

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

ARTURO NEVAREZ-UGARTE,
Petitioner.

No. 2 CA-CR 2013-0458-PR
Filed January 22, 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NOT FOR PUBLICATION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. CR2007162236001DT

The Honorable Julie P. Newell, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

COUNSEL

William G. Montgomery, Maricopa County Attorney
By E. Catherine Leisch, Deputy County Attorney, Phoenix
Counsel for Respondent

Arturo Nevarez-Ugarte, Tucson
In Propria Persona

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MEMORANDUM DECISION

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

V Á S Q U E Z, Presiding Judge:

¶1 Petitioner Arturo Nevarez-Ugarte seeks review of the trial court’s summary dismissal of his successive notice of post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. We grant review, but, for the following reasons, we deny relief.

¶2 After a jury trial in 2008, Nevarez-Ugarte was convicted of two counts each of kidnapping, theft by extortion, and armed robbery, all dangerous offenses. The trial court sentenced Nevarez-Ugarte to enhanced, aggravated terms of imprisonment, some consecutive and some concurrent, for a total of thirty-one years. We affirmed his convictions and sentences on appeal. *State v. Nevarez-Ugarte*, No. 1 CA-CR 08-0305 (memorandum decision filed Apr. 2, 2009).

¶3 Nevarez-Ugarte then filed a timely notice of post-conviction relief, and, in March 2010, appointed counsel notified the trial court that he could find no colorable claims to raise in a Rule 32 proceeding. The court granted Nevarez-Ugarte an opportunity to file a pro se petition, and Nevarez-Ugarte sought and received several extensions of time for filing his petition. When he ultimately filed his pro se petition in February 2012, it consisted of a form containing checked boxes that identified several claims, including “[t]he denial of the constitutional right to representation by a competent lawyer at every critical stage of the proceeding.” But, although the form directed petitioners to state the factual basis for their claims “clearly and fully” in an attachment, Nevarez-Ugarte provided no explanation for the boxes he had checked. The court summarily denied the petition on August 22, 2012. After review,

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this court also denied relief. *State v. Nevarez-Ugarte*, No. 2 CA-CR 2013-0426-PR (memorandum decision filed Dec. 23, 2013).

¶4 Nevarez-Ugarte filed a second notice of post-conviction relief on September 4, 2012. Relying on *Martinez v. Ryan*, ___ U.S. ___, 132 S. Ct. 1309 (2012), he alleged counsel in his first Rule 32 proceeding had been ineffective in failing to claim that the assistance provided by trial and appellate counsel had been constitutionally inadequate. He argued his claim of ineffective assistance of Rule 32 counsel “did not accrue” until the trial court had dismissed his first Rule 32 proceeding, and he cited this court’s decision in *Osterkamp v. Browning*, 226 Ariz. 485, 250 P.3d 551 (App. 2011), for the proposition that his notice, although “successive,” was nonetheless “timely.” As “reasons for not raising the claim[s] in the previous petition or in a timely manner,” Nevarez-Ugarte cited “[e]xtrinsic fraud/denial of due process of law/denial of access to the courts throughout” his first Rule 32 proceeding and alleged “agents of [the state]” had denied him “a meaningful opportunity to present his claims.”

¶5 The trial court summarily dismissed the notice, finding Nevarez-Ugarte had “fail[ed] to state a claim for which relief can be granted in an untimely Rule 32 proceeding.” The court construed Nevarez-Ugarte’s reference to *Martinez* as an argument that the Supreme Court case was a significant change in the law that gave rise to a claim of ineffective assistance of Rule 32 counsel. *See* Ariz. R. Crim. P. 32.1(g), 32.2(b). The court rejected this argument, concluding *Martinez* pertains only to rules regarding procedural default in federal habeas proceedings and does not “provide relief at the state court level.” The court then found Nevarez-Ugarte’s claims of ineffective assistance of trial and appellate counsel precluded because they “cannot [be] raise[d] . . . in an untimely or successive Rule 32 proceeding.”

¶6 The trial court also addressed Nevarez-Ugarte’s claim that his “failure to file a timely notice of post-conviction relief or notice of appeal was without fault on [his] part,” *see* Ariz. R. Crim. P. 32.1(f), and found the conclusory allegations in his notice insufficient to avoid preclusion. As the court explained, “a defendant who has filed an untimely notice of post-conviction relief must provide the

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Court with sufficient information to support each claim” or risk summary dismissal pursuant to Rule 32.2(b). *See* Ariz. R. Crim. P. 32.2(b) (“If the specific exception [to preclusion] and meritorious reasons do not appear substantiating the claim and indicating why the claim was not stated in the previous petition or in a timely manner, the notice shall be summarily dismissed.”). The court noted the additional requirement, in Rule 32.5, that a petition for post-conviction relief set forth specific facts and evidence supporting a petitioner’s allegations.

