

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

ANTHONY A. GARCIA,
Petitioner.

No. 2 CA-CR 2013-0474-PR
Filed January 24, 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NOT FOR PUBLICATION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. CR2003020101001DT

The Honorable Carey Snyder Hyatt, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Anthony A. Garcia, Florence
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 After a jury trial, petitioner Anthony Garcia was convicted of molestation of a child, sexual abuse of a child, and kidnapping, all dangerous crimes against children. This court affirmed the convictions and the sentences imposed. *State v. Garcia*, No. 1 CA-CR 04-0571 (memorandum decision filed Oct. 14, 2005). In this petition for review, Garcia challenges the trial court's order summarily dismissing his notice of post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb the trial court's ruling absent a clear abuse of the court's discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Garcia has not sustained his burden of establishing such abuse here.

¶2 Garcia filed his first, untimely notice of post-conviction relief in 2007; the trial court dismissed it. He filed his second notice in August 2012, claiming he was entitled to relief based on significant changes in the law, specifically, three United States Supreme Court decisions: *Martinez v. Ryan*, ___ U.S. ___, 132 S. Ct. 1309 (2012), *Missouri v. Frye*, ___ U.S. ___, 132 S. Ct. 1399 (2012), and *Lafler v. Cooper*, ___ U.S. ___, 132 S. Ct. 1376 (2012). In its minute entry dismissing the notice, the court correctly concluded that although such a claim can be raised in a successive or untimely petition, an exception to the rule of preclusion in Rule 32.2, none of these decisions could provide Garcia with a basis for seeking post-conviction relief pursuant to Rule 32.1(g). Garcia has not persuaded us otherwise; therefore, we adopt the court's well-reasoned ruling. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993).

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¶3 Finally, in his petition for review, Garcia correctly states that in his notice of post-conviction relief he had requested that counsel be appointed to represent him and asks this court to “remand this case back to the trial court to appoint counsel, and” conduct a hearing on the issues he has raised. Because this was a successive post-conviction proceeding, Garcia was not entitled to the appointment of counsel; rather, it was for the trial court to determine whether to appoint counsel in the exercise of its discretion. *See* Ariz. R. Crim. P. 32.4(c)(2); *see also Osterkamp v. Browning*, 226 Ariz. 485, ¶¶ 11, 15-16, 250 P.3d 551, 554-55 (App. 2011) (defendant entitled appointment of counsel “[u]pon the filing of a timely or first notice” of post-conviction relief). In any event, as this court stated in *State v. Harden*, 228 Ariz. 131, ¶ 11, 263 P.3d 680, 682-83 (App. 2011), Rule 32.2(b) does not require a trial court to appoint counsel when notice of post-conviction relief is “facially non-meritorious.” Given the trial court’s correct conclusion that Garcia would not be entitled to relief based on the cases he cites, the court did not abuse its discretion by dismissing the notice without first appointing counsel in this successive proceeding.

¶4 We grant the petition for review but for the reasons stated, we deny relief.