

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

STANLEY VASCOE TUTEN,
Petitioner.

No. 2 CA-CR 2017-0129-PR
Filed May 3, 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NOT FOR PUBLICATION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 Maricopa County
No. CR2005034835002SE
The Honorable Connie Contes, Judge

REVIEW GRANTED; RELIEF DENIED

Stanley Tuten, Eloy
In Propria Persona

STATE v. TUTEN
Decision of the Court

MEMORANDUM DECISION

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Vásquez and Judge Howard¹ concurred.

ECKERSTROM, Chief Judge:

¶1 Stanley Tuten seeks review of the trial court's order summarily dismissing his notice of post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P.² We will not disturb that ruling unless the court clearly has abused its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Tuten has not sustained his burden of establishing such abuse here.

¶2 After three separate jury trials, Tuten was convicted of two counts of burglary; possession of dangerous drugs for sale and possession of drug paraphernalia; and possession of dangerous drugs for sale, possession of drug paraphernalia and weapons misconduct. On August 24, 2007, the trial court sentenced Tuten to concurrent prison terms in all three matters, the longest of which is 15.75 years, and some of which run consecutively to the sentences imposed in other matters.³ On appeal, we affirmed Tuten's convictions and sentences. *State v. Tuten*, No. 1 CA-CR 07-0749 (Ariz. App. June 12, 2008) (mem. decision) (affirmed as corrected);

¹The Hon. Joseph W. Howard, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and our supreme court.

²The trial court treated Tuten's notice of and petition for post-conviction relief, filed on the same day, as a single notice.

³Although Tuten included the case numbers for other matters in the underlying notice of and petition for post-conviction relief, it appears the instant Rule 32 proceeding is based only on the three above-referenced cases.

STATE v. TUTEN
Decision of the Court

State v. Tuten, No. 1 CA-CR 07-0753 (Ariz. App. Sept. 23, 2008) (mem. decision); *State v. Tuten*, No. 1 CA-CR 07-0751 (Ariz. App. Oct. 9, 2008) (mem. decision).

¶3 In August 2015, Tuten filed a notice of and petition for post-conviction relief, checking the boxes on the form notice indicating counsel had been ineffective, his failure to file a timely notice of post-conviction relief was through no fault of his own,⁴ and there was a significant change in the law entitling him to relief. *See* Ariz. R. Crim. P. 32.1(a), (f), (g). He argued trial counsel had failed to properly advise him to accept the state's plea offer and that *Martinez v. Ryan*, 566 U.S. 1, 16-17 (2012), constituted a significant change in the law entitling him to relief. The trial court concluded Tuten's claims were precluded and summarily dismissed his notice. This petition for review followed.

¶4 In its ruling denying Tuten's notice, the trial court determined he was precluded from raising a claim of ineffective assistance in a successive proceeding, specifically stating his notice followed "several" previous Rule 32 notices in his "cases."⁵ The

⁴Although Tuten checked the box indicating his failure to file a timely notice was through no fault of his own, the trial court correctly rejected this assertion. Not only did Tuten fail to develop this argument below or on review, but Rule 32.1(f) does not apply to a defendant like Tuten, who was convicted after a jury trial. *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).

⁵Notably, the only other Rule 32 proceedings contained in the record before us do not include the underlying cases. Additionally, to the extent the trial court concluded Tuten was precluded from raising additional claims of ineffective assistance of counsel because he had already done so in a proceeding the court stated it had dismissed on June 12, 2009, we note that the record before us does not contain that ruling.

STATE v. TUTEN
Decision of the Court

court explained that Tuten could only raise a successive claim pursuant to Rule 32.1(d), (e), (f), (g), or (h), and further stated that a claim of ineffective assistance, arising under Rule 32.1(a), must be raised in a timely proceeding. *See* Ariz. R. Crim. P. 32.2(b), 32.4(a). The court also concluded that *Martinez* did not afford Tuten relief, noting that *Martinez* did “not entitle [Tuten] to raise state court claims in an untimely fashion,” as Tuten had attempted to do here, and that he had not asserted any other claim “for which Rule 32 can provide relief.”

¶5 On review, Tuten contends the trial court abused its discretion by finding his claim of ineffective assistance of trial counsel precluded. He reasserts trial counsel should have advised him to accept the state’s plea offer, maintaining he would have done so if counsel had so advised him.⁶ Assuming this was a successive Rule 32 proceeding, which both the court’s ruling and Tuten’s petition below suggest is the case, the court correctly found Tuten’s claim of ineffective assistance of trial counsel precluded. *See* Ariz. R. Crim. P. 32.2(a). And even if not precluded by Tuten’s failure to raise this claim in his first Rule 32 proceeding, a claim of ineffective assistance arises under Rule 32.1(a), and such a claim cannot be raised in an untimely proceeding such as this one. *See* Ariz. R. Crim. P. 32.4(a); *State v. Lopez*, 234 Ariz. 513, ¶¶ 8-10, 323 P.3d 1164, 1166 (App. 2014). This proceeding, initiated more than six years after the

⁶To the extent Tuten also asserts his “[f]irst [Rule 32] counsel was ineffective by missing the colorable claim” of trial counsel’s deficient conduct, we do not address this argument. Tuten appears to have raised this claim for the first time on review. *See* Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review to contain issues “decided by the trial court . . . which the defendant wishes to present to the appellate court for review”); *State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (appellate court does not consider issues in petition for review that “have obviously never been presented to the trial court for its consideration”). Moreover, non-pleading defendants, like Tuten, are not constitutionally entitled to effective counsel in post-conviction proceedings. *State v. Escareno-Meraz*, 232 Ariz. 586, ¶ 4, 307 P.3d 1013, 1014 (App. 2013).

STATE v. TUTEN
Decision of the Court

mandates issued in Tuten's direct appeals, is patently untimely. *See* Ariz. R. Crim. P. 32.4(a). We therefore cannot say the court abused its discretion in rejecting Tuten's claim of ineffective assistance of counsel. *Cf. State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984) (appellate court obliged to affirm trial court's ruling if result legally correct for any reason).

¶6 Tuten also contends the trial court should have accepted his claim that *Martinez* is a significant change in the law entitling him to relief under Rule 32.1(g), which is an exception to both the preclusion and timeliness requirements. *See* Ariz. R. Crim. P. 32.2(b), 32.4(a). However, federal habeas law regarding circumstances that might excuse a prisoner's procedural default in state court has no relevance to a state court's determination that a Rule 32 petitioner is barred or precluded under applicable state law from raising a claim in an untimely, successive petition. *See State v. Escareno-Meraz*, 232 Ariz. 586, ¶¶ 4-6, 307 P.3d 1013, 1014 (App. 2013) (Supreme Court's decision affording "equitable" cause for relief from state court procedural default of federal habeas claim did not alter established Arizona law of claims allowable under Rule 32), *quoting Martinez*, 566 U.S. at 16.⁷

¶7 Therefore, we grant review but deny relief.

⁷We also reject Tuten's request that we "amend or overturn" our decision in *Escareno-Meraz*.