

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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THE STATE OF ARIZONA,  
*Respondent,*

*v.*

ERIC DEWAYNE PHILLIPS,  
*Petitioner.*

No. 2 CA-CR 2015-0272-PR  
Filed September 15, 2015

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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NOT FOR PUBLICATION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.

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Petition for Review from the Superior Court in Maricopa County

No. CR2005127287002DT

The Honorable Andrew G. Klein, Judge

**REVIEW GRANTED; RELIEF DENIED**

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Eric D. Phillips, Florence  
*In Propria Persona*

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**MEMORANDUM DECISION**

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

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ECKERSTROM, Chief Judge:

¶1 Petitioner Eric Phillips seeks review of the trial court’s order dismissing his notice for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. We will affirm a trial court’s ruling in a proceeding for post-conviction relief “absent a clear abuse of discretion.” *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Phillips has not sustained his burden of establishing such abuse here.

¶2 Pursuant to a plea agreement, in 2006, Phillips was convicted of armed robbery, with one prior felony conviction, and was sentenced to thirteen years in prison. Phillips thereafter sought and was denied post-conviction relief. In 2011, he filed multiple notices of post-conviction relief, each of which was summarily dismissed. He sought review of the final dismissal, and this court granted review of his petition, but denied relief. *State v. Phillips*, No 2 CA-CR 2012-0369-PR (memorandum decision filed Oct. 22, 2012).

¶3 In 2012, Phillips initiated another proceeding for post-conviction relief. On his notice, he indicated his claim was one of newly discovered evidence, and explained that although he had “immediately invoked his right to counsel,” he did not “retain counsel” for more than a month after his arrest. He stated he “was not aware of this claim” and therefore did not “knowing[ly], intelligently or voluntarily waive” his claim relating to his “right to counsel.” The trial court summarily dismissed the notice, concluding that Phillips’s claim was not one pursuant to Rule 32.1(e), but rather Rule 32.1(g), and that he had not established a significant change in the law that would entitle him to relief.

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¶4 On review, Phillips argues the trial court abused its discretion in denying him a hearing on his claim and summarily dismissing the notice. He explains the claim set forth in his notice was that he was denied the “active assistance of counsel” until after his arraignment. He insists this claim is one made pursuant to “Rule 32.1(e), not Rule 32.1(g)” as the court concluded below. And he alleges that because he “was not aware of this claim” he could not have adequately waived it, and it is therefore not subject to preclusion. He also raises what appear to be claims of ineffective assistance of trial counsel in relation to counsel’s conduct in the early stages of his case.<sup>1</sup>

¶5 Insofar as Phillips’s claims can be characterized as claims of ineffective assistance of counsel, they are precluded. *See* Ariz. R. Crim. P. 32.2(a)(3), 32.4(a). And we agree with the trial court that any claim that *Missouri v. Frye*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 1399 (2012), is a significant change in the law entitling Phillips to relief fails. It has long been the law in Arizona that 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). Additionally, although Phillips attempts to redefine his claim as one of newly discovered evidence, rather than a significant change in the law, a claim of newly discovered evidence requires the discovery of “material facts” and does not encompass the discovery of new legal arguments. Ariz. R. Crim. P. 32.1(e).

¶6 Furthermore, even viewing Phillips’s claim as one of a total denial of counsel and assuming arguendo that such a claim was not waived by his guilty plea, *see State v. Flores*, 218 Ariz. 407, ¶6, 188 P.3d 706, 708-09 (App. 2008), and could be considered exempt from preclusion as a claim of sufficient constitutional magnitude, *see Stewart v. Smith*, 202 Ariz. 446, ¶ 12, 46 P.3d 1067, 1071 (2002), the court did not abuse its discretion in dismissing Phillips’s notice. In order to avoid summary dismissal, Rule 32.2(b) requires a defendant

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<sup>1</sup>To the extent Phillips raises new claims on review, we do not address them. *See 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).

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in a successive proceeding to set forth in the notice of post-conviction relief “the substance of the specific exception and the reasons for not raising the claim in the previous petition or in a timely manner.” Phillips here only claimed that he was “not aware of” a claim. We cannot say this constitutes a “meritorious reason[],” Ariz. R. Crim. P. 32.2(b), and the trial court therefore could properly have dismissed his claim solely on that basis.

¶7 Even were the court to have reached the question of denial of counsel, however, the record contradicts Phillips’s claim. He was appointed counsel upon his release on August 30, 2005. He was directed to contact the appointed office within two days of release. And, the minute entry of his arraignment on September 19, which he claims on review was “held ‘without counsel,’” indicates that the office appeared on his behalf.

¶8 Therefore, although we accept review, we deny relief.