

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

JERRY REGINALD BOONE,
Petitioner.

No. 2 CA-CR 2015-0424-PR
Filed December 28, 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NOT FOR PUBLICATION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 Maricopa County

No. CR2010005405001DT

The Honorable Arthur T. Anderson, Judge

REVIEW GRANTED; RELIEF DENIED

Jerry R. Boone, Florence
In Propria Persona

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MEMORANDUM DECISION

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

VÁSQUEZ, Presiding Judge:

¶1 Jerry Boone petitions for review of the trial court’s summary dismissal of his successive, *pro se* petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. We grant review, but we deny relief.

¶2 Pursuant to a plea agreement, Boone was convicted in 2010 of two counts of armed robbery and sentenced to a prison term of 10.5 years, to be followed by a three-year term of probation. In September 2011, the trial court summarily denied Boone’s of-right petition for post-conviction relief, in which he had alleged, *inter alia*, that counsel had rendered ineffective assistance and sought to withdraw from his plea.

¶3 On January 15, 2014, Boone filed a successive and untimely petition for post-conviction relief in which he again alleged he had received ineffective assistance of counsel. But he maintained “preclusion does not apply to this Petition[,] notwithstanding its successive and untimely submission,” asserting his claims were based on his “actual innocence pursuant to Rule 32.1([h])” and on a significant change in the law – specifically *United States v. Jones*, ___ U.S. ___, 132 S. Ct. 945 (2012) – “which if applied to his case would change the outcome” under Rule 32.1(g).¹ In a section of his petition

¹ In *Jones*, the Supreme Court held “the Government’s installation of a [Global Positioning System] device on a target’s vehicle, and its use of that device to monitor the vehicle’s movements, constitutes a ‘search’” under the Fourth Amendment. ___ U.S. at ___, 132 S. Ct. at 949.

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denominated “Notice of Federal Claims,” Boone relied on *Martinez v. Ryan*, ___ U.S. ___, 132 S. Ct. 1309 (2012), to argue his ineffective assistance claims were subject to “substantive review” because “none of [them] . . . were ever properly presented to the state courts by first Rule 32 counsel.”² The trial court summarily denied relief, finding Boone’s claims of ineffective assistance of counsel were time-barred and concluding neither *Martinez* nor *Jones* affords a basis for relief. The court observed that “*Martinez* may permit [Boone] to seek relief in federal court,” “in a federal *habeas corpus* action,” but did not entitle him to relief under Rule 32.1(g). And, citing *State v. Reed*, 121 Ariz. 547, 592 P.2d 381 (App. 1979), the court found *Jones* inapplicable because, “[b]y pleading guilty, [Boone] waived his right to contest the evidence against him.” This petition for review followed.

¶4 We review a summary denial of post-conviction relief for an abuse of discretion, *State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006), and we find none here. On review, Boone asserts the arguments he raised below, including claims that the trial court “abused its discretion by forcing [him] into the plea” and that trial counsel was ineffective for failing to investigate allegedly “defective” witness identifications or challenge “evidence obtained by police use of GPS [(Global Positioning System)] devices.”³ He

²In *Martinez*, a non-pleading defendant argued he had a constitutional right to effective assistance of counsel in his first Rule 32 proceeding because, under Arizona law, that collateral proceeding “provide[d] the first occasion to raise a claim of ineffective assistance at trial.” ___ U.S. at ___, 132 S. Ct. at 1313, 1315. The Court declined to address this constitutional claim. *Id.* at ___, 132 S. Ct. at 1315. Instead, the Court held “a federal habeas court may excuse a procedural default of an ineffective-assistance claim when the claim was not properly presented in state court due to an attorney’s errors in an initial-review collateral proceeding.” *Id.* at ___, ___, 132 S. Ct. at 1313, 1315.

³For example, Boone argues on review, as he did below, that counsel was ineffective “by subjecting [him] to a guilty plea when [he] is actually innocent and when police use of the GPS tracking

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also argues the court abused its discretion and erred in concluding “the *Martinez* holding does not provide relief at the state court level.”

¶5 In its order, the trial court first concluded Boone’s claims of ineffective assistance of trial counsel and court error during plea proceedings arose under Rule 32.1(a)—claims which may not be raised in a successive or untimely proceeding. *See* Ariz. R. Crim. P. 32.2, 32.4(a). Boone is correct that, as a pleading defendant, he was entitled to the effective assistance of counsel in his first Rule 32 proceeding and therefore was entitled to raise, in a second Rule 32 proceeding, a claim that his first Rule 32 counsel was ineffective for failing to assert these claims. *See State v. Petty*, 225 Ariz. 369, ¶ 9, 238 P.3d 637, 640 (App. 2010).⁴ But such a claim is

devices to establish probable cause violated the [Fourth] Amendment.” In challenging the court’s denial of his ineffective assistance claim on review, Boone apparently alludes to Rule 32.1(h) by referring to his “actual innocence.” But he develops no argument challenging the trial court’s implicit denial of such relief, which would have required “clear and convincing evidence” of facts “sufficient to establish that no reasonable fact-finder would have found [the] defendant guilty of the underlying offense beyond a reasonable doubt.” Ariz. R. Crim. P. 32.1(h). Even if Boone had adequately developed such a claim in his petition below, he has waived review of the issue in his petition for review. *See* Ariz. R. Crim. P. 32.9(c)(1) (“Failure to raise any issue that could be raised in the petition . . . for review shall constitute waiver of appellate review of that issue.”).

⁴Boone’s claim is thus distinguished from that of *Martinez*, a non-pleading defendant who argued he was entitled to effective assistance of first Rule 32 counsel, even though he had already had the benefit of a direct appeal. *See Martinez*, ___ U.S. at ___, 132 S. Ct. at 1313-14. Also unlike *Martinez*, Boone filed a pro se petition in his first Rule 32 proceeding in which he raised allegations of ineffective assistance of trial counsel. *See id.* at ___, 132 S. Ct. at 1314. Thus, although he may be correct that such claims were not raised by Rule 32 counsel, they were raised in his first Rule 32 proceeding.

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subject to timeliness requirements, *see id.* ¶ 3, and may only be raised in a second notice of post-conviction relief filed “within thirty days after the issuance of the final order . . . in the petitioner’s first petition for post-conviction relief proceeding,” Ariz. R. Crim. P. 32.4(a). As the court correctly concluded, a claim of ineffective assistance of counsel may not be raised in an untimely proceeding like this one. *See id.*

¶6 The trial court also correctly concluded *Martinez* has no relevance to an Arizona Rule 32 proceeding. *See State v. Escareno-Meraz*, 232 Ariz. 586, ¶ 6, 307 P.3d 1013, 1014 (App. 2013) (“*Martinez* does not alter established Arizona law.”). Nor do we find any abuse of discretion in the court’s determination that *Jones* does not afford Boone a basis for relief under Rule 32.1(g). A defendant who enters a valid guilty plea waives all nonjurisdictional defects, including allegations that evidence was obtained through an illegal search. *State v. Lerner*, 113 Ariz. 284, 284-85, 551 P.2d 553, 553-54 (1976); *see also State v. Flewellen*, 127 Ariz. 342, 345, 621 P.2d 29, 32 (1980) (any error in court’s pretrial ruling regarding admissibility of evidence waived by guilty plea).

¶7 For the foregoing reasons, we grant review, but we deny relief.