

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

JORGE LUIS HERNANDEZ,
Petitioner.

No. 2 CA-CR 2019-0220-PR
Filed May 4, 2020

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NOT FOR PUBLICATION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. 31.19(e).

Petition for Review from the Superior Court in Pinal County
No. S1100CR201402733
The Honorable Steven J. Fuller, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

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

Jorge L. Hernandez, Florence
In Propria Persona

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MEMORANDUM DECISION

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

STARING, Presiding Judge:

¶1 Petitioner Jorge Hernandez seeks review of the trial court's order dismissing his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P.¹ "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 (App. 2007). Hernandez has not sustained his burden of establishing such abuse here.

¶2 After a jury trial, Hernandez was convicted of promoting prison contraband and possession of a narcotic drug. The trial court sentenced him to enhanced, concurrent prison terms, the longer of which was 10.5 years. On appeal, this court affirmed his convictions and his sentences as corrected.² *State v. Hernandez*, No. 2 CA-CR 2016-0113 (Ariz. App. Sept. 23, 2016) (mem. decision).

¶3 Hernandez thereafter sought post-conviction relief, arguing in his petition he was actually innocent and had received ineffective assistance of trial counsel. He maintained counsel was ineffective in failing to interview his cellmate and counselors, by not filing certain pretrial motions, by telling him the state would not use a cell phone and charger as evidence, and failing to use documentary evidence he had given counsel to show he did not occupy the bunk in which the contraband was found. The trial court summarily denied relief.

¹ Effective January 1, 2020, our supreme court amended the post-conviction relief rules. Ariz. Sup. Ct. Order R-19-0012 (Aug. 29, 2019). The amendments apply to all cases pending on the effective date unless a court determines that "applying the rule or amendment would be infeasible or work an injustice." *Id.* Because it is neither infeasible nor works an injustice here, we cite to and apply the current version of the rules.

²The trial court had incorrectly stated in its minute entry that Hernandez was sentenced as a non-repetitive offender.

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¶4 Six months after the trial court denied relief, in December 2018, Hernandez filed a motion stating he had not received notice that relief had been denied and asking for an extension of time in which to file a petition for review. The court granted the motion, as well as a request to order counsel to provide Hernandez with his records.

¶5 In May 2019, however, Hernandez filed a new petition for post-conviction relief arguing that his repetitive-offender sentence violated the constitutional provisions against double jeopardy, that he had “missed the right to file an appeal” due to prison transfers between July 2016 and May 2017, that he was being held “over [his] prison sentence” based on his belief that he should not have been sentenced as a category-three repetitive offender, that he had received ineffective assistance of trial counsel, that certain evidence was presented for the first time at trial, and that the trial court erred in jury instruction. The court summarily dismissed Hernandez’s petition and also denied his motion for rehearing.

¶6 On review, Hernandez argues trial counsel was ineffective in advising him about a plea agreement offered by the state and as to the state’s evidence against him. He also again maintains his rights against double jeopardy were violated by his repetitive-offender sentencing. We agree with the trial court, however, that these claims are precluded based on his failure to raise them in the previous proceeding.³ See Ariz. R. Crim. P. 32.1(a), 32.2(a)(3). We do not address the remainder of Hernandez’s claims raised below because he has abandoned them on review. See Ariz. R. Crim. P. 32.16(c)(2); *State v. Rodriguez*, 227 Ariz. 58, n.4 (App. 2010) (declining to address argument not raised in petition for review).

¶7 We grant the petition for review, but deny relief.

³To the extent Hernandez’s argument can be read as a separate challenge to his sentence that might be cognizable under Rule 32.1(c), the trial court rejected that claim on the merits after Hernandez filed a motion to modify his sentence in late 2018. Any such claim is also therefore precluded. See Ariz. R. Crim. P. 32.2(a)(2), (b).