

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

ALBERT DALE LEWIS,
Petitioner.

No. 2 CA-CR 2016-0413-PR
Filed March 20, 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NOT FOR PUBLICATION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. CR20113758002
The Honorable Christopher C. Browning, Judge

REVIEW GRANTED; RELIEF DENIED

Albert D. Lewis, Buckeye
In Propria Persona

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MEMORANDUM DECISION

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Howard and Judge Vásquez concurred.

ECKERSTROM, Chief Judge:

¶1 Albert Lewis seeks review of the trial court’s order denying the relief requested in 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. *State v. Roseberry*, 237 Ariz. 507, ¶ 7, 353 P.3d 847, 848 (2015). Lewis has not met his burden of demonstrating such abuse here.

¶2 After a jury trial, Lewis was convicted of unlawful imprisonment, assault, aggravated robbery, second-degree burglary, and aggravated assault on an incapacitated victim. The trial court sentenced him to aggravated, consecutive and concurrent prison terms totaling 17.5 years. On appeal, this court vacated a criminal restitution order entered at sentencing, but otherwise affirmed his convictions and sentences. *State v. Lewis*, No. 2 CA-CR 2012-0404 (Ariz. App. May 12, 2014) (mem. decision).

¶3 Lewis sought post-conviction relief, and appointed counsel filed a notice stating he had reviewed the record but had found no “legitimate basis for relief under Rule 32.” Lewis filed a pro se petition, which the trial court denied in July 2015. He did not timely seek review of that ruling.¹

¹In January 2016, Lewis filed in the trial court a motion seeking permission to file a delayed petition for review, but the court did not rule on that motion. In October, Lewis requested a ruling on the motion, to which the court responded that it had “previously addressed” the issue in its “October 3, 2016 ruling.” That ruling, however, addressed a motion by Lewis seeking to extend the time to file a petition for post-conviction relief in this proceeding, not his

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¶4 In January 2016, Lewis filed a notice of post-conviction relief. The trial court appointed counsel, who filed a notice stating that, “after a thorough review of the record and transcripts,” he had found “no basis in fact and/or law for post-conviction relief.” Lewis then filed a pro se petition asserting his Rule 32 counsel had been ineffective “for failing to raise the fact that the state failed to prove prior convictions by clear and convincing eviden[c]e,” the state had committed misconduct during his priors trial, and his sentences were improper. The court summarily denied relief, concluding that Lewis’s claim of ineffective assistance of counsel was precluded and his claims were without merit in any event. This petition for review followed.

¶5 On review, Lewis asserts his claim of ineffective assistance of Rule 32 counsel was cognizable pursuant to *Martinez v. Ryan*, 566 U.S. 1 (2012), and, thus, his claim was not precluded. He additionally argues the state failed to prove his previous convictions by clear and convincing evidence. 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. 566 U.S. at 17. 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 Lewis “have no constitutional right to counsel in post-conviction proceedings,” and his claim is not cognizable under Rule 32. *Id.* ¶ 4. And, to the extent he raises it separately from his claim of ineffective assistance, Lewis’s sentencing claim is precluded because it could have been raised previously but was not. Ariz. R. Crim. P. 32.2(a)(3).

¶6 We grant review but deny relief.

request to file a delayed petition for review in his previous proceeding.