IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

RUDOLPH CHARLES ARENAS,
Petitioner.

No. 2 CA-CR 2016-0378-PR
Filed February 7, 2017

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NOT FOR PUBLICATION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. CR20012407
The Honorable Joan Wagener, Judge

REVIEW GRANTED; RELIEF DENIED

Rudolph Charles Arenas, Buckeye
In Propria Persona

MEMORANDUM DECISION

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

M I L L E R, Judge:

¶1 Rudolph Arenas seeks review of the trial court's order summarily denying what appears to be his fifth petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb the court's ruling absent an abuse of discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We find no such abuse here.

¶2 After a jury trial in 2002, Arenas was convicted of second-degree murder and two counts of attempted second-degree murder. The trial court sentenced him to aggravated, consecutive prison terms totaling fifty-four years. We affirmed his convictions and sentences on appeal, *State v. Arenas*, No. 2 CA-CR 2002-0082, ¶ 22 (Ariz. App. Jan. 29, 2004) (mem. decision), denied relief on the trial court's denial of one of his petitions for post-conviction relief, *State v. Arenas*, No. 2 CA-CR 2006-0313-PR, ¶ 1 (Ariz. App. Mar. 15, 2007) (mem. decision), and denied review on another, *State v. Arenas*, No. 2 CA-CR 2015-0437-PR, ¶ 1 (Ariz. App. Apr. 20, 2016) (mem. decision). In September 2016, Arenas initiated the current proceeding, indicating in his notice of post-conviction relief that his failure to file a timely notice was without fault on his part pursuant to Rule 32.1(f), and arguing, inter alia, that *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004), were significant changes in the law entitling him to relief pursuant to Rule 32.1(g), and that trial, appellate and Rule 32 counsel had been ineffective.

¶3 The trial court summarily "den[ied] and dismiss[ed]" Arenas's notice and memorandum. Because *Apprendi* had been decided in June 2000, well before Arenas's convictions became final

in August 2004, *see State v. Towery*, 204 Ariz. 386, ¶ 8, 64 P.3d 828, 831-32 (2003) (case final when time expires for defendant to seek review of supreme court's decision affirming convictions and sentences), the court correctly found there was "no merit" to Arenas's argument that *Apprendi* should apply retroactively to him. Similarly, after properly determining that *Blakely* applied to Arenas, *see State v. Cleere*, 213 Ariz. 54, n.2, 138 P.3d 1181, 1184 n.2 (App. 2006) ("*Blakely* applies to cases pending on direct review when *Blakely* was decided."), the court nonetheless concluded that his sentences were not imposed in violation of that case.[1] The court further concluded that Arenas could have, but did not, challenge his sentences on direct appeal, and noted that he had not "request[ed] relief that falls under any of the exceptions provided for in Rule 32.2(b) or Rule 32.4(a)." The court thus determined his claims were untimely and precluded. *See* Ariz. R. Crim. P. 32.2(a)(1), (3). The court also noted that it had addressed claims of ineffective assistance of trial, appellate and Rule 32 counsel in prior Rule 32 petitions, and thus concluded that those claims also were untimely and precluded. *See* Ariz. R. Crim. P. 32.2(a)(2), (3). The court similarly found Arenas's challenge to a search warrant untimely and precluded.

¶4 In his pro se petition for review, Arenas argues that *Montgomery v. Louisiana*, ___ U.S. ___, 136 S. Ct. 718 (2016), constitutes a significant change in the law that entitles him to relief pursuant to Rule 32.1(g), and that the trial court erred in concluding

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[1]Although the trial court apparently relied on the date when Arenas filed his first notice of post-conviction relief (August 6, 2004) to determine that *Blakely* applied to him, the relevant time for this determination was the date the mandate issued from his direct appeal (August 17, 2004), which was also after *Blakely* was filed in June 2004. Therefore, the court's conclusion that *Blakely* applied to Arenas was correct. *See State v. Oakley*, 180 Ariz. 34, 36, 881 P.2d 366, 368 (App. 1994) (appellate court "will affirm the trial court when it reaches the correct result even though it does so for the wrong reasons"). Additionally, because the court was not required to determine whether Arenas's sentences violated *Blakely*, an otherwise precluded issue, we do not address his argument regarding this finding on review.

he was not entitled to a retroactive application of *Apprendi* and *Blakely*. He also maintains he is entitled to an evidentiary hearing. As previously noted, both *Apprendi* and *Blakely* were decided before Arenas's convictions and sentences became final in August 2004. Therefore, retroactive application of those cases is not an issue here, as the court correctly found.

¶5 Moreover, the trial court properly found this claim precluded. Although claims based on a significant change in the law are potentially exempt from preclusion, this exception does not extend to a defendant like Arenas who had the opportunity to raise the claim in a prior proceeding, and the court thus correctly determined that his claim did not fall within the exceptions to preclusion. *See* Ariz. R. Crim. P. 32.2(b). Additionally, although Arenas checked the box indicating that his failure to file a timely notice was through no fault of his own, the court impliedly rejected this assertion as well. Not only did Arenas fail to develop this argument below, but Rule 32.1(f) does not apply to a defendant like Arenas who was convicted after a jury trial. Rule 32.1(f) would have applied only if he had failed to timely file a notice of appeal. *See* Ariz. R. Crim. P. 32.1 (defining "Rule 32 of-right proceeding" as applicable to pleading defendants); Ariz. R. Crim. P. 32.1(f) (application limited to "of-right" notice of post-conviction relief or notice of appeal).

¶6 To the extent Arenas also argues that trial, appellate and Rule 32 counsel were ineffective for various reasons, including their failure to argue that his sentences were imposed in violation of *Blakely* and *Apprendi*, the trial court correctly found these claims precluded. Such claims fall within Rule 32.1(a) and, as such, cannot be raised in an untimely proceeding like this one. *See* Ariz. R. Crim. P. 32.4(a); *State v. Petty*, 225 Ariz. 369, ¶ 11, 238 P.3d 637, 641 (App. 2010). And, to the extent Arenas argues the court "failed to even address" his claims of ineffective assistance of counsel, we note that by deeming his arguments untimely and precluded, the court did, in fact, "address" his claims. Finally, insofar as Arenas attempts to challenge counsel's conduct on additional claims, to wit, the failure

to challenge the search warrant[2] and certain jury instructions, these claims are also precluded by Rule 32.2(a)(2) and (3).

¶7 For all of these reasons, we grant the petition for review but deny relief.

[2]Although the trial court stated Arenas could have challenged the warrant on direct appeal, because he presented this claim as one of ineffective assistance of counsel, he could not have raised it on appeal. *See State v. Spreitz*, 201 Ariz. 1, ¶ 9, 39 P.3d 525, 527 (2002) (claim of ineffective assistance of counsel cannot be raised on direct appeal, and must instead "be brought in Rule 32 proceedings"). However, for the reasons previously stated, this claim was nonetheless precluded and the court's finding was, therefore, correct. *See Oakley*, 180 Ariz. 34, 36, 881 P.2d at 368).