

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

SERGIO MENDOZA,
Petitioner.

No. 2 CA-CR 2013-0422-PR
Filed January 7, 2014

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NOT FOR PUBLICATION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); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Maricopa County

No. CR2009007427046DT

The Honorable Paul J. McMurdie, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

William G. Montgomery, Maricopa County Attorney
By Gerald R. Grant, Deputy County Attorney, Phoenix
Counsel for Respondent

Sergio Mendoza, Kingman
In Propria Persona

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MEMORANDUM DECISION

Chief Judge Howard authored the decision of the Court, in which Presiding Judge Vásquez and Judge Miller concurred.

H O W A R D, Chief Judge:

¶1 Sergio Mendoza petitions this court for review of the trial court's order summarily dismissing his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that ruling unless the court clearly has abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Mendoza has not met his burden of demonstrating such abuse here.

¶2 Mendoza pled guilty to illegally conducting an enterprise and was sentenced to a 3.5-year prison term in January 2010. In September 2011, he filed a form notice of post-conviction relief, stating he wished to raise claims of ineffective assistance of counsel, newly discovered evidence, and actual innocence. The trial court observed that the notice was not timely filed pursuant to Rule 32.4(a) and appointed counsel filed a notice stating she had reviewed the record but was "unable to discern any colorable claim upon which to base a Petition for Post-Conviction relief."

¶3 Mendoza filed a pro se petition arguing that he had recently discovered "additional information" "via [his] co-defendant's motion to suppress" suggesting his attorney had been ineffective for failing to seek suppression of wiretap evidence and evidence obtained through the use of global positioning system (GPS) tracking. He additionally argued there had been a significant change in the law applicable to his case, apparently referring to *United States v. Jones*, ___ U.S. ___, 132 S. Ct. 945 (2012). The trial court summarily denied relief.

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¶4 On review, Mendoza repeats his arguments and, for the first time, claims he would not have pled guilty had counsel properly investigated evidence supporting a motion to suppress and filed such a motion. Again, he grounds his claim of ineffective assistance of counsel in an argument that he had only recently discovered evidence of counsel’s ineffectiveness—namely, that his codefendants had successfully moved for the suppression of evidence.

¶5 Because Mendoza’s notice of post-conviction relief was untimely, he may only raise claims pursuant to Rule 32.1(d), (e), (f), (g), or (h). Ariz. R. Crim. P. 32.4(a). A claim of ineffective assistance of counsel does not fall within any of those subsections and generally cannot be raised in an untimely proceeding.¹

¶6 But, as we noted above, Mendoza attempts to rescue his precluded claim of ineffective assistance of counsel by asserting he only recently discovered the evidence of counsel’s ineffectiveness. A claim of newly discovered evidence may be raised in an untimely post-conviction proceeding. Ariz. R. Crim. P. 32.1(e), 32.4(a). We observe, however, that a claim of recently discovered ineffective assistance of counsel is not clearly cognizable under Rule 32.1(e). The plain language of that subsection does not encompass newly discovered material facts related to post-conviction claims—only those facts relevant to the defendant’s “verdict or sentence.” See

¹Our supreme court stated in *Stewart v. Smith*, 202 Ariz. 446, ¶¶ 10, 12, 46 P.3d 1067, 1071 (2002), that a defendant could raise ineffective assistance of counsel for the first time in a successive petition for post-conviction relief if the “right allegedly affected by counsel’s ineffective performance . . . is of sufficient constitutional magnitude to require personal waiver by the defendant and there has been no personal waiver.” Even assuming this reasoning applies with equal force to an untimely proceeding like Mendoza’s, he does not assert that his claims encompass a right that must be waived personally. And, although Mendoza cites *Nevius v. Sumner*, 852 F.2d 463, 470 (9th Cir. 1988), for the proposition that his claims are not precluded, that case is not relevant to any issue before us.

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State ex rel. Thomas v. Newell, 221 Ariz. 112, ¶ 7, 210 P.3d 1283, 1285 (App. 2009) (rule's plain language is best indicator of meaning); *cf. United States v. Hanoum*, 33 F.3d 1128, 1130-31 (9th Cir. 1994) (claim of "newly discovered evidence" under Rule 33, Fed. R. Crim. P., "limited to where the newly discovered evidence relates to the elements of the crime charged").

¶7 Even if we assume that a claim of newly discovered ineffective assistance of counsel is cognizable under Rule 32.1(e), Mendoza's claim nonetheless fails. A defendant presents a colorable claim of newly discovered evidence if the following requirements are met:

(1) the evidence must appear on its face to have existed at the time of trial but be discovered after trial; (2) the [petition] must allege facts from which the court could conclude the defendant was diligent in discovering the facts and bringing them to the court's attention; (3) the evidence must not simply be cumulative or impeaching; (4) the evidence must be relevant to the case; (5) the evidence must be such that it would likely have altered the verdict, finding, or sentence if known at the time of trial.

State v. Bilke, 162 Ariz. 51, 52-53, 781 P.2d 28, 29-30 (1989).

¶8 Mendoza's petition below and petition for review do not explain why he was unable to bring this claim before September 2011, when he filed his untimely notice of post-conviction relief. The documents he attached to his petition below show the trial court granted his codefendants' motion to suppress in June 2010. Mendoza stated below only that he "assert[ed] his claim diligently . . . once he became aware of the suppression ruling." But he does not explain how he became aware of the ruling, or provide any other information permitting the trial court or this court to evaluate his diligence in uncovering counsel's purported ineffectiveness.

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¶9 Moreover, Mendoza has identified no evidence demonstrating that his trial counsel actually was unaware of facts that could have supported a motion to suppress. And there clearly was a strategic basis for counsel to forgo a motion to suppress and instead recommend that Mendoza plead guilty to only one of the four crimes charged—and avoid the more serious conspiracy charge—with the sentence to be concurrent to sentences imposed in other cause numbers. *See State v. Beaty*, 158 Ariz. 232, 250, 762 P.2d 519, 537 (1988) (“[m]atters of trial strategy and tactics are committed to defense counsel’s judgment” and cannot support claim of ineffective assistance of counsel). Thus, Mendoza has not made a colorable claim for relief pursuant to Rule 32.1(e), and, even were that claim colorable, Mendoza has not made a colorable claim of ineffective assistance of counsel.

¶10 He apparently has abandoned on review his claim pursuant to Rule 32.1(g) that *Jones* constitutes a significant change in the law applicable to his case. We therefore do not address that question. *See State v. Rodriguez*, 227 Ariz. 58, n.4, 251 P.3d 1045, 1048 n.4 (App. 2010) (declining to address argument not raised in petition for review).

¶11 For the first time on review, Mendoza appears to argue that his resentencing in another cause number invalidated his plea agreement in this case. We do not address claims that were not raised in the trial court. *State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980); *see also* Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review should contain “issues which were decided by the trial court and which the defendant wishes to present to the appellate court for review”).

¶12 Although review is granted, relief is denied.