

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

GERALD RAY TIMMONS,
Petitioner.

No. 2 CA-CR 2016-0261-PR
Filed October 6, 2016

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NOT FOR PUBLICATION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 Pima County
No. CR20031946
The Honorable Howard Fell, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

Gerald R. Timmons, San Luis
In Propria Persona

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MEMORANDUM DECISION

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

ESPINOSA, Judge:

¶1 Gerald Timmons seeks review of the trial court’s order denying his 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. *State v. Roseberry*, 237 Ariz. 507, ¶ 7, 353 P.3d 847, 848 (2015). Timmons has not met his burden of demonstrating such abuse here.

¶2 After a jury trial, Timmons was convicted of armed robbery, aggravated robbery, six counts of kidnapping, and six counts of aggravated assault stemming from his role in a 2003 robbery. The trial court sentenced him to a combination of concurrent and consecutive prison terms totaling 30.5 years. We affirmed his convictions and sentences on appeal. *State v. Timmons*, No. 2 CA-CR 2004-0058 (Ariz. App. Oct. 27, 2005) (mem. decision). Timmons then sought post-conviction relief, which the trial court denied, and this court denied relief on review. *State v. Timmons*, No. 2 CA-CR 2009-0306-PR (Ariz. App. Mar. 10, 2010) (mem. decision).

¶3 In 2015, Timmons again sought post-conviction relief, arguing primarily that his Rule 32 counsel had been ineffective, and he was entitled to raise that claim pursuant to *Martinez v. Ryan*, ___ U.S. ___, 132 S. Ct. 1309 (2012). The trial court summarily denied relief, and Timmons did not seek review of that ruling. Instead, in May 2016, he filed a notice of and petition for post-conviction relief in which he claimed “*State v. Lizardi*” and “*State v. Martinez*” constituted a significant change in the law and that his sentences were improper because he “was sentenced for a dangerous offense . . . while also being sentenced to an aggravated sentence,

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simultaneously using the ‘same two factors’ that were the heart of the state’s case.”

¶4 The trial court interpreted Timmons’s reliance on “*State v. Lizardi*” as referring to *State v. Lizardi*, 234 Ariz. 501, ¶ 18, 323 P.3d 1152, 1157 (App. 2014), in which this court concluded that a jury was required to find “an aggravating factor that increases a statutory minimum sentence” pursuant to *Alleyne v. United States*, ___ U.S. ___, 133 S. Ct. 2151 (2013). The trial court determined *Alleyne* constituted a significant change in the law pursuant to Rule 32.1(g) but did not entitle Timmons to relief. Timmons filed a motion for reconsideration, explaining that he was instead relying on “*State v. Lizardi*, Court of Appeals No. 1-CA-CR 13-0783” and “*State v. Martinez*, 1-CA-CR 15-0370.” He further claimed he was seeking relief both from the “same . . . factors” having been used to aggravate and enhance his sentence, as well as from his consecutive sentences. The court denied the motion for reconsideration, and this petition for review followed.

¶5 On review, Timmons restates his claims that his consecutive sentences are improper and that his sentences could not be enhanced and aggravated based on the same factors. But such sentencing claims cannot be raised in this untimely proceeding. See Ariz. R. Crim. P. 32.1(a), (c); 32.4(a). Thus, the trial court was correct to summarily reject them. See *State v. Banda*, 232 Ariz. 582, n.2, 307 P.3d 1009, 1012 n.2 (App. 2013) (“We can affirm the trial court’s ruling for any reason supported by the record.”).

¶6 Moreover, the cases Timmons claims constitute a significant change in the law are unpublished memorandum decisions. See *State v. Martinez*, 1 CA-CR 15-0370 (Ariz. App. May 3, 2016) (mem. decision); *State v. Lizardi*, 1 CA-CR 13-0783 (Ariz. App. Feb. 12, 2015) (mem. decision). An unpublished memorandum decision has no precedential value in Arizona. Ariz. R. Sup. Ct. 111(c)(1). Thus, it cannot constitute a significant change in the law pursuant to Rule 32.1(g).

¶7 Timmons also suggested below that he could raise his sentencing claims pursuant to Rule 32.1(e) or (h). Although a claim

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under Rule 32.1(e) can be raised in an untimely proceeding, a claim of newly discovered material facts does not encompass newly discovered legal theories or authority. *See generally State v. Saenz*, 197 Ariz. 487, ¶ 7, 4 P.3d 1030, 1032 (App. 2000) (to establish claim of newly discovered evidence, defendant must show “that the evidence was discovered after trial although it existed before trial; that it could not have been discovered and produced at trial through reasonable diligence; that it is neither cumulative nor impeaching; that it is material; and that it probably would have changed the verdict”).

¶8 Nor has Timmons made any effort to establish a claim pursuant to Rule 32.1(h). And, finally, we reject his assertion made below that he may raise these claims pursuant to *Schlup v. Delo*, 513 U.S. 298 (1995). Nothing in that decision addresses post-conviction relief under Arizona law; the Supreme Court instead addressed the showing required to overcome procedural default in federal habeas corpus proceedings. *See id.* at 326-27.

¶9 Although we grant review, relief is denied.