

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

LUIS MARIANO MARTINEZ,
Petitioner.

No. 2 CA-CR 2023-0191-PR
Filed May 6, 2024

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NOT FOR PUBLICATION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. S1100CR99026111
The Honorable Jason Holmberg, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

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

Luis M. Martinez, Florence
In Propria Persona

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MEMORANDUM DECISION

Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Brearcliffe and Judge Kelly concurred.

ECKERSTROM, Judge:

¶1 Luis Martinez seeks review of the trial court’s orders summarily dismissing his successive petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P., and his motion for rehearing. We will not disturb those rulings unless the court abused its discretion. *See State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). Martinez has not established such abuse.

¶2 After a jury trial, Martinez was convicted of two counts of sexual conduct with a minor under the age of fifteen and sentenced to consecutive life terms with no possibility of release for thirty-five years. We affirmed his convictions and sentences on appeal. *State v. Martinez*, No. 2 CA-CR 2002-0088 (Ariz. App. Mar. 22, 2004) (mem. decision). Martinez has since sought and been denied post-conviction relief numerous times.

¶3 In July 2023, Martinez filed a motion seeking to “reopen” his case, citing Rule 32. He argued *State v. Starks*, 251 Ariz. 383 (App. 2021), constituted a significant change in the law regarding expert testimony about the behavior of sexually abused children. He also claimed he was actually innocent, pointing to the state’s decision not to test vaginal aspirate from the victim – which did not contain sperm – for his DNA. Relatedly, he asserted the state had committed misconduct by declining to test the aspirate because it knew “the aspirate would exonerate” him. He also asked that the aspirate swabs be tested for DNA. Last, Martinez asserted the prosecutor had engaged in improper vouching and misconduct. The trial court, treating Martinez’s motion as a petition for post-conviction relief, summarily dismissed the proceeding. It also denied Martinez’s motion for rehearing. This petition for review followed.

¶4 On review, Martinez reasserts his claim that *Starks* constitutes a significant change in the law. *See* Ariz. R. Crim. P. 32.1(g). But *Starks* was ordered depublished by our supreme court in April 2022. *State v. Starks*,

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253 Ariz. 1 (2022). As such, it has no persuasive value and cannot be cited as authority for any legal proposition, *see* Ariz. R. Sup. Ct. 111(c)(1)(C), (g), and it cannot support a claim under Rule 32.1(g).

¶5 Martinez also argues the trial court erred in finding precluded his claim of prosecutorial vouching and misconduct made under Rule 32.1(a). He argues that his untimeliness should be excused for various reasons, including the lack of access to legal materials, particularly for “non english speaker[s].” But those excuses, even if true, have no bearing on whether his claim is subject to preclusion. The claim is precluded because Martinez waived it by failing to raise it on appeal. *See* Ariz. R. Crim. P. 32.2(a)(3).

¶6 Martinez asserts, without explanation, that he may nonetheless raise this claim under Rule 32.1(e), (f), and (h).¹ None of those provisions apply here. Rule 32.1(e) provides for relief based on newly discovered facts. Martinez has identified no such facts related to his claims of misconduct. Rule 32.1(f) allows a late appeal if “the failure to timely file a notice of appeal was not the defendant’s fault.” Martinez’s appeal was decided long ago; the rule does not allow a second appeal to raise a waived claim. Last, Rule 32.1(h) provides relief when “the defendant demonstrates by clear and convincing evidence that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would find the defendant guilty of the offense beyond a reasonable doubt.” In short, the rule allows a defendant to demonstrate actual innocence. It does not allow defendants to raise waived constitutional claims.

¶7 Martinez also argues he did not knowingly waive his misconduct claim. Post-conviction claims are not subject to preclusion on waiver grounds if “the claim raises a violation of a constitutional right that can only be waived knowingly, voluntarily, and personally by the defendant.” Ariz. R. Crim. P. 32.2(a)(3). But Martinez has cited no authority, and we find none, suggesting that this claim implicates constitutional rights requiring personal waiver.

¶8 Martinez further asserts the trial court erred in rejecting his request for DNA testing of the vaginal aspirate samples under Rule 32.17.

¹Martinez also appears to frame this claim as one of ineffective assistance of counsel. The time for Martinez to raise such a claim has long passed and, like his underlying claim of misconduct, is precluded. *See* Ariz. R. Crim. P. 32.2(a)(3), 32.4(b)(3)(A).

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Under that rule, a court must order requested DNA testing of existing evidence if “a reasonable probability exists that the defendant would not have been prosecuted, or the defendant’s verdict or sentence would have been more favorable, if DNA testing would produce exculpatory evidence” and was not previously subjected to DNA testing. Ariz. R. Crim. P. 32.17(d)(1).

¶9 The trial court rejected Martinez’s request because the aspirate did not contain “semen or spermatozoa” and thus contained “no biological evidence to test for DNA.” On review, Martinez argues that conclusion is incorrect because “every contact leaves a trace of DNA.” But, although he refers to what he claims is a scientific text in support of this assertion, he did not provide any evidence to the trial court suggesting that sexual conduct with the victim would necessarily result in DNA evidence being found in the vaginal aspirate. Absent such evidence, Martinez cannot meet his burden under Rule 32.17. The trial court did not err in summarily rejecting this claim.

¶10 We grant review but deny relief.