

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

JUAN MARTIN FELIX,
Petitioner.

No. 2 CA-CR 2016-0312-PR
Filed November 23, 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NOT FOR PUBLICATION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. CR20143724001
The Honorable Richard D. Nichols, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

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

Harold L. Higgins, P.C., Tucson
By Harold Higgins
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 Juan Felix seeks review of the trial court's order denying 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. Roseberry*, 237 Ariz. 507, ¶ 7, 353 P.3d 847, 848 (2015). Felix has not met his burden of demonstrating such abuse here.

¶2 Felix pled guilty to possession of a deadly weapon by a prohibited possessor and was sentenced on February 2, 2015, to a presumptive, 4.5-year prison term. On May 26, he filed a notice of post-conviction relief that he had signed on May 12. Felix, through appointed counsel, then filed a petition for post-conviction relief arguing counsel had been ineffective in failing to present information relevant to Felix's mental health history and that his hepatitis C diagnosis constituted newly discovered evidence relevant to his sentence. He argued, alternatively, that if the diagnosis was not newly discovered, counsel was ineffective in failing to bring it to the court's attention at sentencing. The trial court summarily denied relief, stating the same sentence would have been imposed even had the court been made aware of Felix's mental health history or hepatitis C diagnosis. This petition for review followed.

¶3 On review, Felix repeats his claim trial counsel was ineffective for failing to present evidence related to his mental health issues and initial hepatitis C diagnosis. He also repeats his claim that his hepatitis C diagnosis constitutes newly discovered evidence pursuant to Rule 32.1(e). First, we note that Felix's notice of post-

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conviction relief was filed more than ninety days after his sentencing and was therefore untimely. Ariz. R. Crim. P. 32.4(a). His claims of ineffective assistance cannot be raised in this untimely proceeding. *See id*; *State v. Lopez*, 234 Ariz. 513, ¶ 8, 323 P.3d 1164, 1166 (App. 2014) (“[T]he time limits for filing a notice and petition ‘are jurisdictional, and an untimely filed notice or petition shall be dismissed with prejudice.’”), quoting A.R.S. § 13-4234(G); *State v. Petty*, 225 Ariz. 369, ¶ 11, 238 P.3d 637, 641 (App. 2010) (ineffective assistance claim falls within Rule 32.1(a)). Accordingly, we do not address them further. *See State v. Banda*, 232 Ariz. 582, n.2, 307 P.3d 1009, 1012 n.2 (App. 2013) (“We can affirm the trial court’s ruling for any reason supported by the record.”).

¶4 Felix is correct that recently discovered medical diagnoses can constitute newly discovered evidence pursuant to Rule 32.1(e). *State v. Bilke*, 162 Ariz. 51, 53, 781 P.2d 28, 30 (1989). To state a colorable claim for such relief, however, Felix was required to show that the evidence existed at the time of sentencing but could not have been discovered in the exercise of reasonable diligence. *See id.* at 52, 781 P.2d at 29 (“[E]vidence must appear on its face to have existed at the time of trial but be discovered after trial.”); *State v. Saenz*, 197 Ariz. 487, ¶ 7, 4 P.3d 1030, 1032 (App. 2000) (evidence not newly discovered unless “it could not have been discovered and produced at trial through reasonable diligence”).

¶5 Felix has not shown that his hepatitis C diagnosis could not have been discovered before trial through reasonable diligence. Indeed, he asserts counsel should have discovered and presented that diagnosis at sentencing based on then-existing medical records. He suggests, however, that those records showed only a preliminary diagnosis, with his final diagnosis of chronic hepatitis C occurring only after his sentencing. But, even if we agreed that Felix’s hepatitis C diagnosis could not have been presented at sentencing through reasonable diligence, he still is not entitled to relief.

¶6 To prevail on a claim of newly discovered evidence, Felix must additionally show that evidence of the diagnosis “probably would have changed [his] sentence.” Ariz. R. Crim. P. 32.1(e). The trial court—the same court that presided over Felix’s

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sentencing—concluded that, in light of Felix’s “extensive criminal history,” the new evidence would not have changed the sentence. Although Felix complains that this conclusion is inconsistent with the presumptive sentence imposed, he does not develop any meaningful argument or cite authority suggesting that evidence of a hepatitis C diagnosis would have required the court to impose a lesser prison term. *See State v. Stefanovich*, 232 Ariz. 154, ¶ 16, 302 P.3d 679, 683 (App. 2013) (insufficient argument waives claim on review); *see also State v. Cazares*, 205 Ariz. 425, ¶ 8, 72 P.3d 355, 357 (App. 2003) (“[A] sentencing court is not required to find that mitigating circumstances exist merely because mitigating evidence is presented; the court is only required to give the evidence due consideration.”). Thus, we do not address this argument further.

¶7 We grant review but deny relief.