

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

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THE STATE OF ARIZONA,  
*Respondent,*

*v.*

TIMOTHY LYNN KREUS,  
*Petitioner.*

No. 2 CA-CR 2017-0194-PR  
Filed October 2, 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NOT FOR PUBLICATION  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. CR20100688001  
The Honorable Deborah Bernini, Judge

**REVIEW GRANTED; RELIEF DENIED**

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Timothy Kreis, Florence  
*In Propria Persona*

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**MEMORANDUM DECISION**

Judge Espinosa authored the decision of the Court, in which Presiding Judge Staring and Judge Kelly<sup>1</sup> concurred.

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ESPINOSA, Judge:

¶1 Timothy Kreis seeks review of the trial court's summary dismissal of his untimely, successive notice of and petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P.<sup>2</sup> 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). Kreis has not met his burden of demonstrating such abuse here.

¶2 Following a jury trial in 2011, Kreis was convicted of attempted kidnapping, kidnapping, aggravated assault with a deadly weapon, and assault. The trial court sentenced him to two concurrent life terms of imprisonment and a consecutive, aggravated prison term of twenty-eight years. We affirmed the convictions and sentences on appeal. *State v. Kreis*, No. 2 CA-CR 2011-0385, ¶ 1 (Ariz. App. Jan. 31, 2013) (mem. decision). The court denied as untimely Kreis's first notice of post-conviction relief, filed in August 2013.<sup>3</sup> In October 2013, Kreis initiated his second post-conviction proceeding, and after

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<sup>1</sup>The Hon. Virginia C. Kelly, 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.

<sup>2</sup>Although Kreis calls one of his filings in this proceeding a "Petition for Post-Conviction Relief," it more closely resembles a notice.

<sup>3</sup>Although that notice and order are not part of the record before us, Kreis does not dispute the procedural history as set forth by the trial court, and we thus presume the record supports it.

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appointed counsel filed a notice of completion of post-conviction review stating he was unable to find any claims to raise, the court permitted Kreis to file a supplemental, pro se petition. Kreis failed to do so by the court-imposed deadline of March 7, 2014, and the court dismissed his notice in May 2014.

¶3 More than two years later, on August 22, 2016, Kreis wrote a letter to the trial court asking that an attorney be appointed or a hearing set to “hear [his] arguments” about what “was wrong with [his] whole case and trial.” The court denied his request, and Kreis then filed the underlying notice of and petition for post-conviction relief, initiating his third post-conviction proceeding. The court subsequently dismissed Kreis’s notice, in which he asserted he was raising a claim based on newly discovered evidence pursuant to Rule 32.1(e), contending he did not discover “material evidence supporting [his] claim” until “8-22-16,” and that such evidence would establish he did not testify at trial because the court, the prosecutor, and trial counsel had misled him to believe he would receive a longer sentence if he testified. He also contended trial counsel had been ineffective and that employees from the Department of Corrections had denied him access to his paperwork. In its order dismissing Kreis’s notice, the court found “any issues that may have existed have either been adjudicated on their merits or waived,” and that “[t]his new request to challenge the effectiveness of trial counsel because he advised [Kreis] not to testify is not ‘newly discovered’ evidence and could have been raised in one of the two earlier [p]etitions.”

¶4 On review, Kreis reasserts his claims, suggesting the trial court improperly dismissed his notice. Notably, Kreis contends that, although he was aware of the newly discovered evidence when he filed his second Rule 32 notice in 2013, he did not submit that evidence until he filed the underlying notice in 2017, “when copies could be made.” To be entitled to a claim of newly discovered evidence, a defendant must first demonstrate the evidence is, in fact, newly discovered. *State v. Serna*, 167 Ariz. 373, 374, 807 P.2d 1109, 1110 (1991) (describing five elements of successful newly discovered evidence claim). Even assuming such information could constitute

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newly discovered evidence, Kreuz has utterly failed to establish such a claim.

¶5 Moreover, Kreuz's claim of ineffective assistance of counsel falls under Rule 32.1(a). *See State v. Petty*, 225 Ariz. 369, ¶ 11, 238 P.3d 637, 641 (App. 2010). Consequently, he was barred from raising it in an untimely post-conviction proceeding, like this one. *See Ariz. R. Crim. P. 32.4(a)*. As we stated in *State v. Rosales*, 205 Ariz. 86, ¶ 11, 66 P.3d 1263, 1267 (App. 2003), with respect to claims under Rule 32.1(a) through (c), "no exception to the preclusion or timeliness rules exists." Because Kreuz failed to raise any viable claim in this successive post-conviction relief proceeding, the trial court did not abuse its discretion in summarily dismissing his notice as untimely and precluded. *See Ariz. R. Crim. P. 32.2(a), 32.4(a)*.

¶6 Accordingly, although we grant review, relief is denied.