

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

PATRICK GREENBERRY MARTIN,
Petitioner.

No. 2 CA-CR 2017-0198-PR
Filed November 29, 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NOT FOR PUBLICATION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 Pinal County
No. S1100CR99025919
The Honorable Kevin D. White, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Kent P. Volkmer, Pinal County Attorney
By Thomas C. McDermott, Deputy County Attorney, Florence
Counsel for Respondent

Patrick Martin, Buckeye
In Propria Persona

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MEMORANDUM DECISION

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

ESPINOSA, Judge:

¶1 Patrick Martin seeks review of the trial court's order summarily dismissing his successive and untimely petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that order unless the court clearly abused its discretion. *See State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). Martin has not met his burden of demonstrating such abuse here.

¶2 In 2001, Martin pled guilty to second-degree murder and second-degree burglary and was sentenced to consecutive prison terms totaling twenty-five years. Before the current proceeding, he has unsuccessfully sought post-conviction relief at least four times. In January 2017, he initiated this proceeding by filing a notice of and petition for post-conviction relief raising several claims, including that *Apprendi v. New Jersey*, 530 U.S. 466 (2000), is a significant change in the law applicable to his case, his sentences are illegal, he was entitled to an additional mental-health examination before pleading guilty, his mental health should have been a mitigating factor at sentencing, the investigating detective lied during his arraignment, he has been diagnosed with hepatitis and is entitled to a reduced sentence, and his trial counsel was ineffective. The court summarily denied relief, and this petition for review followed.

¶3 On review, Martin reasserts many of his claims. In this successive and untimely petition, Martin was permitted to raise only those claims falling within Rule 32.1(d) through (h). Ariz. R. Crim. P. 32.4(a). He has identified no such claim on review;¹ instead, his claims fall within Rule 32.1(a) and (b). And, he is incorrect that he is permitted to raise a claim of ineffective assistance of Rule 32 counsel – his opportunity to do so has long passed. *See* Ariz. R. Crim. P. 32.4(a) (requiring of-right petitioner to file

¹Martin does not argue on review that his purported hepatitis diagnosis entitles him to sentencing relief. Thus, we do not address this claim.

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successive Rule 32 within thirty days of “final order . . . in the petitioner’s first petition for post-conviction relief proceeding”).

¶4 Martin is also incorrect that he is entitled to raise claims of “Constitutional magnitude” pursuant to *Stewart v. Smith*, 202 Ariz. 446 (2002). Rule 32.2(a)(3), Ariz. R. Crim. P., precludes a defendant from raising in any Rule 32 proceeding a claim “[t]hat has been waived at trial, on appeal, or in any previous collateral proceeding.” But, citing *Smith*, the comment to that rule states that “[i]f an asserted claim is of sufficient constitutional magnitude, the state must show that the defendant ‘knowingly, voluntarily and intelligently’ waived the claim” for preclusion to apply. Ariz. R. Crim. P. 32.2 cmt. As this court has explained, however, the waiver principles discussed in the comment to Rule 32.2(a)(3) and *Smith* do not apply to untimely proceedings like this one. See *State v. Lopez*, 234 Ariz. 513, ¶¶ 7-8 (App. 2014).

¶5 Although we grant review, relief is denied.