

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

ROBERT RAY VIRAMONTES,
Petitioner.

No. 2 CA-CR 2015-0003-PR
Filed April 3, 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NOT FOR PUBLICATION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 Pima County

No. CR64354

The Honorable James E. Marner, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Barbara LaWall, Pima County Attorney
By Heather A. Mosher, Deputy County Attorney, Tucson
Counsel for Respondent

Robert R. Viramontes, Buckeye
In Propria Persona

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MEMORANDUM DECISION

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

ESPINOSA, Judge:

¶1 Robert Viramontes seeks review of the trial court's orders denying his petition for post-conviction relief and motion for rehearing filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb those rulings unless the court clearly has abused its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Viramontes has not met his burden of demonstrating such abuse here.

¶2 After a jury trial, Viramontes was convicted of felony murder, first-degree burglary, and two counts of aggravated assault. He was sentenced to life imprisonment without the possibility of release for twenty-five years for the murder, to be served concurrently with ten-year prison terms for his assault convictions, and to a consecutive 10.5-year prison term for burglary. We affirmed those convictions and sentences on appeal. *State v. Viramontes*, No. 2 CA-CR 99-0533 (memorandum decision filed Nov. 24, 2000). He then sought post-conviction relief, raising claims of ineffective assistance of counsel. The trial court summarily denied relief, and we denied relief on review. *State v. Viramontes*, No. 2 CA-CR 2002-0316-PR (memorandum decision filed June 16, 2003).

¶3 In April 2014, Viramontes filed a new notice of post-conviction relief in which he asserted that his failure to file it timely was without fault on his part, and that there was newly discovered evidence material to his sentence. Specifically, he claimed he had rejected an offer to plead guilty to second-degree murder based on his counsel's advice that he would be released in twenty-five years if sentenced to life in prison. He stated he had only recently been informed by the Arizona Department of Corrections (ADOC) that he

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would not be released “unless pardoned or commuted by the governor.” Thus, he claimed, due to the “vague nature” of the governing statutes, he was entitled to reinstatement of the plea offer. Pursuant to Viramontes’s request, the trial court appointed counsel.

¶4 Viramontes, through counsel, filed a petition for post-conviction relief arguing trial counsel had been ineffective for giving erroneous advice about the sentence Viramontes could face upon conviction, thereby causing him to reject the state’s plea offer. Viramontes additionally argued his Rule 32 counsel had been ineffective for failing to raise this claim, and he is entitled to relief because “the Court itself misinformed [him]” he would be eligible for parole. The trial court summarily denied relief, concluding that Viramontes’s claim of ineffective assistance of trial counsel was precluded, that his claim of ineffective assistance of Rule 32 counsel was not a cognizable claim, and that the trial court had not incorrectly advised Viramontes about his sentence.

¶5 Viramontes then filed a pro se motion for rehearing, arguing the trial court had failed to address his claim, raised in his notice of post-conviction relief, that the relevant statutes were “unconstitutionally vague,” resulting in an “illegal sentence.” He further asserted he could not have known of the claim until 2014 when ADOC “told him . . . that his sentence was in fact illegal.” The trial court denied the motion for rehearing, stating that appointed counsel had “abandoned” the assertions Viramontes had made in his notice and that, in any event, his claims that he was unaware that he was not eligible for release and that the sentencing statutes were unconstitutionally vague were without merit. This petition for review followed.

¶6 On review, Viramontes contends that his claim of “a constitutionally illegal sentence” cannot be waived and that it violates his due process rights to require him to raise claims of ineffective assistance of trial counsel in a Rule 32 proceeding in which he lacks a right to effective assistance of counsel. But his failure to cite any authority in support of his arguments waives those arguments on review. *Cf. State v. Bolton*, 182 Ariz. 290, 298, 896

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P.2d 830, 838 (1995) (failure to develop legal argument waives argument on review).

¶7 And, in any event, Viramontes's arguments on review are unsupported by the law. A claim of an illegal sentence does not fall within Rule 32.1(e) through (h) but instead is a claim pursuant to Rule 32.1(a). Thus, it cannot be raised in an untimely proceeding like this one. See *Ariz. R. Crim. P. 32.4(a)*. And our supreme court has stated that, for a non-pleading defendant like Viramontes, a claim of ineffective assistance of Rule 32 counsel is not cognizable under Rule 32. See *State v. Mata*, 185 Ariz. 319, 336-37, 916 P.2d 1035, 1052-53 (1996); *State v. Krum*, 183 Ariz. 288, 291-92 & n.5, 903 P.2d 596, 599-600 & n.5 (1995). We have no authority to disregard that determination. See *State v. Sullivan*, 205 Ariz. 285, ¶ 15, 69 P.3d 1006, 1009 (App. 2003) (court of appeals may not disregard decisions of supreme court).

¶8 Although we grant review, relief is denied.