

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

HAROLD MAURICE HUMMEL,
Petitioner.

No. 2 CA-CR 2013-0546-PR
Filed April 28, 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NOT FOR PUBLICATION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 Pima County

No. CR023599

The Honorable Christopher P. Staring, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Barbara LaWall, Pima County Attorney
By Jacob R. Lines, Deputy County Attorney, Tucson
Counsel for Respondent

Harold M. Hummel, Tucson
In Propria Persona

MEMORANDUM DECISION

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

M I L L E R, Judge:

¶1 Petitioner Harold Hummel 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 a trial court's ruling on a petition for post-conviction relief absent a clear abuse of discretion." *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Hummel has not sustained his burden of establishing such abuse here.

¶2 After a jury trial, Hummel was convicted of five counts of armed robbery arising from one robbery of two victims in June 1987 and a second robbery of three victims in February 1988. The trial court imposed aggravated prison terms of eighteen years on the first two counts and enhanced, aggravated, twenty-five-year terms on the other three counts, ordering all terms to be served consecutively for a total of 111 years' imprisonment. This court affirmed Hummel's convictions and sentences on appeal and denied relief on a consolidated petition for review from the trial court's denial of his first petition for post-conviction relief. *State v. Hummel*, Nos. 2 CA-CR 90-0924, 2 CA-CR 92-0098-PR (consolidated) (memorandum decision filed Mar. 4, 1993). Hummel thereafter sought and was denied post-conviction relief in three more proceedings, and in each proceeding this court denied relief on his petition for review. *State v. Hummel*, No. 2 CA-CR 2005-0280-PR (memorandum decision filed Apr. 28, 2006); *State v. Hummel*, No. 2 CA-CR 98-0039-PR (memorandum decision filed June 25, 1998); *State v. Hummel*, No. 2 CA-CR 94-0244-PR (memorandum decision filed Sept. 13, 1994).

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¶3 In July 2013, Hummel filed a fifth petition for post-conviction relief. First, in a somewhat confusing argument, he asserted *Martinez v. Ryan*, ___ U.S. ___, 132 S. Ct. 1309 (2012), entitled him to relief. He also pointed out that he had been represented by the same person on appeal and in his first Rule 32 proceeding. Hummel further contended he had received ineffective assistance of trial counsel and that the state had violated his rights by withholding evidence. Finally, he maintained newly discovered evidence—specifically certain witness statements—entitled him to relief. The trial court summarily denied relief, concluding Hummel’s claims were precluded because they had “been rejected in earlier proceedings.”

¶4 On review, Hummel contends the trial court abused its discretion in finding precluded his claim that *Martinez* was a significant change in the law and repeats his claims of newly discovered evidence and that trial and appellate/Rule 32 counsel were ineffective. We agree with the trial court that many of Hummel’s claims are precluded either because they were adjudicated in or not raised in previous proceedings. *See* Ariz. R. Crim. P. 32.2(a)(2), (3).

¶5 Hummel is correct, however, that his claims of newly discovered evidence and a significant change in the law are not subject to preclusion. *See* Ariz. R. Crim. P. 32.2(b). And, although this proceeding is untimely, such claims may be raised in an untimely proceeding. *See* Ariz. R. Crim. P. 32.4(a). We will, however, affirm the trial court if its ruling is correct for any reason. *Cf. State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984) (appellate court is obliged to affirm trial court’s ruling if result legally correct for any reason).

¶6 Hummel contends that certain witness statements constitute newly discovered evidence. Pursuant to Rule 32.1(e), to establish a claim of newly discovered evidence a petitioner must meet the following requirements:

- (1) the evidence must appear on its face to have existed at the time of trial but be

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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).

¶7 In this case, although the dates on the witness statements suggest they existed at the time of trial, Hummel has not “allege[d] facts from which the court could conclude [he had been] diligent in discovering” them and “bringing them to the court’s attention.” *Id.* Indeed, all Hummel asserts is that he “received” the documents in June 2013. Likewise, we cannot say he established the evidence was “such that it would likely have altered the verdict.” *Id.* We therefore cannot say Hummel has established a claim of newly discovered evidence.

¶8 We likewise reject Hummel’s claim related to *Martinez*. We determined in *State v. Escareno-Meraz* that *Martinez* did not alter established Arizona law that a non-pleading defendant had no constitutional right to counsel in post-conviction proceedings and, therefore, had no constitutional right to effective assistance of Rule 32 counsel. 232 Ariz. 586, ¶¶ 4-6, 307 P.3d 1013, 1014 (App. 2013). To the extent Hummel’s claim can be read as one based on *State v. Bennett*, 213 Ariz. 562, ¶¶ 14-16, 146 P.3d 63, 67 (2006), in which our supreme court determined a defendant’s claim of ineffective assistance of counsel was not precluded in a second post-conviction relief proceeding when he was represented by the same attorney on appeal and in his first Rule 32 proceeding, that rule is not implicated here. Hummel’s claims do not relate to counsel’s performance in her appellate capacity, but rather to her purported failures to properly raise Hummel’s claims of ineffective assistance of trial counsel in his

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first Rule 32 proceeding. But, as noted above, a non-pleading defendant is not entitled to effective counsel in post-conviction proceedings. See *Escareno-Meraz*, 232 Ariz. 586, ¶¶ 4-6, 307 P.3d at 1014. In any event, Hummel has not explained why he did not raise such a claim in a timely fashion. See Ariz. R. Crim. P. 32.2(b).

¶9 For these reasons, we cannot say the trial court abused its discretion in summarily dismissing Hummel's petition for post-conviction relief. *Perez*, 141 Ariz. at 464, 687 P.2d at 1219. Thus, although we grant the petition for review, we deny relief.