FILED BY CLERK
OCT -4 2012
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. STEVEN JON PURKERSON, Petitioner.	2 CA-CR 2012-0328-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF MOHAVE COUNTY

Cause No. CR97703

Honorable Steven F. Conn, Judge

REVIEW GRANTED; RELIEF DENIED

Steven Jon Purkerson
Winslow
In Propria Persona

E CK E R S T R O M, Presiding Judge.

¶1 Petitioner Steven Purkerson seeks review of the trial court's order dismissing his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. "We will not disturb a trial court's ruling on a petition for post-conviction relief absent a clear abuse of discretion." *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Purkerson has not sustained his burden of establishing such abuse here.

¶2 After a jury trial in 1998, Purkerson was convicted of second-degree murder and the trial court imposed an aggravated, twenty-year sentence. His conviction and sentence were affirmed on appeal. *State v. Purkerson*, No. 1 CA-CR 98-0226 (memorandum decision filed Mar. 25, 1999). Thereafter, he initiated a post-conviction relief proceeding, and the trial court denied relief. Review of that decision was denied in 2003.

¶3 In 2011, Purkerson filed another notice of post-conviction relief, asserting that "[n]ewly discovered material facts exist[ed] which probably would have changed the verdict or sentence." In the notice he requested "new testing per A.R.S. [§] 13-4240 . . . for new determination of fact by independent testing of [his] clothing and cigarette butt found at [the] scene to show there was no blood on [his] clothing and that the initial report from the [police laboratory] was fraudulent." He also filed a motion for DNA[1] testing under that statute, making the same request. Because the trial court was uncertain about "[t]he relationship between [§ 13-4240] and Rule 32," it ordered Purkerson to file a petition for post-conviction relief, stating "it will be the obligation of the Defendant in

[1]Deoxyribonucleic acid.

that Petition to cite specific facts to enable the Court to make the findings necessary pursuant to [§ 13-4240(B)] before ordering DNA testing to be done."

¶4 Purkerson filed a petition asserting he was entitled to relief based on unconstitutional search and seizure, infringement of his right against self-incrimination, denial of his right to counsel, actual innocence, and newly discovered evidence. He further argued (1) the trial court's instruction on proof beyond a reasonable doubt and the prosecutor's argument on the point had minimized the state's burden of proof, (2) the court incorrectly instructed the jury on second-degree murder, and (3) he was entitled to "have a legal conference" with the criminal investigator who had worked on his case. He also elaborated on his request for DNA testing, stating that "[a] DNA test would prove that there was none of the victim's blood found on [Purkerson's] clothing that would have been there" if he had shot the victim at close range, as the other evidence suggested. The trial court concluded most of Purkerson's claims were precluded and his request to confer with the investigator was "not relief available under Rule 32." It also denied his request for DNA testing, concluding "it is not clear that DNA testing would prove anything."

¶5 On review, Purkerson repeats his arguments made below, asserts that the issues he raised below were of "sufficient constitutional magnitude" that they could not be waived, and claims that DNA testing "would have shown a reasonable doubt as to whether it was even possible for [him] to have committed the crime." As the trial court correctly concluded, other than his claims of actual innocence and newly discovered evidence, Purkerson's arguments are precluded. *See* Ariz. R. Crim. P. 32.2(a), (b).

Although he asserts on review that these claims are of sufficient constitutional magnitude to avoid preclusion, *see* Ariz. R. Crim. P. 32.2 cmt., he did not raise that argument below, nor does he adequately develop it in his petition to this court. We therefore do not address it. *See* Ariz. R. Crim. P. 32.9(c)(1)(iv) (petition for review shall contain "[t]he reasons why the petition should be granted" and "specific references to the record"); *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (failure to develop argument sufficient for review results in waiver); *State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (court will not consider arguments raised for first time on review).

¶6 Furthermore, we agree with the trial court that Purkerson's request for the court to arrange a conference with his case investigator "is not relief available under Rule 32." And, in the absence of any new evidence, Purkerson's claim of actual innocence must also fail. As this court previously determined on appeal, sufficient evidence existed for a rational jury to find Purkerson guilty of the underlying offense beyond a reasonable doubt. *Purkerson*, No. 1 CA-CR 98-0226, at 5-7. We turn then to Purkerson's claim of newly discovered evidence. Because the trial court denied Purkerson's request for DNA testing, no such evidence now exists.[2] We therefore consider whether the court abused its discretion in denying Purkerson's motion for DNA testing.

¶7 Our supreme court has recently made clear that a petition for DNA testing pursuant to § 13-4240 "differs from a petition for postconviction relief under Rule 32 and

[2]As the trial court pointed out, a claim under Rule 32.1(e) must rest on newly discovered material facts, not on "newly discovered or newly conceived legal theories for relief."

its statutory counterparts." *State v. Gutierrez*, 229 Ariz. 573, ¶ 21, 278 P.3d 1276, 1280 (2012). In *Gutierrez*, the court clarified that a petition for testing could be filed first, and, if the results of testing were favorable, the petitioner could proceed either at a hearing pursuant to § 13-4240 or by filing a notice for post-conviction relief pursuant to Rule 32. 229 Ariz. 573, ¶¶ 23-26, 278 P.3d at 1280-81. Here, however, it is of no import that the court ordered Purkerson to proceed pursuant to Rule 32, as it ultimately denied his request for testing. And we agree with its implicit conclusion that Purkerson had failed to meet the requirements of § 13-4240.

¶8 That statute provides that "a person who was convicted of and sentenced for a felony offense" may, at any time, request DNA testing of "any evidence that is in the possession or control of the court or the state, that is related to the investigation or prosecution that resulted in the judgment of conviction" if he or she meets certain enumerated requirements. § 13-4240(A). Testing is required or permitted when (1) there is "[a] reasonable probability" the petitioner would not have been prosecuted or convicted if the results had been known, he or she would have received a "more favorable" verdict or sentence, or the testing "will produce exculpatory evidence"; (2) the evidence still exists and is in a condition to allow testing; and (3) the evidence was not previously tested. § 13-4240(B), (C).

¶9 In this case, the record clearly shows that the cigarette butt found at the scene was subjected to DNA testing before trial and therefore is not eligible for testing under § 13-4240. The record also suggests Purkerson's clothing was tested and the blood on it was determined to be his own. And, in any event, although it appears that the

clothing was taken by authorities, Purkerson has not shown that the clothing still exists or is in a condition to be tested.[3] *See* § 13-4240(B)(2), (C)(2). Thus, even if we were to accept Purkerson's argument that a lack of the victim's blood on the clothing would be exculpatory and that the trial court erred in concluding otherwise, he has failed to meet the other requirements of the statute. We therefore cannot say the court abused its discretion in denying his motion for DNA testing. *Cf. State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984) (appellate court obliged to affirm trial court's ruling if result correct for any reason). For all these reasons, although we grant the petition for review, we deny relief.

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

CONCURRING:

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

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

[3]The record indicates some portions of Purkerson's clothing were retained in "laboratory frozen storage," but that was in 1998.