

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

ALFRED MORONES CANO,
Petitioner.

No. 2 CA-CR 2016-0004-PR
Filed May 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NOT FOR PUBLICATION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. CR20093681
The Honorable K.C. Stanford, Judge

REVIEW GRANTED; RELIEF DENIED

Alfred M. Cano, Buckeye
In Propria Persona

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MEMORANDUM DECISION

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

M I L L E R, Judge:

¶1 Alfred Cano seeks review of the trial court's ruling summarily dismissing his 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). Cano has not met his burden of demonstrating such abuse here.

¶2 After a jury trial, Cano was convicted of second-degree burglary, aggravated domestic violence, kidnapping (domestic violence), and aggravated assault on an incapacitated victim (domestic violence). The trial court sentenced him to presumptive, enhanced, concurrent prison terms, the longest of which was 15.75 years. We affirmed his convictions and sentences on appeal. *State v. Cano*, No. 2 CA-CR 2010-0178 (memorandum decision filed May 25, 2011). Cano sought post-conviction relief, and appointed counsel filed a notice stating she had reviewed the record but found no claims to raise pursuant to Rule 32. The trial court granted leave for Cano to file a pro se petition, to be filed by May 2013, but Cano did not do so.

¶3 In October 2015, Cano filed a notice of and petition for post-conviction relief arguing: (1) *Alleyne v. United States*, ___ U.S. ___, 133 S. Ct. 2151 (2013), was a significant change in the law applicable to his sentence; (2) his sentence was illegal because prior convictions used to enhance his sentence were not found by a jury; and (3) his trial, sentencing, appellate, and Rule 32 counsel were ineffective. The trial court summarily dismissed the notice and

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petition.¹ It concluded Cano's claims of ineffective assistance of counsel were precluded as untimely, as was his sentencing claim. It determined that *Alleyne* was not retroactively applicable to Cano and, in any event, would not alter his sentence. This petition for review followed.

¶4 We agree with the trial court that Cano's claims of ineffective assistance of trial, sentencing, and appellate counsel are untimely. Such claims fall within Rule 32.1(a) and, as such, cannot be raised in an untimely proceeding like this one. Ariz. R. Crim. P. 32.4(a); *State v. Petty*, 225 Ariz. 369, ¶ 11, 238 P.3d 637, 641 (App. 2010). Pursuant to Rule 32.4(a), only claims pursuant to Rule 32.1(d) through (h) may be raised in an untimely proceeding. And, as a non-pleading defendant, Cano has no constitutional right to counsel in a post-conviction proceeding and, thus, his "claim that Rule 32 counsel was ineffective is not a cognizable ground for relief in a subsequent Rule 32 proceeding." *State v. Escareno-Meraz*, 232 Ariz. 586, ¶ 4, 307 P.3d 1013, 1014 (App. 2013). Cano is incorrect that he is entitled to raise a claim of ineffective Rule 32 counsel pursuant to *Martinez v. Ryan*, ___ U.S. ___, 132 S. Ct. 1309 (2012). As we explained in *Escareno-Meraz*, *Martinez* "does not alter established Arizona law."² 232 Ariz. 586, ¶ 6, 307 P.3d at 1014. Finally, Cano's

¹The trial court had not entered an order dismissing Cano's previous post-conviction proceeding. It nonetheless treated Cano's recent filings as a successive proceeding and, in its order dismissing that proceeding, also "correct[ed] its error" and dismissed the first. Cano does not assert the court erred by doing so.

²Cano's reliance on *Osterkamp v. Browning*, 226 Ariz. 485, 250 P.3d 551 (App. 2011), is misplaced. In that case, we addressed the right of a pleading defendant to argue his or her post-conviction counsel was ineffective. *Id.* ¶¶ 20-25. As we have explained, as a non-pleading defendant, Cano is not entitled to raise that claim. Cano also suggests he may raise his various claims because he did not voluntarily and knowingly waive them, citing *State v. Espinosa*, 200 Ariz. 503, 29 P.3d 278 (App. 2001). But the time limits of Rule 32.4(a) are not grounded in waiver. *State v. Lopez*, 234 Ariz. 513, ¶¶ 8-9, 323 P.3d 1164, 1166 (App. 2014).

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sentencing claims, other than to the extent they implicate *Alleyne*, fall under Rule 32.1(a) and (c) and therefore also cannot be raised in this untimely proceeding. *See* Ariz. R. Crim. P. 32.4(a).

¶5 In a detailed, closely-reasoned ruling, the trial court concluded that Cano is not entitled to relief under *Alleyne*, even assuming it constitutes a significant change in the law pursuant to Rule 32.1(g) and is retroactively applicable. We agree *Alleyne* does not apply here.

¶6 In *Alleyne*, the United States Supreme Court held that any fact that increases the mandatory minimum sentence must be submitted to the jury and proved beyond a reasonable doubt. ___ U.S. at ___, 133 S. Ct. at 2157-58, 2162-63 (any fact that increases mandatory minimum sentence for crime is “element” of crime, not “sentencing factor,” that must be submitted to jury). Cano argues that his sentences could not be enhanced on the basis of his previous convictions without the jury finding those convictions. But the Supreme Court explicitly chose in *Alleyne* to omit from its analysis the longstanding rule that prior convictions may be found by the court and need not be submitted to the jury. *See id.* at ___ n.1, 133 S. Ct. at 2160 n.1; *see also Blakely v. Washington*, 542 U.S. 296, 301 (2004) (“Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”), *quoting Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). Thus, because the prior convictions were not an element of the offenses for which Cano was convicted, *Alleyne* does not provide a basis for relief.

¶7 Cano also asserts he is entitled to relief pursuant to Rule 32.1(e). Although Cano indicated in his notice that he was raising a claim of newly discovered evidence pursuant to that rule, his claim appears to be that he recently learned of *Alleyne*. But Rule 32.1(e) permits relief on the basis of newly discovered material facts, not the recent discovery of legal authority. Cano further asserts the trial court failed to address his claim that the sentencing judge was biased against him. To the extent he raised that claim in his petition

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below, it cannot be raised in an untimely proceeding. *See* Ariz. R. Crim. P. 32.4(a).

¶8 We grant review but deny relief.