

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

YANG GUN LU,
Petitioner.

No. 2 CA-CR 2016-0179-PR
Filed June 8, 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NOT FOR PUBLICATION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. CR2010006549002DT
The Honorable Jo Lynn Gentry, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Law Offices of Michael J. Bresnehan, P.C., Tempe
By Michael J. Bresnehan
Counsel for Petitioner

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MEMORANDUM DECISION

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

H O W A R D, Presiding Judge:

¶1 Petitioner Yang Gun Lu 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). Lu has not sustained his burden of establishing such abuse here.

¶2 Pursuant to a plea agreement, Lu was convicted of two counts of attempted production of marijuana. In March 2011, the trial court suspended the imposition of sentence and placed him on probation for eighteen months. Lu was discharged from probation, and his offenses were designated misdemeanors. In March 2013, the court granted Lu’s motion to set aside the convictions and “expunge his record.”

¶3 In May 2014, Lu filed a notice of post-conviction relief, indicating he was raising claims of ineffective assistance of counsel and pursuant to Rule 32.1(e), (f), and (g). The trial court dismissed the notice, stating that Lu had failed to comply with the requirements of Rule 32 in an untimely proceeding. Days later, Lu filed another notice of post-conviction relief, this time indicating he was raising claims of ineffective assistance of counsel and indicating that his “failure to file a timely notice of post-conviction relief . . . was without fault on [his] part.” He explained he was claiming counsel had been ineffective in “failing to advise him that his conviction would result in his certain deportation.” Treating the notice as a second Rule 32 proceeding, the court dismissed the notice. Lu filed a motion for rehearing in which he argued his first

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notice had been “dismissed without prejudice under Rule 32.2(b)” and the second notice was therefore part of the first proceeding. On the record before us, the court did not rule on that motion.

¶4 On review, Lu again contends the trial court erred in concluding the filing of the second notice initiated a second Rule 32 proceeding. And he again contends he is entitled to relief under Rule 32.1(f), because “his attorney was ineffective by failing to advise him that his conviction would result in his certain deportation” and he did not realize this effect of his conviction “until after the 90-day time period for filing the Notice of Post Conviction Relief had expired.”

¶5 We need not resolve, however, whether Lu’s notice should properly have been treated as part of a first or a second proceeding for post-conviction relief, because he is not entitled to relief in either circumstance. If the second notice initiated a successive Rule 32 proceeding, the trial court’s analysis of Lu’s claims was correct—any claim under Rule 32.1(a) was precluded and Rule 32.1(f) did not apply because, in this circumstance, the proceeding was not “of-right.”

¶6 And even if the second notice was part of the original proceeding or was otherwise initiated “without prejudice,” Lu was still not entitled to relief under Rule 32.1(f). As we explained in *State v. Poblete*, citing the 2007 comment to Rule 32.1(f),

Rule 32.1(f) provides that a petitioner may request the right to file a delayed notice of post-conviction relief if his failure to file timely was “without fault on the [petitioner’s] part.” Relief should be granted under this rule if the trial court failed to advise the defendant of his right to seek of-right post-conviction relief or if the defendant intended to seek post-conviction relief in an of-right proceeding and had believed mistakenly his counsel had filed a timely notice or request.

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227 Ariz. 537, ¶ 6, 260 P.3d 1102, 1104 (App. 2011) (alteration in *Poblete*). Like *Poblete*, Lu “is not arguing he was unaware of his right to petition for post-conviction relief or of the time within which a notice of post-conviction relief must be filed or that he intended to challenge the court’s decision but his attorney or someone else interfered with his timely filing of a notice as contemplated by Rule 32.1(f).” *Id.* ¶ 7. “Rather, his claim is essentially that, based on information that later came to light, he regretted having failed to challenge his conviction. Such a claim is not cognizable under Rule 32.1(f).”¹ *Id.*

¶7 Therefore, although we grant the petition for review, we deny relief.

¹We also note that *Padilla v. Kentucky*, 559 U.S. 356 (2010), was decided March 31, 2010. Lu’s plea agreement was entered in March 2011. Thus, because *Padilla* was the law at the time of his conviction, Lu has no cognizable claim based on a significant change in the law. See *Poblete*, 227 Ariz. 537, ¶¶ 12, 16, 260 P.3d 1102, 1105-07 (App. 2011).