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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OF ARIZONA, Respondent, v. DANIEL OQUITA GUTIERREZ, Petitioner.	2 CA-CR 2012-0048-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court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. CR20054047

Honorable Jose H. Robles, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

Daniel Gutierrez — San Luis
In Propria Persona

B R A M M E R, Judge.

¶1 Petitioner Daniel Gutierrez 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. We will not disturb that ruling unless the court clearly has abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Gutierrez has not met his burden of establishing such abuse here.

¶2 Gutierrez was convicted after a jury trial of one count of manslaughter, three counts of aggravated assault with a deadly weapon, two counts of aggravated assault causing serious physical injury, and one count of aggravated assault causing temporary but substantial disfigurement. The trial court sentenced him to a combination of aggravated, consecutive, and concurrent prison terms totaling sixty-six years. We affirmed his convictions and sentences on appeal. *State v. Gutierrez*, No. 2 CA-CR 2006-0366 (memorandum decision filed Mar. 17, 2008). He petitioned for post-conviction relief, asserting that his trial counsel had been ineffective and that his sentences were excessive. The court denied relief after an evidentiary hearing, and we denied relief on review. *State v. Gutierrez*, No. 2 CA-CR 2009-0304-PR (memorandum decision filed Mar. 11, 2010).

¶3 In March 2011, Gutierrez filed a successive notice and petition for post-conviction relief, raising claims pursuant to Rule 32.1(a) and (e) and asserting that, in January 2011, he learned his trial counsel, Rafael Gallego, had been abusing cocaine before and during his 2006 trial. Gutierrez argued that Gallego's failure to disclose his cocaine use deprived Gutierrez of "the opportunity to seek other counsel or to have the [trial] court disqualify Mr. Gallego from acting on [his] behalf." He additionally claimed Gallego's drug use "rendered him inappropriate to act as counsel," listing the same bases for his earlier ineffective assistance of counsel claim and asserting Gallego's drug use "explain[ed]" his deficient performance at trial.

¶4 The trial court summarily denied relief. It concluded Gutierrez's claim of ineffective assistance of counsel pursuant to Rule 32.1(a) was precluded and rejected his

claim of newly-discovered evidence pursuant to Rule 32.1(e), finding the evidence was "cumulative" because the purported deficiencies Gutierrez had identified in Gallego's performance already had been "raised and addressed" in Gutierrez's previous Rule 32 proceeding. The court additionally found that, in any event, the evidence was not newly discovered, noting Gutierrez's first Rule 32 counsel had stated in Gutierrez's previous petition for post-conviction relief that Gallego recently had been suspended for using cocaine during a trial and the hearing officer's report detailing Gallego's drug use was filed several months before Gutierrez first sought Rule 32 relief.

¶5 Gutierrez then filed a motion for reconsideration, asserting the trial court had not addressed his claim that Gallego's failure to inform him about his drug abuse violated his right to counsel. He also asserted his first Rule 32 counsel had been deficient in failing to raise this claim. The court denied the motion, stating that "[a]ll claims originally identified . . . have been addressed." This petition for review followed.

¶6 On review, Gutierrez repeats his claims that evidence of Gallego's drug use is newly discovered evidence and that Gallego was ineffective. He also asserts the trial court failed to address several issues he had raised—specifically that his right to counsel had been violated by Gallego's failure to disclose his substance abuse and prejudice should be presumed.

¶7 Gutierrez's claim of ineffective assistance of counsel plainly is precluded because he raised an ineffective assistance of counsel claim in his first Rule 32 proceeding. As our supreme court has noted, "[t]he ground of ineffective assistance of

counsel cannot be raised repeatedly," even if the bases for those claims are different. *Stewart v. Smith*, 202 Ariz. 446, ¶ 12, 46 P.3d 1067, 1071 (2002).

¶8 Gutierrez also asserts, as he did below, that his right to counsel was violated because Gallego was obligated to inform him about his substance abuse, and had he done so Gutierrez would have opted for different counsel. This claim fails for several reasons. First, although Gutierrez appears to assert this claim somehow is distinct from a claim of ineffective assistance of counsel, he cites no relevant authority supporting that argument, and we find no meaningful distinction. Ultimately, Gutierrez's claim is that Gallego fell below prevailing professional norms in failing to comply with his ethical obligation to inform Gutierrez about his substance abuse and he was prejudiced thereby. *See Strickland v. Washington*, 466 U.S. 668, 688, 693 (1984) (defendant claiming ineffective assistance of counsel must prove attorney failed to provide reasonably effective assistance "under prevailing professional norms" and any deficient performance "actually had an adverse effect on the defense"). Accordingly, because Gutierrez previously raised a claim of ineffective assistance of counsel, this claim is precluded and cannot be raised in a successive petition. *Smith*, 202 Ariz. 446, ¶ 12, 46 P.3d at 1071.

