

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

AMINADAB ORDUNO,
Petitioner.

No. 2 CA-CR 2015-0065-PR
Filed June 15, 2015

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NOT FOR PUBLICATION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)(1); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Pima County

No. CR20000218

The Honorable D. Douglas Metcalf, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

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

Aminadab Orduno, Kingman
In Propria Persona

STATE v. ORDUNO
Decision of the Court

MEMORANDUM DECISION

Presiding Judge Miller authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Espinosa concurred.

M I L L E R, Presiding Judge:

¶1 After a jury trial, petitioner Aminadab Orduno was convicted of three counts of kidnapping, three counts of aggravated assault with a deadly weapon, kidnapping a minor under the age of fifteen, and first-degree burglary. This court affirmed his convictions and sentences on appeal. *State v. Orduno*, No. 2 CA-CR 2000-0435 (memorandum decision filed Jul. 17, 2003). Orduno sought and was denied post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., in three proceedings; this court denied relief on review in the first proceeding. *See State v. Orduno*, No. 2 CA-CR 2006-0118-PR (memorandum decision filed Jan. 30, 2007). Orduno now challenges the trial court's order summarily dismissing his fourth petition for post-conviction relief. We will not disturb the court's ruling absent a clear abuse of discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 In its order dismissing Orduno's Rule 32 petition, the trial court observed he had raised claims of ineffective assistance of counsel in the first three post-conviction proceedings and did so again in this one. Relying on this court's decision in *Swoopes*, the court found the claim precluded. The court went on to rule that, in any event, the claim that trial counsel had been ineffective in rejecting two plea offers by the state was without merit, given that the first plea offer was withdrawn by the state and the second was rejected by the court.

¶3 A trial court's determination whether a claim is precluded based on Rule 32.2 is a legal question that it must answer in exercising its discretion to decide if a defendant is entitled to post-conviction relief; we review that legal question de novo. *See*

STATE v. ORDUNO
Decision of the Court

Swoopes, 216 Ariz. 390, ¶ 4, 166 P.3d at 948. Orduno has not persuaded this court that the trial court erred as a matter of law and thereby abused its discretion by finding the claim of ineffective assistance of counsel precluded. To the extent the claim of ineffective assistance of trial counsel Orduno raised in this proceeding is substantially the same as the claim that was raised and adjudicated in the first post-conviction proceeding, Rule 32.2(a)(2) precluded Orduno from seeking relief on that same ground in this successive proceeding. And to the extent the claim is based on allegations of deficient performance by trial counsel that differ from those previously raised, the claim is precluded under Rule 32.2(a)(3) because Orduno could have raised these claims in the initial post-conviction proceeding.

¶4 We also reject Orduno’s arguments in his petition for review that (1) the trial court failed to consider the argument he raised in a “Motion for Substantive Review,” which he had filed as part of his petition for post-conviction relief, that his claim is not precluded based on federal authorities, in particular, a purported “exception” to the rule of preclusion created in *Martinez v. Ryan*, ___ U.S. ___, 132 S. Ct. 1309 (2012), and (2) this court should grant him relief based on *Martinez*, which he argues permits a defendant to raise claims of ineffective assistance of trial counsel in successive proceedings for post-conviction relief.¹

¶5 First, we presume the trial court reviewed and considered the motion that was before it. See *Flynn v. Cornoyer-Hedrick Architects & Planners, Inc.*, 160 Ariz. 187, 193, 772 P.2d 10, 16 (App. 1988) (rejecting argument that court had not read reply to response to motion, despite absence in minute entry of express statement by court it had read reply); cf. *Occidental Chem. Co. v. Connor*, 124 Ariz. 341, 344, 604 P.2d 605, 608 (1979) (presuming trial

¹Orduno did not argue that *Martinez* constitutes a significant change in the law entitling him to relief under Rule 32.1(g), rather he simply relies on *Martinez* for the proposition that a defendant may not be precluded from raising claims of ineffective assistance of counsel in successive post-conviction proceedings.

STATE v. ORDUNO
Decision of the Court

court considered affidavits that were part of record when it ruled on motion); *State v. Everhart*, 169 Ariz. 404, 407, 819 P.2d 990, 993 (App. 1991) (rejecting defendant's claim trial court erred in failing to expressly state it had considered evidence in mitigation and presuming sentencing court had considered all relevant factors before it, including evidence in mitigation). Second, nothing in *Martinez* alters the preclusive effect of Rule 32.2(a) and this court's application of that rule to preclude claims of ineffective assistance of counsel that were raised or could have been raised in a previous post-conviction proceeding. See *Swoopes*, 216 Ariz. 390, ¶ 23, 166 P.3d at 952. In *Martinez*, the Supreme Court addressed a defendant's equitable right to effective representation of counsel in the initial post-conviction proceeding in the context of default in federal habeas review. See *State v. Escareno-Meraz*, 232 Ariz. 586, ¶ 5, 307 P.3d 1013, 1014 (App. 2013), citing *Martinez*, ___ U.S. at ___, ___, 132 S. Ct. at 1315, 1319-20. It does not apply to claims of ineffective assistance of counsel raised pursuant to Rule 32 in successive post-conviction proceedings. See *id.* ¶¶ 4-6.

¶6 Because the trial court correctly determined the claim of ineffective assistance of counsel was precluded, it did not abuse its discretion in dismissing the petition without an evidentiary hearing and could have done so on that ground alone. We need not, therefore, address Orduno's argument that the court erred in rejecting the claim on the merits. We grant the petition for review but deny relief.