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APR 28 2011
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

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| THE STATE OF ARIZONA,<br>Respondent,<br>v.<br>BARRY JAYE WADE,<br>Petitioner. | 2 CA-CR 2010-0407-PR<br>DEPARTMENT B<br><br>MEMORANDUM DECISION<br>Not for Publication<br>Rule 111, Rules of<br>the Supreme Court |

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20060854

Honorable John S. Leonardo, Judge

REVIEW GRANTED; RELIEF DENIED

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Barbara LaWall, Pima County Attorney
By Jacob R. Lines
Tucson
Attorneys for Respondent

Barry Jaye Wade
Phoenix
In Propria Persona

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E C K E R S T R O M, Judge.

**¶1** Barry Wade seeks review of the trial court's summary dismissal of his successive notice of post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P., upon finding Wade had "filed two prior Rule 32 petitions and his new claim does not fall within any exception to the preclusion rule" set forth in Rule 32.2. *See generally State v.*

*Wade*, No. 2 CA-CR 2009-0368-PR (memorandum decision filed Mar. 16, 2010); *State v. Wade*, No. 2 CA-CR 2008-0323-PR (memorandum decision filed Mar. 12, 2009). On review, Wade challenges the court's determination that his claim is precluded because it has been finally adjudicated on the merits. He also argues his claim is not precluded because it is based on "newly discovered evidence" consisting of an affidavit signed by the attorney who represented him in his plea proceedings, and he maintains the court failed to understand his argument.

**¶2** Pursuant to a plea agreement, Wade was convicted in February 2007 of two class three felonies: one count of sexual abuse of a minor under the age of fifteen, a dangerous crime against children, and one count of "Molestation of a Child in the Second Degree[,] a Preparatory Dangerous Crime Against Children." The trial court sentenced him to a presumptive, five-year prison term for the sexual abuse conviction; for the molestation conviction, the court suspended the imposition of sentence and placed Wade on a twenty-year term of intensive probation. We review a trial court's summary denial of post-conviction relief for an abuse of discretion. *State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006). We find none here.

**¶3** Under Rule 32.2(a), a defendant is generally precluded from raising claims that have been "[f]inally adjudicated on the merits on appeal or in any previous collateral proceeding" or "waived at trial, on appeal, or in any previous collateral proceeding." Ariz. R. Crim. P. 32.2(a)(2), (3). Thus, unless Wade's claims fall within one of the exceptions to preclusion identified in Rule 32.2(b), they are now precluded, either because they have been raised and finally adjudicated on their merits or because they

have been waived by Wade's failure to raise them in one of his two prior Rule 32 proceedings.

**¶4** Wade argues his claims of error regarding the drafting and entry of his plea agreement are based on "newly discovered evidence," apparently referring to Rule 32.1(e), and are therefore 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").

**¶5** 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" and that he exercised due diligence to secure evidence of those facts. Along with his notice of post-conviction relief, Wade filed an affidavit in which his former counsel averred as follows:

> Regarding Amended Count Four in the plea agreement, [Wade] was informed that Count Four would be an attempted molestation. [Wade]'s copy was amended to read attempted molestation. The copy submitted to the Court[] was not. The reason for this was the State[']s attorney, Sue Eazer, stated that it was not necessary to include the word attempted molestation in the title of the offense. So it was omitted without knowledge of [Wade].
>
> In conclusion, Count Four should have been attempted molestation in the second degree, a preparatory offense.

Wade argues the outcome of the proceedings would have been different as a result of the facts stated in counsel's affidavit because he would not have pleaded guilty if he had known he would be convicted of the "completed offense" of child molestation.

**¶6** "Evidence is not newly discovered unless . . . at the time of trial . . . 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). Thus, the trial court correctly concluded that trial counsel's affidavit did not constitute newly discovered evidence, because it contains facts that were known or knowable at the time of Wade's change of plea hearing.

**¶7** Moreover, Wade has not shown the facts in counsel's affidavit would probably have changed the outcome of his plea proceedings. Although Wade argues he did not knowingly agree to be convicted of the "completed offense" of molestation, both his plea and the trial court's sentencing minute entry indicate he was not convicted of the completed offense, but rather a preparatory offense. The version of A.R.S. § 13-604.01 in effect when Wade committed his offenses distinguished between completed offenses, which were designated first-degree dangerous crimes against children, and preparatory offenses, which were designated second-degree dangerous crimes against children. *See* 2005 Ariz. Sess. Laws, ch. 327, § 2 (former § 13-604.01(L)(1)). That statute also set forth specific classification and sentencing provisions for preparatory, second-degree dangerous crimes against children notwithstanding the provisions found in title 13, chapter 10 of the Arizona Revised Statutes, which ordinarily govern preparatory offenses. *See* 2005 Ariz. Sess. Laws, ch. 327, § 2 (former § 13-604.01(I)); *see also* A.R.S. §§ 13-1001 through 13-1004 (defining preparatory offenses of attempt, solicitation, conspiracy, and facilitation); *State v. Carlisle*, 198 Ariz. 203, ¶ 17, 8 P.3d 391, 395 (App. 2000) ("[In former § 13-604.01,] [t]he legislature specifically classified preparatory offenses such as

attempt . . . as dangerous crimes against children in the second degree provided the completed offense would have been a dangerous crime against children in the first degree.").

**¶8** The trial court's sentencing minute entry sufficiently identifies Wade's molestation conviction as being for a preparatory, second-degree offense, classified as a class three felony and a dangerous crime against children, consistent with the provisions of former § 13-604.01(I) and (L)(1). Wade did not plead guilty to, nor was he convicted of, the completed offense of molestation.

**¶9** The trial court did not abuse its discretion in dismissing Wade's third notice of post-conviction relief. *See* Ariz. R. Crim. P. 32.2(b) ("If the specific exception [to preclusion] 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."). Accordingly, although we grant review, we deny relief.

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

CONCURRING:

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

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