¶9 In addition to the claim being barred procedurally by preclusion, the claim is not colorable. Gutierrez provided no affidavit or evidence supporting his assertion that he would have selected different counsel. His unsupported assertion in his petition to that effect is not sufficient. An unsubstantiated argument does not take the place of an affidavit or other sworn statement required to establish a colorable post-conviction claim warranting an evidentiary hearing. *See State v. Borbon*, 146 Ariz. 392, 399, 706 P.2d

718, 725 (1985) (unsubstantiated claim witness would give favorable testimony does not compel evidentiary hearing); *State v. Donald*, 198 Ariz. 406, ¶ 17, 10 P.3d 1193, 1200 (App. 2000) (to obtain post-conviction evidentiary hearing, defendant should support allegations with sworn statements). And a bare allegation of prejudice, without supporting evidence, is insufficient to create a colorable claim. *See Donald*, 198 Ariz. 406, ¶ 21, 10 P.3d at 1201.

¶10 Because Gutierrez's petition for post-conviction relief was successive, he is precluded from raising any claim he could have raised in his first Rule 32 proceeding or on appeal. Ariz. R. Crim. P. 32.2. A claim of newly discovered material facts pursuant to Rule 32.1(e), however, is not necessarily precluded by Rule 32.2. Ariz. R. Crim. P. 32.2(b). Facts are material if they "probably would have changed the verdict or sentence." Ariz. R. Crim. P. 32.1(e). But, "[e]vidence is not newly discovered unless it was unknown to the trial court, the defendant, or counsel at the time of trial and neither the defendant nor counsel could have known about its existence by the exercise of due diligence." *State v. Saenz*, 197 Ariz. 487, ¶ 13, 4 P.3d 1030, 1033 (App. 2000). And the facts must have existed at the time of trial but be discovered after trial, the defendant must have "exercised due diligence in securing" them, and the facts must not be "merely cumulative or used solely for impeachment." Ariz. R. Crim. P. 32.1(e).

¶11 The requirement in Rule 32.1(e) that, in order to be material, any newly discovered fact "probably" must change "the verdict or sentence" suggests that it applies only to evidence relevant to guilt or sentencing. Gutierrez's claim does not refer to such evidence, but instead is, at its core, a claim of newly discovered facts material to his

claim of ineffective assistance of counsel. Gutierrez cites no authority, and we find none, suggesting Rule 32.1(e) applies in these circumstances.

¶12 And, even if we agreed such a claim was cognizable under Rule 32.1(e), the trial court did not err in determining the evidence was not newly discovered. As the court correctly observed, the evidence—specifically, a hearing officer's report concerning Gallego's drug use—existed at the time of Gutierrez's first Rule 32 proceeding. Gutierrez has provided no evidence suggesting the report was not readily available at the time of his first Rule 32 proceeding. And Gutierrez's first Rule 32 counsel was aware Gallego had been disciplined for substance abuse, having noted in Gutierrez's initial petition for post-conviction relief that Gallego "has recently been suspended . . . after admitting that he conducted a trial while using cocaine."

¶13 Gutierrez also asserted below, for the first time in his reply to the state's answering memorandum, that his first Rule 32 counsel believed, based on conversations with another attorney, that Gallego's drug use had ended several years before Gutierrez's trial. And, in an affidavit Gutierrez filed after the trial court had rejected his petition and his motion for reconsideration, his first Rule 32 counsel avowed he had checked the Arizona State Bar website and reviewed a summary of Gallego's disciplinary proceedings, "which made no mention of anything occurring" near the time of Gutierrez's trial. Even assuming the court was required to consider Gutierrez's assertion in his reply memorandum or the late-filed affidavit,[1] we find no abuse of the court's

[1]Although Gutierrez obtained the affidavit of his first Rule 32 counsel in response to the state's assertion that counsel clearly had been aware of Gallego's disciplinary

discretion in determining Gutierrez had not been reasonably diligent in discovering the hearing officer's report given his first Rule 32 counsel's knowledge that Gallego recently had been disciplined.[2] *See Saenz*, 197 Ariz. 487, ¶ 13, 4 P.3d at 1033.

¶14 For the reasons stated, although review is granted, relief is denied.

/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

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history and drug abuse, it was Gutierrez's burden to show the report could not have been obtained in the exercise of reasonable diligence at the time of his first Rule 32 petition. *See Saenz*, 197 Ariz. 487, ¶ 13, 4 P.3d at 1033; *see also State v. Lopez*, 223 Ariz. 238, ¶¶ 6-7, 221 P.3d 1052, 1054 (App. 2009) (issues not raised clearly in petition for post-conviction relief waived).

[2]Gutierrez asserts in passing that Rule 32 counsel's insufficient diligence "should not be ascribed to [him]" and that his first Rule 32 counsel was ineffective. But Gutierrez raised this claim for the first time in his motion for reconsideration below, and therefore it is waived. *See Lopez*, 223 Ariz. 238, ¶¶ 6-7, 221 P.3d at 1054. In any event the claim is not cognizable under Rule 32; Gutierrez is not constitutionally entitled to the effective assistance of Rule 32 counsel. *See Osterkamp v. Browning*, 226 Ariz. 485, ¶ 18, 250 P.3d 551, 556 (App. 2011).