

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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THE STATE OF ARIZONA,  
*Respondent,*

*v.*

RICHARD MARTINEZ,  
*Petitioner.*

No. 2 CA-CR 2017-0175-PR  
Filed August 29, 2017

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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NOT FOR PUBLICATION  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.*

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Petition for Review from the Superior Court in Pima County  
No. CR20080065  
The Honorable Jane L. Eikleberry, Judge

**REVIEW GRANTED; RELIEF DENIED**

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Richard Martinez, Florence  
*In Propria Persona*

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**MEMORANDUM DECISION**

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Vásquez and Judge Howard<sup>1</sup> concurred.

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ECKERSTROM, Chief Judge:

¶1 Richard Martinez seeks review of the trial court's order denying his motion to withdraw from his guilty plea, which the court construed as a successive petition for post-conviction relief 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). Martinez has not met his burden of demonstrating such abuse here.

¶2 In 2008, Martinez pled guilty to four counts of armed robbery, seven counts of aggravated assault, and two counts of weapons misconduct; he was sentenced to a combination of concurrent and consecutive prison terms totaling twenty-one years. The trial court later resentenced Martinez because the state had violated his plea agreement by recommending consecutive sentences. The court imposed the same aggregate twenty-one year prison term.

¶3 Martinez has repeatedly sought and been denied post-conviction relief. *See, e.g., State v. Martinez*, 2015-0147-PR (Ariz. App. Sep. 3, 2015) (mem. decision); *State v. Martinez*, No. 2 CA-CR 2014-0030-PR (Ariz. App. Jun. 17, 2014) (mem. decision); *State v. Martinez*, No. 2 CA-CR 2012-0235 (Ariz. App. Sep. 13, 2012) (mem. decision); *State v. Martinez*, No. 2 CA-CR 2011-0358 (Ariz. App. Mar. 15, 2012) (mem. decision); *State v. Martinez*, No. 2 CA-CR 2010-0066 (Ariz. App. Aug. 17, 2010) (mem. decision). In February 2017, Martinez filed a motion to withdraw from his guilty plea, arguing the weapon he had

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<sup>1</sup>The 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.

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used was inoperable and, thus, his plea lacked an adequate factual basis. The trial court, construing his filing as a successive petition for post-conviction relief, denied the claim as precluded, citing Rule 32.2(a)(3). The court denied Martinez's subsequent motion for rehearing, and this petition for review followed.

¶4 On review, Martinez asserts the trial court erred by finding his claim precluded, citing *State v. Draper*, 123 Ariz. 399, 599 P.2d 852 (App. 1979). Nothing in *Draper* suggests the court erred. There, the court determined only that, by pleading guilty, the defendant did not waive a challenge to the use of a prior conviction to enhance his sentence. *Id.* at 401, 599 P.2d at 854. The court did not address the waiver from failing to timely raise a claim under Rule 32.2(a)(3) or otherwise suggest a claim of an insufficient factual basis was not subject to waiver. In any event, even had Martinez not waived the claim as contemplated by that rule, the claim is patently untimely pursuant to Rule 32.4(a), and he does not assert it falls within any exception to the timeliness requirement.<sup>2</sup> The court did not err in summarily rejecting Martinez's claim. *See State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984) (reviewing court will affirm for any reason supported by record).

¶5 We grant review but deny relief.

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<sup>2</sup>A claim that the factual basis for a plea is insufficient might arguably be raised as a claim of actual innocence pursuant to Rule 32.1(h). *See State v. Johnson*, 181 Ariz. 346, 348-51, 890 P.2d 641, 643-46 (App. 1995). Claims under that rule may be raised in an untimely proceeding. Ariz. R. Crim. P. 32.4(a). However, even were we to treat Martinez's claim as a claim under Rule 32.1(h), and disregard his failure to explain why he did not raise the claim previously, Ariz. R. Crim. P. 32.2(b), the claim nonetheless fails. The operability of a firearm is not an element of any offense to which Martinez pled guilty; it is—at most—an affirmative defense he failed to raise. *See State v. Young*, 192 Ariz. 303, ¶ 16, 965 P.2d 37, 41 (App. 1998); *State v. Rosthenhausler*, 147 Ariz. 486, 490-93, 711 P.2d 625, 629-32 (App. 1985).