IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

ROBERT WILLIAM LEIGHTON,
Petitioner.

No. 2 CA-CR 2021-0122-PR
Filed March 30, 2022

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NOT FOR PUBLICATION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 Pima County
No. CR20092025002
The Honorable Danelle B. Liwski, Judge

REVIEW GRANTED; RELIEF DENIED

Robert William Leighton, Eloy
In Propria Persona

MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Eckerstrom and Chief Judge Vásquez concurred.

E S P I N O S A, Judge:

¶1 Robert Leighton seeks review of the trial court's order dismissing his notice of post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that order unless the court abused its discretion. *See State v. Martinez*, 226 Ariz. 464, ¶ 6 (App. 2011). Leighton has not met his burden of establishing such abuse here.

¶2 After a 2010 jury trial, Leighton was convicted of first-degree murder, burglary, kidnapping, and armed robbery. The trial court sentenced him to life imprisonment for murder and to concurrent prison terms for the other offenses. This court affirmed Leighton's convictions and sentences on appeal. *State v. Leighton*, No. 2 CA-CR 2010-0120 (Ariz. App. Dec. 22, 2010) (mem. decision). Leighton has previously sought and been denied post-conviction relief. *State v. Leighton*, No. 2 CA-CR 2017-0180-PR (Ariz. App. Sept. 14, 2017) (mem. decision).

¶3 In August 2021, Leighton filed a notice of post-conviction relief in which he asserted he had "received new evidence that contradicts [his] sentence in court and the advice of [his] attorney pre-trial." The trial court treated his claim as arising under Rule 32.1(a), found it untimely, and dismissed the notice. The following month, Leighton filed another notice of post-conviction relief, this time asserting a claim of newly discovered material facts and that the failure to file a timely notice was not his fault. *See* Ariz. R. Crim. P. 32.1(e), (f). The court, however, dismissed the notice, explaining that Leighton had failed "to state what newly discovered material fact[s] exist" and to explain his "failure to raise the claim in a timely manner."

¶4 In October 2021, Leighton filed another notice of post-conviction relief, raising a "possible claim" based on *Viramontes v. Attorney General of the State of Arizona*, No. CV-16-00151-TUC-RM (D. Ariz. Mar. 16, 2021) (order). He characterized his claim as one of newly discovered material facts and asserted he had been "misadvised" by trial counsel on the availability of parole. The trial court dismissed the notice.

It explained that Leighton had failed to provide any newly discovered material facts, instead citing *Viramontes*, which the court found was "not applicable" to Leighton's case. The court further observed that Leighton's claim was "in fact" one of ineffective assistance of counsel and concluded that such a claim was untimely. This petition for review followed.

¶5 On review, Leighton challenges the trial court's finding that *Viramontes* is "not applicable" to his case. Leighton maintains that both he and Viramontes were incorrectly "advised pre-trial that they faced a life sentence with [the] possibility of parole after twenty-five years." He therefore reasons that they both "received inaccurate advice from their trial attorneys."

¶6 Leighton's claim is appropriately characterized as one of ineffective assistance of counsel pursuant to Rule 32.1(a), as the trial court pointed out. Such a claim is untimely and precluded in this successive proceeding. *See* Ariz. R. Crim. P. 32.2(a)(3), 32.4(b)(3)(A); *see also State v. Spreitz*, 202 Ariz. 1, ¶ 4 (2002).

¶7 Leighton nevertheless asserts that *Viramontes* constitutes newly discovered material facts under Rule 32.1(e) because he learned after its issuance that "incorrect sentencing advice is material and prejudicial to a defendant" when "contemplating accepting a plea . . . or [proceeding] to trial." He further reasons that he "could not possibly have known of his right to make a claim prior to that."

¶8 But this court has previously explained that an attorney's failure to give accurate advice or information necessary to allow a defendant to make an informed decision whether to accept a plea agreement constitutes deficient performance. *State v. Donald*, 198 Ariz. 406, ¶ 16 (App. 2000). In addition, we have clarified that such an error may be prejudicial to the defendant if he can show that, but for the deficient advice, the defendant would have accepted the plea agreement. *Id.* ¶¶ 20, 22. Thus, the general proposition for which Leighton relies on *Viramontes* existed before, and Leighton had reason to know he could have raised his claim, but he did not do so.

¶9 Moreover, one of the requirements of newly discovered material facts under Rule 32.1(e) is that "the evidence must appear on its face to have existed at the time of trial but be discovered after trial." *State v. Amaral*, 239 Ariz. 217, ¶ 9 (2016). The Arizona district court's recent *Viramontes* decision did not exist at the time of Leighton's trial. It therefore cannot comprise a claim of newly discovered material facts. The trial court

did not abuse its discretion in dismissing Leighton's notice for post-conviction relief. *See Martinez*, 226 Ariz. 464, ¶ 6.

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