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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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.

SERGIO AMARO PEREZ, *Petitioner*.

No. 1 CA-CR 14-0592 PRPC
FILED 10-27-2016

Petition for Review from the Superior Court in Maricopa County
No. CR2009-113981-002 DT
The Honorable Susanna C. Pineda, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

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

Sergio Amaro Perez, Buckeye
Petitioner

MEMORANDUM DECISION

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

S W A N N, Judge**:**

¶1 Sergio Amaro Perez petitions for review of the summary dismissal of his notice of post-conviction relief, filed pursuant to Arizona Rule of Criminal Procedure (Rule) 32. We have considered the petition for review and, for the reasons stated, grant review but deny relief.

¶2 A jury convicted Perez of three counts of kidnapping, five counts of theft by extortion, three counts of aggravated assault, and one count of theft of means of transportation. The superior court sentenced Perez to consecutive and concurrent prison terms totaling 33.5 years with credit for presentence incarceration. Perez's convictions were affirmed on appeal with his sentences being modified to increase the credit for pre-sentence incarceration by one day. *State v. Perez*, 1 CA-CR 11-0032, 2011 WL 6287939 (Ariz. App. Dec. 15, 2011) (mem. decision).

¶3 Before this proceeding, Perez sought post-conviction relief on three other occasions. In his first post-conviction proceeding, appointed counsel filed a notice stating she had reviewed the record but found no colorable claims to raise pursuant to Rule 32. After Perez filed a pro se petition, the superior court summarily dismissed the proceeding, ruling Perez failed to state a colorable claim for relief. Perez did not seek review of that order. In the next two proceedings, the superior court summarily dismissed Perez's notices of post-conviction relief, ruling Perez failed to state a colorable claim for relief that could be raised in an untimely proceeding, and Perez did not seek review of those orders.

¶4 In July 2014, Perez filed his fourth notice of post-conviction relief indicating his intent to raise a claim that his original Rule 32 counsel was ineffective for failing to assert a claim that his trial counsel provided ineffective assistance. Citing Rule 32.1(g) and *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), Perez argued *Martinez* constituted a significant change in the law, permitting him to raise a claim of ineffective assistance of Rule 32 counsel. The superior court summarily dismissed the notice, ruling Perez was precluded from raising a claim of ineffective assistance of counsel in an

untimely and successive post-conviction proceeding. This petition for review followed.

¶5 On review, Perez contends the superior court erred in summarily dismissing his notice, arguing that, pursuant to *Martinez*, he is entitled to raise a claim that his Rule 32 counsel was ineffective. We review the summary dismissal of a post-conviction relief proceeding for abuse of discretion. *State v. Bennett*, 213 Ariz. 562, 566, ¶ 17 (2006).

¶6 In *Martinez*, the Supreme Court held that, as a matter of equity, a nonpleading defendant may be able to obtain federal habeas review of a claim that is procedurally barred if he can show ineffective assistance of his first post-conviction counsel. 132 S. Ct. at 1319-20. As this court explained in *State v. Escareno-Meraz*, 232 Ariz. 586, 587, ¶ 4-6 (App. 2013), however, that holding has no application to Arizona post-conviction proceedings. Nonpleading defendants like Perez "have no constitutional right to counsel in post-conviction proceedings," and therefore his claim of ineffective assistance of Rule 32 counsel is not cognizable under Rule 32.1. *Id*. at ¶4. Nor can the underlying claim of ineffective assistance of trial counsel be directly raised in an untimely and successive post-conviction proceeding. Ariz. R. Crim. P. 32.4(a); *State v. Petty*, 225 Ariz. 369, 373, ¶ 11 (App. 2010). Thus, there was no error in the summary dismissal of Perez's fourth notice of post-conviction relief.

¶7 Accordingly, although we grant review, we deny relief.

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