

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Respondent*,

v.

GILBERTO OSORIO-HERNANDEZ, *Petitioner*.

No. 1 CA-CR 14-0756 PRPC
FILED 10-25-2016

Petition for Review from the Superior Court in Maricopa County
No. CR2004-130274-001
The Honorable Robert L. Gottsfield, Judge *Retired*

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Maricopa County Attorney's Office, Phoenix
By Diane Meloche
Counsel for Respondent

Gilberto Osorio-Hernandez, Eloy
Petitioner Pro Se

MEMORANDUM DECISION

Judge Patricia A. Orozco delivered the decision of the Court, in which
Presiding Judge Andrew W. Gould and Judge Peter B. Swann joined.

STATE v. OSORIO-HERNANDEZ
Decision of the Court

O R O Z C O, Judge:

¶1 Gilberto Osorio-Hernandez petitions for review of the summary dismissal of his second post-conviction relief proceeding. We have considered the petition for review and, for the reasons stated, grant review and deny relief.

¶2 A jury convicted Osorio-Hernandez of six counts of aggravated assault, and he was sentenced to consecutive and concurrent prison terms totaling twenty-five years. This court affirmed his convictions and sentences on appeal. *State v. Osorio-Hernandez*, 1 CA-CR 05-0722 (Ariz. App. Feb. 1, 2007) (mem. decision).

¶3 The superior court summarily dismissed Osorio-Hernandez's first petition for post-conviction relief in 2008. In 2014, he filed an untimely and successive petition for post-conviction relief raising a claim of ineffective assistance of counsel. Ruling that Osorio-Hernandez failed to state a claim for which relief could be granted in an untimely and successive petition for post-conviction relief, the superior court summarily dismissed the notice. This petition for review followed.

¶4 Relying on *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), Osorio-Hernandez argues the superior court erred in ruling he is precluded from raising a claim of ineffective assistance of counsel in an untimely and successive post-conviction relief proceeding. His reliance on *Martinez* is misplaced. In *Martinez*, the Supreme Court determined that, as a matter of equity, as opposed to a matter of constitutional right, a non-pleading defendant may be able to obtain federal habeas review of a claim that was procedurally defaulted if he can show ineffective assistance of his first post-conviction counsel. 132 S. Ct. at 1319-20. As explained in *State v. Escareno-Meraz*, 232 Ariz. 586, 587, ¶¶ 4-6 (App. 2013), that holding does not apply to Arizona post-conviction proceedings. In Arizona, "a non-pleading defendant may not assert a claim of ineffective assistance of post-conviction counsel," *id.* at ¶ 3 (internal quotation omitted), because such a defendant has "no constitutional right to counsel in post-conviction proceedings" in the first place, *id.* at ¶ 4. Thus, *Martinez* would not permit Osorio-Hernandez to overcome the time limits of Rule 32.4.a of the Arizona Rules of Criminal Procedure.

STATE v. OSORIO-HERNANDEZ
Decision of the Court

¶5

Accordingly, although we grant review, we deny relief.



AMY M. WOOD • Clerk of the Court
FILED: AA