IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. DAVID WAYNE SROUT, Petitioner.	2 CA-CR 2012-0323-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF MOHAVE COUNTY

Cause No. CR20061144

Honorable Steven F. Conn, Judge

REVIEW GRANTED; RELIEF DENIED

Matthew J. Smith, Mohave County Attorney
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E S P I N O S A, Judge.

¶1 Petitioner David Srout was convicted following a jury trial of first-degree murder, armed robbery, and hindering prosecution of murder. This court affirmed the convictions and the sentences on appeal. *State v. Srout*, No. 1 CA-CR 08-0284, ¶ 1 (memorandum decision filed Dec. 10, 2009). Srout has filed a petition for review in which he challenges the trial court's dismissal of his petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., contending the court abused its discretion by rejecting his claims of newly discovered evidence and ineffective assistance of counsel without conducting an evidentiary hearing. We will not disturb the trial court's ruling absent a clear abuse of discretion. *See State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006). We see no such abuse here.

¶2 Srout was charged by an indictment that included two codefendants: Shannon Blair and Larry Tate. Michael Withers was also charged with offenses that arose out of the same incident in a separate indictment. Withers had made numerous statements to law enforcement officers, some of which Srout contended in his petition for post-conviction relief were potentially exculpatory and would have supported his defense that he was merely present when the victim was murdered. But Withers invoked his rights under the Fifth Amendment and refused to testify at Srout's trial. Srout argued in his petition for post-conviction relief that Withers's convictions had become final, Withers was now available to testify, and his testimony and statements constituted newly discovered evidence that entitled Srout to relief.

¶3 The trial court rejected Srout's claim, finding, *inter alia*, that even assuming Withers were to testify at a new trial consistent with his statements to law

enforcement officers, his anticipated testimony was not newly discovered evidence under Rule 32.1(e). Rather, the testimony and pretrial statements were newly available evidence. Although the court could have denied relief on that basis alone, it addressed whether, assuming the evidence could be characterized as newly discovered, it satisfied the other elements of Rule 32.1(e), concluding it did not.

¶4 Srout contends in his petition for review that the trial court erred in characterizing the evidence as newly available and denying relief pursuant to Rule 32.1(e) in part for this reason. But Srout has not persuaded us the court erred and thereby abused its discretion in denying relief on this claim. *See State v. Burgett*, 226 Ariz. 85, ¶ 1, 244 P.3d 89, 90 (App. 2010) (noting in petition for review of denial of Rule 32 "abuse of discretion includes an error of law"). The court correctly relied on *State v. Dunlap*, 187 Ariz. 441, 465-66, 930 P.2d 518, 542-43 (App. 1996), in which this court found the anticipated testimony of a codefendant at a new trial, who initially had invoked his right against self-incrimination at the defendant's initial trial, was not newly discovered evidence for purposes of a motion to vacate judgment under Rule 24.2(a)(2), Ariz. R. Crim. P., but newly available evidence. As the trial court here correctly noted, in *Dunlap* this court stated that a motion under Rule 24.2(a)(2) must be "evaluated under the standards of Rule 32.1[(e)]." *Id.* Thus, the procedural distinction between this case and *Dunlap* is insignificant, contrary to Srout's suggestion. And we are not persuaded by Srout's other attempts to distinguish *Dunlap*, nor do we accept his invitation to "reconsider" the distinction between newly discovered and newly available evidence in this context. The court's analysis of this claim under the remaining portions of

Rule 32.1(e) was also correct, and Srout has not persuaded us otherwise in his petition for review. We therefore adopt the remaining portions of the court's ruling on this claim. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993).

¶5 Srout also challenges on review the trial court's rejection, without an evidentiary hearing, of his claim that trial counsel had been ineffective in failing to call Officer Deanna Smalley, a detention officer from the Mohave County jail, to testify that an inmate had told her Blair had admitted to him that she had planned the murder and had left the victim's body under a bridge in Laughlin. Srout argued in the trial court and asserts again on review that counsel should have called the inmate to testify about the conversation or recalled Blair and impeached her with these statements. Srout insists Blair's statements to the inmate would have been admissible through Blair, when she testified, the inmate, or Smalley, and would have demonstrated that Blair had been "much more culpable in the crime than she testified to," that she, not Srout, had been the "ring leader," and that she was a "liar." The court addressed this claim thoroughly, clearly, and in a manner that permits this or any other court to review the basis for the court's determination that the claim was not colorable. *Whipple*, 177 Ariz. at 274, 866 P.2d at 1360; *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984) (colorable claim of ineffective assistance of counsel requires showing that counsel's performance deficient and prejudicial); *State v. Fillmore*, 187 Ariz. 174, 180, 927 P.2d 1303, 1309 (App. 1996) ("[t]o avoid summary dismissal and achieve an evidentiary hearing on a post-conviction claim of ineffective assistance of counsel," petitioner must present colorable claim on both parts of *Strickland* test). Because we conclude the court resolved this claim

correctly and Srout has not demonstrated the court abused its discretion, we adopt this portion of the court's ruling as well. *See Whipple*, 177 Ariz. at 274, 866 P.2d at 1360.

¶6 We grant the petition for review, but for the reasons stated, relief is denied.

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

CONCURRING:

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

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