

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

AMANDO GAMBOA-MOLINA,
Petitioner.

No. 2 CA-CR 2017-0165-PR
Filed July 31, 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NOT FOR PUBLICATION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. CR2006008681011DT
The Honorable Peter C. Reinstein, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Law Offices of Thomas E. Higgins, P.L.L.C., Tucson
By Thomas E. Higgins
Counsel for Petitioner

STATE v. GAMBOA-MOLINA
Decision of the Court

MEMORANDUM DECISION

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

V Á S Q U E Z, Presiding Judge:

¶1 Petitioner Amando Gamboa-Molina 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). Gamboa-Molina has not sustained his burden of establishing such abuse here.

¶2 After a bench trial, at which he was represented by Herman Alcantar Jr., Gamboa-Molina was convicted of conspiracy, illegally conducting an enterprise, and multiple drug-related charges. The trial court imposed presumptive, consecutive and concurrent prison terms totaling twenty years’ imprisonment. The convictions and sentences were affirmed on appeal. *State v. Gamboa-Molina*, No. 1 CA-CR 08-0231 (Ariz. App. Sept. 1, 2009) (mem. decision).

¶3 Gamboa-Molina, represented by Bruce Blumberg, the same attorney who had represented him on appeal, thereafter filed an untimely notice of post-conviction relief, which the trial court dismissed. In January 2011, Blumberg filed a “Motion for Leave to File Rule 32,” in which he asserted that he had “failed to timely file the Notice of Post-Conviction Relief” and that Gamboa-Molina had been in prison, did not speak English, and was “unaware” of the time in which to seek post-conviction relief. The court denied the motion

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.

STATE v. GAMBOA-MOLINA
Decision of the Court

in June 2011, but did not foreclose the possibility of relief pursuant to Rule 32.1(f).

¶4 Gamboa-Molina, still represented by Blumberg, filed a notice of post-conviction relief shortly thereafter, and the trial court appointed another attorney in the matter. That attorney ultimately filed a notice pursuant to *Montgomery v. Sheldon*, 181 Ariz. 256, 889 P.2d 614 (1995), stating he was “unable to raise any viable issues under Rule 32.” The court granted Gamboa-Molina an extension of time in which to file a pro se supplemental petition, but Gamboa-Molina instead retained two more attorneys, each of whom also filed a notice stating they could find no issues to raise. After Gamboa-Molina failed to file a pro se, supplemental petition, the court dismissed the proceeding in April 2014.

¶5 In November 2015, Gamboa-Molina filed a “Memorandum in Support of Second Petition for Post-Conviction Relief,” represented by Thomas Higgins, who had been the third attorney to file a *Montgomery* notice in the previous proceeding. He now asserted he had received ineffective assistance of trial counsel and of appellate counsel based on counsel’s failure to “provide a complete record upon which to challenge the trial court’s ruling on [a] search warrant.” And, although he acknowledged claims of ineffective assistance would generally be precluded in a successive Rule 32 proceeding, he contended that, because Blumberg had represented him on appeal and in his first Rule 32 proceeding, he could not have raised appellate ineffectiveness in that proceeding. The trial court denied relief, concluding the proceeding was untimely and Gamboa-Molina was not entitled to relief under Rule 32.1(f) because the proceeding was not “of-right.”

¶6 On review, Gamboa-Molina argues the trial court erred in rejecting his claims because his petition should be deemed timely, asserting “he was unable to submit a claim of ineffective assistance of counsel in a[] previous petition since his trial and appellate counsel were the same.” He likewise contends he could not have raised a claim of appellate ineffectiveness because he was represented by the same counsel on appeal and in his first Rule 32 proceeding. But, as detailed above, Gamboa-Molina was represented by different

STATE v. GAMBOA-MOLINA
Decision of the Court

attorneys at trial and on appeal. And, although appellate counsel filed a notice of post-conviction relief, multiple other attorneys represented him in regard to the possible filing of a petition for post-conviction relief, including current counsel, and each filed a *Montgomery* notice in the matter. Because any claims of ineffective assistance could have been raised in previous proceedings and because this proceeding is untimely, such claims are precluded. Ariz. R. Crim. P. 32.2(a), 32.4(a). The court therefore properly denied relief.

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