IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

RICKY LEE SABIN,
Petitioner.

No. 2 CA-CR 2014-0014-PR
Filed June 12, 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NOT FOR PUBLICATION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
Nos. CR20041696 and CR20050236
The Honorable Scott Rash, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

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

Ricky L. Sabin, Florence
In Propria Persona

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 Petitioner Ricky Sabin 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). Sabin has not sustained his burden of establishing such abuse here.

¶2 After a bench trial based on stipulated evidence, Sabin was convicted of sexual conduct with a minor and continuous sexual abuse of a minor. The trial court imposed consecutive, aggravated terms of imprisonment totaling thirty-seven years. This court affirmed his convictions and sentences on appeal. *State v. Sabin*, No. 2 CA-CR 2005-0181 (memorandum decision filed Nov. 13, 2006). Sabin thereafter sought and was denied post-conviction relief, and this court granted review, but denied relief on his petition for review. *State v. Sabin*, No. 2 CA-CR 2009-0153-PR (memorandum decision filed Oct. 1, 2009).

¶3 In November 2013, Sabin initiated a second proceeding for post-conviction relief, arguing in his petition that he had received ineffective assistance of trial counsel in relation to counsel's failure to adequately communicate a plea offer to him, that Rule 32 counsel was ineffective in failing to argue trial counsel's ineffectiveness, and that *Missouri v. Frye*, ___ U.S. ___, 132 S. Ct. 1399 (2012), and *Martinez v. Ryan*, ___ U.S. ___, 132 S. Ct. 1309 (2012), were significant changes in the law entitling him to relief. The trial court summarily denied relief, concluding Sabin's claims were precluded. Sabin filed a motion for rehearing, asserting that counsel

should have been appointed and essentially rearguing his claims. The court summarily denied that motion as well.

¶4 On review, Sabin argues the trial court should have appointed him counsel and maintains the court abused its discretion in finding his claims precluded and rejecting his claims of significant changes in the law. Relying primarily on a comment to Rule 32.5, Sabin maintains a court is required to appoint counsel, even in a successive proceeding, if ineffective assistance of counsel is raised for the first time therein. But, that comment appears to relate to former Rule 32.5, which was renumbered to 32.4 in 1992, and which was substantively amended in 2000 to remove the requirement for appointment of counsel when a first claim of ineffective assistance of counsel is raised in a successive petition. *See* 170 Ariz. LXVIII-LXXI (1992); 198 Ariz. CXIV-CXV (2000). Rule 32.4(c) now provides that on the filing any notice other than one that is a first or timely notice, "the appointment of counsel is within the discretion of the presiding judge." "Although a comment may clarify a rule's ambiguous language, a comment cannot otherwise alter the clear text of a rule." *State v. Aguilar*, 209 Ariz. 40, ¶ 26, 97 P.3d 865, 873 (2004). And to accept Sabin's reading of the comment to Rule 32.5 would elevate that comment above the clear language of the rule. We therefore conclude the trial court did not err in refusing to appoint counsel in this matter.

¶5 Sabin also argues the trial court erred in determining his claims of ineffective assistance of counsel are precluded. Even if not precluded by Sabin's failure to raise the claim in his first proceeding, however, a claim of ineffective assistance of counsel arises under Rule 32.1(a), and such a claim cannot be raised in an untimely proceeding such as this one. *See* Ariz. R. Crim. P. 32.4(a); *State v. Lopez*, ___ Ariz. ____, ¶¶ 8-10, 323 P.3d 1164, 1166 (App. 2014). We therefore cannot say the trial court abused its discretion in rejecting the claim. *Cf. State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984) (appellate court will affirm trial court's ruling if result legally correct for any reason).

¶6 Sabin finally contends the trial court should have accepted his claims that *Martinez* and *Frye* were significant changes

in the law entitling him to relief under Rule 32.1(g), which is an exception to both preclusion and timeliness requirements. *See* Ariz. R. Crim. P. 32.2(b), 32.4(a). But we determined in *State v. Escareno-Meraz* that *Martinez* did not alter established Arizona law that a non-pleading defendant, like Sabin, was not constitutionally entitled to effective counsel in post-conviction proceedings. 232 Ariz. 586, ¶¶ 4-6, 307 P.3d 1013, 1014 (App. 2013).

¶7 And, *Trevino v. Thaler*, on which Sabin also relies, does not create a different result. ___ U.S. ___, ____, 133 S. Ct. 1911, 1921 (2013). That case merely applies the rule in *Martinez* to states in which a claim of ineffective assistance of counsel may be raised on appeal, but it is "highly unlikely" a defendant "will have a meaningful opportunity" to do so. *Id.* Additionally, it has long been the law in Arizona that, as *Frye* provides, a defendant is entitled to effective representation in the plea context. *See State v. Donald*, 198 Ariz. 406, ¶¶ 9, 14, 10 P.3d 1193, 1198, 1200 (App. 2000); *see also Frye*, ___ U.S. at ___, 132 S. Ct. at 1407-08. We therefore cannot agree that *Frye* is a significant change in the law. *See State v. Poblete*, 227 Ariz. 537, ¶ 8, 260 P.3d 1102, 1105 (App. 2011) (significant change in law "'requires some transformative event, a clear break from the past'"), *quoting State v. Shrum*, 220 Ariz. 115, ¶ 15, 203 P.3d 1175, 1178 (2009).

¶8 For these reasons, although we grant the petition for review, we deny relief.