¶7 In his petition for review, Nevarez-Ugarte restates the arguments he raised below and also asserts the trial court abused its discretion in dismissing his claims pursuant to Rule 32.5, which pertains to a petition for post-conviction relief, not the notice of post-conviction relief filed here.¹ We review the summary dismissal of Rule 32 claims for an abuse of discretion. *State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006). We find none here.

¶8 Nevarez-Ugarte is mistaken that, as a non-pleading defendant, he “has a right” to effective assistance of counsel in his first Rule 32 proceeding based on the Supreme Court’s decision in *Martinez*. *See State v. Escareno-Meraz*, 232 Ariz. 586, ¶¶ 4-6, 307 P.3d 1013, 1014 (App. 2013) (“*Martinez* does not alter established Arizona law.”). We need not rehash the trial court’s correct ruling on this point of law. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993).

¹Nevarez-Ugarte also claims he is entitled to relief based on a “significant change in the law,” *see* Ariz. R. Crim. P. 32.1(g), resulting from the Supreme Court’s decisions in *Missouri v. Frye*, ___ U.S. ___, 132 S. Ct. 1399 (2012), and *Lafler v. Cooper*, ___ U.S. ___, 132 S. Ct. 1376 (2012). We will not consider for the first time on review issues not presented to, or ruled on by, 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 shall contain “[t]he issues which were decided by the trial court and which the defendant wishes to present” for review).

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¶9 Similarly, because Nevarez-Ugarte is a non-pleading defendant who has already had an opportunity for a direct appeal, his reliance on our decision in *Osterkamp* is misplaced. In *State v. Petty*, we held that a pleading defendant is not precluded from claiming—in a second Rule 32 proceeding—that counsel in his first, “of-right” Rule 32 proceeding had been ineffective. 225 Ariz. 369, ¶¶ 8-9, 238 P.3d 637, 640 (App. 2010). We reached this conclusion because a pleading defendant “is constitutionally entitled to the effective assistance of counsel on his first [of-right] petition for post-conviction relief, the counterpart of a direct appeal.” *Id.* ¶ 9, quoting *State v. Pruett*, 185 Ariz. 128, 131, 912 P.2d 1357, 1360 (App. 1995) (alteration in *Petty*); see also Ariz. R. Crim. P. 32.1 (“Rule 32 of-right proceeding” refers to proceeding filed by defendant who “pled guilty or no contest, admitted a probation violation, or whose probation was automatically violated based upon a plea of guilty or no contest”).

¶10 In *Osterkamp*, we simply concluded that counsel must be appointed for a pleading defendant who brings such a claim in a second, timely Rule 32 proceeding, based on “the plain language” of Rule 32.4(c)(2). 226 Ariz. 485, ¶ 11, 250 P.3d at 554. In contrast, “[n]on-pleading defendants like [Nevarez-Ugarte] have no constitutional right to counsel in post-conviction proceedings; thus, despite the existence of state rules providing counsel, a claim that Rule 32 counsel was ineffective is not a cognizable ground for relief in a subsequent Rule 32 proceeding.” *Escareno-Meraz*, 232 Ariz. 586, ¶ 4, 307 P.3d at 1014.

¶11 We agree with Nevarez-Ugarte that the trial court’s reference to Rule 32.5 was inapposite because that rule sets forth the requirements for a petition for post-conviction relief and the court dismissed this proceeding based on the notice filed. But the court did not abuse its discretion in dismissing Nevarez-Ugarte’s notice; Rule 32.2(b) provides a notice of post-conviction relief “shall be summarily dismissed” if it fails to identify a “specific exception” to preclusion, by stating a ground for relief identified in Rule 32.1(d) through (h), and if “meritorious reasons do not appear substantiating the claim and indicating why the claim was not stated in the previous petition or in a timely manner.” As the court

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recognized, Nevarez-Ugarte failed to provide meritorious reasons why his claims of ineffective assistance of counsel would fall within any exceptions to preclusion found in the rule.

¶12 With respect to the trial court's discussion of Rule 32.1(f), we add that this ground simply does not encompass Nevarez-Ugarte's suggestion that he was not at fault for failing to state his claims in his first Rule 32 petition. Rule 32.1(f) provides a ground for post-conviction relief where "[t]he defendant's failure to file a notice of post-conviction relief of-right or notice of appeal within the prescribed time was without fault on the defendant's part." As addressed above, neither of Nevarez-Ugarte's post-conviction proceedings were "of-right" because he is a non-pleading defendant. *See* Ariz. R. Crim. P. 32.1 2000 cmt. ("Relief pursuant to subsection (f) will continue to be unavailable to all post-conviction relief proceedings not 'of-right.'"). In addition, the rule applies only to excuse a late notice, not, as Nevarez-Ugarte seems to suggest, to excuse an incomplete petition. *Cf. State v. Diaz*, 228 Ariz. 541, ¶ 10, 269 P.3d 717, 720 (App. 2012) (Rule 32.1(f) applies only to failure to file notice timely, not failure to file petition).

¶13 In sum, the trial court did not abuse its discretion in summarily dismissing Nevarez-Ugarte's successive notice of post-conviction relief. Accordingly, although review is granted, relief is denied.