 P.3d 948 (2013). Bonfiglio sought post-conviction relief, and appointed counsel filed a notice stating he had reviewed the record but found no meritorious claims to raise in a Rule 32 proceeding. Bonfiglio filed a pro se petition, which the trial court summarily denied on October 3, 2012. Bonfiglio’s petition for review was dismissed as untimely on February 13, 2013.

¶3 In March 2013, Bonfiglio filed a motion seeking an extension of time to file a petition for review, explaining he had initially filed that request in the court of appeals and had been instructed to seek relief in the trial court. He also filed a motion seeking leave to file “a delayed petition for review,” stating that only his advisory counsel had received the trial court’s order denying his petition, and that he had not learned his petition had been denied until February 5, 2013. The trial court denied Bonfiglio’s extension motion, but did not expressly address his request to file a delayed petition for review.

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¶4 In June 2013, Bonfiglio filed another motion seeking permission to file a delayed petition for review. In July, he filed two letters, both titled as a “Request of Actions taken on 1st or 2nd Requests to file a delayed Petition for Review,” and asking the trial court whether he would “be allowed to” file a petition for review. The court declined to rule on Bonfiglio’s latest request to file a delayed petition for review, stating—possibly in error¹—that the motion had been “addressed to the Court of Appeals.” The court, however, ordered the state to respond to Bonfiglio’s letters, which the state failed to do.

¶5 Bonfiglio then filed a petition for post-conviction relief claiming, pursuant to Rule 32.1(g), that *Martinez v. Ryan* ___ U.S. ___, 132 S. Ct. 1309 (2012), was a significant change in the law, and that his trial counsel had been “prejudicially ineffective in the plea bargain process,” causing him to “make an uninformed decision to reject a plea agreement.” The trial court summarily dismissed the petition. The court observed that *Martinez* did not apply and any claim that counsel was ineffective in advising him whether to accept or reject a plea offer was untimely and could have been raised in Bonfiglio’s first Rule 32 proceeding. In the order dismissing Bonfiglio’s petition, the court “clarifie[d]” that it had denied his request in the July letters, noting that “it is unknown at this time why a Minute Entry reflecting such was not issued and/or in the electronic record.” This petition for review followed.

¶6 On review, Bonfiglio argues the trial court erred in finding his ineffective assistance claim precluded, asserting he is

¹The trial court stated the June motion had been “[a]ttached” to a letter from Bonfiglio dated May 28. The May 28 letter, as it appears in the record, has no attachments, and nothing in the June motion suggests it was addressed to the court of appeals. The May 28 letter referred only to Bonfiglio’s earlier motion seeking an extension of time to file his petition for review. However, in late 2012 and early 2013, Bonfiglio did request extensions in this court, pursuant to which he was referred to the superior court.

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entitled to raise the claim “pursuant to Rule 32.1(g)” and *Martinez* because his “first Rule 32 counsel failed to present it in the initial Rule 32 proceeding.” In *Martinez*, the Supreme Court determined that, as a matter of equity, a non-pleading defendant may be able to obtain federal habeas review of a claim that is procedurally barred if he can show ineffective assistance of his first post-conviction counsel. ___ U.S. at ___, 132 S. Ct. at 1319-20. As we explained in *State v. Escareno-Meraz*, that holding does not apply to Arizona post-conviction proceedings. 232 Ariz. 586, ¶¶ 4-6, 307 P.3d 1013, 1014 (App. 2013). Non-pleading defendants like Bonfiglio “have no constitutional right to counsel in post-conviction proceedings.” *Id.* ¶ 4.

¶7 Bonfiglio also asserts the trial court’s “error and negligence” precluded him from filing a timely petition for review in his previous proceeding and, thus, the court erred in treating his petition for post-conviction relief as a “second Rule 32 proceeding.” But he does not explain why his inability to file a timely petition for review in his first proceeding should allow him to avoid preclusion of a new claim in a second proceeding. He had the opportunity to bring the claim he now raises for the first time – it has long been the law in Arizona that a defendant is entitled to effective representation in the plea context. *See State v. Donald*, 198 Ariz. 406, ¶¶ 9, 14, 10 P.3d 1193, 1198, 1200 (App. 2000). And a claim of ineffective assistance cannot be raised in an untimely proceeding like this one. Ariz. R. Crim. P. 32.4(a).

¶8 In any event, a second post-conviction proceeding is not the proper vehicle to address any errors the trial court purportedly made in a previous post-conviction proceeding. Except for a claim of being held beyond the expiration of the sentence imposed, *see* Ariz. R. Crim. P. 32.1(d), Rule 32 is limited to claims concerning the propriety of a defendant’s conviction or sentence; it contains no provision permitting a challenge in a new post-conviction proceeding to a ruling in a previous proceeding. *See* Ariz. R. Crim. P. 32.1. The trial court’s denial of Bonfiglio’s various efforts to file a delayed petition for review in his first proceeding are not before us.

¶9 We grant review but deny relief.