

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

JUN -7 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2012-0071-PR
)	DEPARTMENT B
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
RYAN JOSEPH APODACA,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. S1100CR200401756

Honorable Robert C. Brown, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

James P. Walsh, Pinal County Attorney
By Greg Bizzozero

Florence
Attorneys for Respondent

Ryan Joseph Apodaca

Buckeye
In Propria Persona

ESPINOSA, Judge.

¶1 Petitioner Ryan Apodaca seeks review of the trial court’s order dismissing his successive notice 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).

¶2 Apodaca pled guilty in 2006 to second-degree murder and was sentenced to a twenty-two-year prison term. He filed a notice of post-conviction relief, and appointed counsel filed a notice stating she had reviewed the “transcripts and trial file and c[ould] find no colorable claims pursuant to Rule 32.” Apodaca did not file a pro se petition, and the trial court dismissed the Rule 32 proceeding in May 2007.

¶3 In March 2012, Apodaca filed a notice of post-conviction relief asserting pursuant to Rule 32.1(e) that there were newly discovered material facts that “probably would have changed the verdict or sentence.” He claimed he had been diagnosed with post-traumatic stress disorder (PTSD) “along with another mental . . . disorder,” those disorders “were pre-existing and not dealt with until the present time,” the disorders would warrant a mitigated sentence, and “[a] Rule 11[, Ariz. R. Crim. P.,] should have been initiated” before he entered the plea. In his notice, Apodaca also checked a box stating he was “raising a claim of ineffective assistance of counsel.” The trial court summarily dismissed Apodaca’s notice, noting he had “attached no reports from the doctors who have diagnosed him, nor any other facts other than his bare assertions,” and

concluding Apodaca had “failed to set forth the meritorious reasons why the claim of newly discovered evidence should be allowed.”¹

¶4 On review, Apodaca argues the trial court erred in dismissing his notice without permitting him to file a petition for post-conviction relief, claiming he “could not enclose any additional evidence” in his notice because he cannot obtain his medical records “without the assistance of counsel or a court order.” He also asserts, for the first time, that he was diagnosed with PTSD in November 2011 and did not learn until January 2012 that the diagnosis might be relevant to his sentence.

¶5 Although a claim of newly discovered evidence is not necessarily subject to preclusion pursuant to Rule 32.2(a), Rule 32.2(b) requires a defendant’s notice bringing a claim excepted from preclusion to “set forth the substance of the specific exception and the reasons for not raising the claim in the previous petition or in a timely manner.” Ariz. R. Crim. P. 32.2(a), (b). “If the specific exception and meritorious reasons do not appear substantiating the claim and indicating why the claim was not stated in the previous petition or in a timely manner, the notice shall be summarily dismissed.” Ariz. R. Crim. P. 32.2(b).

¶6 To obtain relief pursuant to Rule 32.1(e), the proffered evidence must have existed at the time of trial but be discovered only after trial; thus, evidence is “newly discovered” only if it is “unknown to the trial court, the defendant, or counsel at the time

¹The trial court did not discuss Apodaca’s claim of ineffective assistance of counsel. Because Apodaca does not address this claim on review, nor do we. *See* Ariz. R. Crim. P. 32.9(c)(1).

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, ¶¶ 13-14 & ¶ 13, 4 P.3d 1030, 1033-34 & 1033 (App. 2000). Although Apodaca claimed in his Rule 32 notice his PTSD had not been “dealt with until the present time,” and he had “only recently [been] made aware that his mental illness should [have] been brought before the court,” he did not explain when his PTSD was diagnosed, much less assert that it could not have been diagnosed and brought to the court’s attention sooner with the exercise of due diligence. Accordingly, he did not meet his burden of explaining in his notice “why the claim was not stated in the previous petition or in a timely manner.” Ariz. R. Crim. P. 32.2(b). And, even if Apodaca’s more detailed explanation in his petition for review was sufficient to meet this burden, it comes too late. *See* Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review must contain “issues . . . decided by the trial court”); *cf.* *State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (appellate court does not consider issues in petition for review that “have obviously never been presented to the trial court for its consideration”). The trial court did not err in summarily dismissing his notice.²

²To the extent the trial court dismissed Apodaca’s notice because he did not include materials supporting his claim, we find nothing in the rules necessarily requiring a petitioner do so in a notice of post-conviction relief. Rule 32.2(b) requires only that the petitioner “set forth the substance of the specific exception and the reasons for not raising the claim in the previous petition or in a timely manner.” *See also* Ariz. R. Crim. P. 32.4(a) (Rule 32 proceeding “commenced by timely filing a notice of post-conviction relief”); *cf.* Ariz. R. Crim. P. 32.5 (enumerating contents of petition and permitting attachment of “[a]ffidavits, records, or other evidence currently available to the defendant”).

¶7

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

/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