IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. LEROY JAMES MICHAEL, Petitioner.	2 CA-CR 2011-0233-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR039880

Honorable Richard D. Nichols, Judge

REVIEW GRANTED; RELIEF DENIED

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LeRoy James Michael
Florence
In Propria Persona

E S P I N O S A, Judge.

¶1 Petitioner Leroy Michael seeks review of the trial court's July 2011 notice summarily dismissing his most recent petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb the court's ruling unless we find the court has abused its discretion. *See State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006).

¶2 In 1993, a jury found Michael guilty of second-degree murder and four counts of aggravated assault, based on evidence he had driven his pickup truck at approximately sixty miles per hour into the rear of a vehicle that was stopped for a traffic light. As we explained in our decision on direct appeal, the vehicle Michael struck had been occupied by four people: Carlos Smith and his wife, his mother-in-law, and his nephew. *State v. Michael*, No. 2 CA-CR 93-0366, 2 (memorandum decision filed May 9, 1995). Smith's mother-in-law was killed and his nephew seriously injured. *Id.* In addition to the second-degree murder charge, Michael had been charged with two counts of aggravated assault against Smith's nephew—for committing an assault that had resulted in serious physical injury and committing an assault using a dangerous instrument—and one count each of aggravated assault against Mr. and Mrs. Smith, for committing assaults using a dangerous instrument. *Id.*; *see also* A.R.S. §§ 13-1203, 13-1204(a)(2). The trial court sentenced him to concurrent prison terms for the four aggravated-assault convictions, the longest of which was fifteen years, to be served consecutively to a twenty-year prison term for the murder conviction.

¶3 In his successive petition for post-conviction relief, Michael appears to have argued he was exposed to double jeopardy because he was erroneously charged with four counts of aggravated assault when only one of the passengers in Smith's vehicle was injured and, therefore "one injury charge and one homicide charge" were all that were permitted. The trial court dismissed the proceeding, finding the claims "precluded under Rule 32.2(a) as having already been raised in previous proceedings." According to the court, "[T]he petition restates the same issues of double jeopardy and improper consecutive sentences that have been previously raised in numerous prior petitions for post-conviction relief. These claims have been rejected by this Court on more than one occasion, and the Court of Appeals has affirmed."

¶4 On review, Michael appears to argue the double-jeopardy claim raised in this latest petition for post-conviction relief is based on "newly discovered evidence," apparently referring to Rule 32.1(e),[1] and therefore is excepted from preclusion. *See* Ariz. R. Crim. P. 32.2(b) (claims based on Rule 32.1(e) not subject to preclusion when notice sets forth substance of specific exception and "the reasons for not raising the claim in the previous petition or in a timely manner"). Specifically, he relies on our most recent memorandum decision denying post-conviction relief on review, in which we noted, "The impact killed one of the second vehicle's four passengers and seriously injured another." According to Michael, all previous post-conviction decisions by trial or

[1]Ariz. R. Crim. P. Rule 32.1(e) sets forth a ground for relief when a petitioner can show that "[n]ewly discovered material facts probably exist and such facts probably would have changed the verdict or sentence."

appellate courts had been based on the erroneous impression that three passengers in the Smith vehicle had been injured.

¶5 We find no abuse of discretion in the trial court's dismissal of these proceedings based on preclusion. As our supreme court has explained,

> 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.

State v. Bilke, 162 Ariz. 51, 52-53, 781 P.2d 28, 29-30 (1989). Thus, Rule 32.1(e) does not contemplate alleged errors in previous appellate decisions as "newly discovered material facts" giving rise to post-conviction relief. Moreover, we find nothing inconsistent in our most recent decision on review and our recitation of the facts on direct appeal more than fifteen years ago.[2]

[2]In support of his argument, Michael cites our decision on review of one of his previous post-conviction proceedings, in which we described the crash as "killing one victim and injuring three others," as evidence that this court based its earlier decisions on "incorrect facts" or a "mistaken belief" about the bases for his convictions. *See State v. Michael*, No. 2 CA-CR 96-0227-PR, 1 (memorandum decision filed Mar. 20, 1997). We disagree. The basis for the aggravated assaults against Mr. and Mrs. Smith was Michael's use of a dangerous instrument, *see* § 13-1204(A)(2), rather than his causing them serious physical injuries. *See* § 13-1204(A)(1). And there was ample evidence at trial that Mr. and Mrs. Smith were also "injur[ed]"in the crash, as we stated in our earlier decision, even if neither of them suffered any "[s]erious physical injury" as defined in A.R.S. § 13-105(39). Thus, our statement to that effect in our earlier decision was not "incorrect." Nor was it relevant to our ruling on review.

¶6 For the foregoing reasons, we grant review but deny relief.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge