

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

JOSE DEJESUS ORTIZ,
Petitioner.

No. 2 CA-CR 2015-0460-PR
Filed April 20, 2016

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NOT FOR PUBLICATION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. CR20020995
The Honorable Howard Fell, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Mandel Young PLC, Phoenix
By Taylor C. Young
Counsel for Petitioner

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MEMORANDUM DECISION

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

ECKERSTROM, Chief Judge:

¶1 Jose Ortiz seeks review of the trial court’s ruling summarily dismissing his successive and untimely petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that order unless the court clearly abused its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Ortiz has not met his burden of demonstrating such abuse here.

¶2 After a jury trial, Ortiz was convicted of attempted armed robbery, conspiracy to commit armed robbery, and first-degree felony murder. The trial court sentenced Ortiz to life imprisonment without the possibility of release for twenty-five years for murder, and to concurrent prison terms for the other convictions. We affirmed his convictions and sentences on appeal. *State v. Ortiz*, No. 2 CA-CR 2009-0260 (memorandum decision filed Jun. 23, 2010).

¶3 Ortiz, represented by counsel, subsequently sought post-conviction relief; the trial court denied relief and this court denied relief on review. *State v. Ortiz*, No. 2 CA-CR 2011-0259-PR (memorandum decision filed Jan. 24, 2012). In January 2013, Ortiz initiated a pro se post-conviction proceeding, arguing there was insufficient evidence he had committed a predicate felony for felony murder. In July 2013, the court summarily denied relief, and Ortiz did not seek review of that decision.¹

¹Ortiz initiated the proceeding by filing a “writ of coram nobis,” which the trial court treated as a notice of post-conviction relief, ordering Ortiz to file a petition. Ortiz raised his substantive claims in his reply to the state’s response to his initial filing, and the court addressed those claims in its ruling denying relief.

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¶4 In April 2015, Ortiz filed through counsel a petition for post-conviction relief “alleging factual innocence under Rule 32.1(h)” and “successive claims of ineffective assistance of trial counsel and direct appeal counsel.” He asserted trial counsel had failed to adequately investigate his case and present witness testimony which contradicted evidence presented at trial that he had intended to rob the victim. In his petition, Ortiz claimed he was “not required to set forth a reason for not raising th[e] claim [of actual innocence] in prior petitions.” He argued trial counsel was ineffective for failing to present the evidence at trial and, although he acknowledged “there is no right to the effective assistance of [post-conviction] counsel, . . . counsel failed to raise this claim in the first [post-conviction] proceeding.” He also asserted his appellate counsel had been ineffective for failing to adequately prepare the appellate record, raise various claims, and file a petition for review after his convictions were affirmed on appeal.

¶5 The state responded, *inter alia*, that Ortiz had not complied with Rule 32.2(b) by setting forth the reasons he had not raised his actual innocence claim “in the previous petition or in a timely manner.” In his reply, Ortiz argued he had complied with Rule 32.2(b) by asserting that “[s]uccessive constitutionally deficient representation has prevented [him] from raising his actual innocence claims until now.” The trial court summarily denied relief, concluding Ortiz’s claims of ineffective assistance of trial and appellate counsel were precluded. It further concluded Ortiz’s “reason for not raising his factual innocence claim in a previous petition or timely manner is without merit,” reasoning that trial counsel’s alleged ineffectiveness “does not justify Ortiz’s failure to raise the claim in his first Rule 32 petition, second Rule 32 petition, or in the 658 days between this Court’s denial of his second petition and the filing of his third petition.” This petition for review followed.

¶6 On review, Ortiz repeats his argument that he is entitled to raise his claim of actual innocence because he has complied with Rule 32.2(b) by alleging his Rule 32 counsel was ineffective. Although a claim of actual innocence pursuant to Rule

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32.1(h)² may be raised in a successive and untimely proceeding like this one, the defendant is required to set forth “meritorious reasons . . . indicating why the claim was not stated in the previous petition or in a timely manner.” Ariz. R. Crim. P. 32.2(b); 32.4(a). A non-pleading defendant like Ortiz is not constitutionally entitled to the effective assistance of Rule 32 counsel. *State v. Escareno-Meraz*, 232 Ariz. 586, ¶ 4, 307 P.3d 1013, 1014 (App. 2013). However, that fact does not necessarily foreclose Ortiz’s argument that the ineffective assistance of Rule 32 counsel can be a “meritorious reason” excusing the failure to raise a Rule 32.1(h) claim in his first proceeding. But, even were we to adopt Ortiz’s argument, the trial court did not err in summarily dismissing Ortiz’s petition.

¶7 Ortiz’s failure to raise the claim in his first proceeding was not the only basis for the trial court’s decision. As the court noted, Ortiz did not raise these issues in his second, pro se proceeding and waited nearly two years before pursuing the claims in his third. Ortiz has not asserted he was unable to retain new counsel or that he was unaware of the factual basis for his claims. Nor has he explained the significant delay between dismissal of his second proceeding and initiation of his third. In these circumstances, we cannot conclude the court abused its discretion in determining Ortiz had not provided “meritorious reasons” justifying his failure to have previously raised his claim of actual innocence.³ See Ariz. R. Crim. P. 32.2(b). And, to the extent Ortiz

²To prevail on a claim of actual innocence under Rule 32.1(h), a defendant must “demonstrate[] by clear and convincing evidence that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would have found defendant guilty of the underlying offense beyond a reasonable doubt.”

³Citing *Carriger v. Stewart*, 132 F.3d 463 (9th Cir. 1997), Ortiz asserts in passing that he is entitled to release if he can demonstrate his probable innocence. Nothing in *Carriger* supports his implicit argument that claim may be raised despite failure to comply with the rules of criminal procedure or in complete derogation of the state’s interest in finality. See *State v. Shrum*, 220 Ariz. 115, ¶ 12, 203 P.3d 1175, 1178 (2009) (“By requiring that all post-conviction claims

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asserts the trial court erred in summarily rejecting his claims of ineffective trial and appellate counsel, those claims cannot be raised in this untimely proceeding. Ariz. R. Crim. P. 32.1(a); 32.4(a).

¶8 Although review is granted, relief is denied.

be raised promptly, Rule 32.2(a) not only serves important principles of finality, but also allows any relief to be issued at a time when the interests of justice, from the perspectives of the defendant, the State, and the victim, can be best served.”) (citations omitted). And, in any event, Ortiz has not argued that he has met this standard – a higher standard than that required to obtain relief pursuant to Rule 32.1(h). See *Carriger*, 132 F.3d at 476.