

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

TONY CRUZ SR.,
Petitioner.

No. 2 CA-CR 2017-0096-PR
Filed June 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NOT FOR PUBLICATION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 Gila County
No. CR201100461
The Honorable Timothy M. Wright, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Bradley D. Beauchamp, Gila County Attorney
By June Ava Florescue, Deputy Gila County Attorney, Globe
Counsel for Respondent

Tony Cruz Sr., Florence
In Propria Persona

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MEMORANDUM DECISION

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

S T A R I N G, Presiding Judge:

¶1 Petitioner Tony Cruz Sr. 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). Cruz has not sustained his burden of establishing such abuse here.

¶2 After jury trials in two cause numbers, CR201100434 and CR201100461, Cruz was convicted of third-degree burglary, three counts of aggravated assault, and one count each of weapons misconduct, criminal damage, and cruelty to animals. The trial court sentenced him to consecutive and concurrent prison terms totaling thirty-two years. We affirmed the convictions and sentences on appeal. *State v. Cruz*, No. 2 CA-CR 2012-0085 (Ariz. App. Mar. 5, 2013) (mem. decision); *State v. Cruz*, No. 2 CA-CR 2012-0084 (Ariz. App. Oct. 30, 2012) (mem. decision). Cruz thereafter sought post-conviction relief in both causes, which the court denied. This court, however, granted relief on review. We noted that although Cruz’s notice of post-conviction relief had been untimely, he had raised a claim pursuant to Rule 32.1(f), and we remanded the matter to the trial court to appoint different counsel because the same attorney had represented Cruz on appeal and in the post-conviction proceeding. *State v. Cruz*, No. 2 CA-CR 2015-0269-PR (Ariz. App. Oct. 26, 2015) (mem. decision).

¶3 On remand, appointed counsel filed a notice stating she had reviewed the record and was unable to find any “colorable claims pursuant to Rule 32.” Cruz filed a supplemental brief in

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CR201100461, but not in CR201100434, and the trial court dismissed the proceeding in CR201100434 in July 2016. In his supplemental pro se petition in CR201100461, Cruz argued he had received ineffective assistance of counsel in that counsel had failed to interview certain witnesses or challenge alleged violations of Cruz's constitutional rights and had failed "to suppress the illegal search and seizure of [his] cell phone as evidence." He also asserted the court had erred in not appointing "alternative counsel" and there had been juror misconduct. He further contended these claims were of sufficient constitutional magnitude to avoid being precluded under Rule 32.2. In October 2016, the court dismissed the petition. Cruz filed a motion for rehearing in November 2016, asserting he had not received the state's response to his petition and therefore had not filed a reply. The court, "in the interest of caution," allowed Cruz time to file a reply, and after reviewing it, denied the motion for rehearing and affirmed its order dismissing the petition.

¶4 In his petition for review, Cruz repeats the claims he had raised in his petition for post-conviction relief. As we pointed out in our previous decision, however, these claims cannot be raised in an untimely proceeding for post-conviction relief. *Cruz*, No. 2 CA-CR 2015-0269-PR, ¶ 6 & n.1; *see also* Ariz. R. Crim. P. 32.4(a); *State v. Lopez*, 234 Ariz. 513, ¶¶ 8-10, 323 P.3d 1164, 1166 (App. 2014). Therefore, the trial court did not abuse its discretion in dismissing the petition.

¶5 We grant the petition for review, but deny relief.