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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. TRAVIS OAKES WATSON, Petitioner.	2 CA-CR 2011-0230-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20072936

Honorable Scott Rash, Judge

REVIEW GRANTED; RELIEF DENIED

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B R A M M E R, Judge.

¶1 Travis Watson seeks review of the trial court's order summarily denying his successive petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P., in which he alleged newly discovered material facts purportedly relevant to his sentencing. We will not disturb the court's ruling absent a clear abuse of the court's discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 Watson pled guilty in March 2008 to possessing methamphetamine, a dangerous drug, for sale. Simultaneously, he pled guilty to three other felonies and two misdemeanors under separate cause numbers. At a consolidated sentencing hearing, the trial court was reminded that Watson had a "stage three" Hepatitis C infection. The court responded that it had "read a lot and studied a lot about the Hepatitis C, and about 50 percent can be cured and about 50 percent cannot be cured. It can be managed, though, but I am well aware of the problems and the effects of that." The court imposed enhanced, concurrent sentences for Watson's four felony convictions, the longest of which was an aggravated, 13.75-year prison term.

¶3 Watson then sought post-conviction relief, arguing inter alia that his trial counsel had been ineffective at sentencing in failing to provide the court with specific information about his Hepatitis C infection and his prognosis and treatment while in prison. The trial court summarily dismissed that petition and this court denied relief on review. We concluded that, because the trial court had expressly stated it would impose the same sentence irrespective of Watson's medical condition and prognosis, he could not show any prejudice resulting from counsel's purported ineffectiveness.

¶4 In May 2011, Watson filed a successive petition for post-conviction relief asserting he had obtained newly discovered material facts relevant to his medical condition. Specifically, he asserted that, although he currently was receiving treatment in prison, new medical studies showed that individuals with a 1a genotype Hepatitis C infection, like Watson, were unlikely to respond to treatment and, if that information had been available to the sentencing court, it would have imposed a lesser sentence. Watson also identified several deficiencies in the medical care he was receiving in prison, including his allegations that Arizona Department of Corrections (ADOC) medical staff had not obtained a current liver biopsy and had failed to address the side effects of his treatment. The trial court summarily denied relief, concluding that the fact Watson may be receiving inadequate treatment did not constitute newly discovered evidence under Rule 32.1(e).

¶5 On review, Watson asserts the trial court erred because it misunderstood his argument; he claims he did not assert that ADOC was providing inadequate care, but instead that he had "new medical information" that showed his Hepatitis C was "worse than was originally thought." The nature of Watson's claim, based on his petition filed below, is not entirely clear—as we noted above, he complained that ADOC was providing inadequate treatment and included documents purportedly supporting that claim. But his petition below also may be read to assert there is new medical information relevant to his condition, as it existed at the time of sentencing, that may have changed the sentence imposed. Although the court did not reject that claim expressly, we nonetheless conclude it did not err in summarily dismissing Watson's petition because

the claim is not colorable. *See* Ariz. R. Crim. P. 32.8; *State v. Spreitz*, 202 Ariz. 1, ¶ 5, 39 P.3d 525, 526 (2002) (defendant entitled to evidentiary hearing if "colorable claim is presented"); *cf. State v. Haight-Gyuro*, 218 Ariz. 356, n.5, 186 P.3d 33, 37 n.5 (App. 2008) (reviewing court may affirm trial court if correct for any reason supported by record).

¶6 Evidence that a defendant had, at the time of sentencing, an undiagnosed medical condition relevant to the sentence imposed may qualify as newly discovered material facts entitling the defendant to relief pursuant to Rule 32.1(e). *State v. Bilke*, 162 Ariz. 51, 53, 781 P.2d 28, 30 (1989); *State v. Cooper*, 166 Ariz. 126, 130, 800 P.2d 992, 996 (App. 1990). We agree with Watson that his claim analytically is similar to Bilke's, and evidence that his medical condition was worse than previously believed may qualify as a newly discovered material fact under Rule 32.1(e).

> A colorable claim in a newly-discovered evidence case is presented if the following five requirements are met: (1) the evidence must appear on its face to have existed at the time of trial but be discovered after trial; (2) the motion must allege facts from which the court could conclude the defendant was diligent in discovering the facts and bringing them to the court's attention; (3) the evidence must not simply be cumulative or impeaching; (4) the evidence must be relevant to the case; (5) the evidence must be such that it would likely have altered the verdict, finding, or sentence if known at the time of trial.

Bilke, 162 Ariz. at 52-53, 781 P.2d at 29-30; *see also* Ariz. R. Crim. P. 32.1(e) (newly discovered material facts exist if discovered after trial, defendant exercised due diligence, and facts "are not merely cumulative or used solely for impeachment").

¶7 In support of his claim, Watson attached several documents discussing the efficacy of Hepatitis C treatments and the side effects of those treatments. We first observe that the bulk of these documents are undated. One document, which notes 1a genotype Hepatitis C is "the most resistant . . . to treatment," appears to have been generated in 1999, well before Watson was sentenced. Even assuming these documents contain any material information the trial court did not consider at sentencing, Watson offers no explanation why these documents were not presented previously. Accordingly, he has not demonstrated the diligence required to bring a claim pursuant to Rule 32.1(e). *See* Ariz. R. Crim. P. 32.1(e)(2); *Bilke*, 162 Ariz. at 52-53, 781 P.2d at 29-30.

¶8 Watson also provides two documents dated May 2011 describing studies concerning the efficacy of Hepatitis C treatment. In sum, the documents state that the effectiveness of treatment "declined . . . following four weeks of therapy" and that those with genotype 1 Hepatitis requiring re-treatment had a forty-one percent chance of a sustained and successful response to those treatments. What these documents do not do, however, even when viewed in conjunction with the other documents Watson provided, is support his assertion that genotype 1a Hepatitis infections are less treatable, or that his illness is worse, than previously believed. And, as we noted above, the trial court[1] determined during Watson's first Rule 32 proceeding that it would have imposed the same sentence "even assuming . . . that [Watson] has a bad form of Hepatitis C, that his

[1]We recognize that Watson's latest Rule 32 petition was considered by a judge different than the one who imposed his sentencing and decided his first Rule 32 petition, but we do not find that pertinent to our resolution here.

condition will worsen in prison and that he will not get treatment . . . in prison." For these reasons, we conclude Watson has not raised a colorable claim that the purportedly newly discovered facts related to his medical condition probably would have changed his sentence. Accordingly, his claim under Rule 32.1(e) fails.

¶9 Although we grant review, we deny relief.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge