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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STATE OF ARIZONA, Respondent, v. JOSE GERARDO GARCIA, Petitioner.	2 CA-CR 2011-0130-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court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. CR048729

Honorable Howard Fell, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

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B R A M M E R, Judge.

¶1 Petitioner Jose Garcia 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., in which he alleged a witness's recantation constituted newly discovered

material facts pursuant to Rule 32.1(e). We will not disturb the court's ruling absent a clear abuse of the court's discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 Garcia was convicted after a jury trial of first-degree murder, armed robbery, and aggravated robbery and was sentenced to concurrent, twenty-one year prison terms for the robbery counts and a consecutive term of life imprisonment with no possibility of parole for twenty-five years. We affirmed his convictions and sentences on appeal and denied relief on Garcia's previous petitions for review from the denial of his petitions for post-conviction relief. *State v. Garcia*, No. 2 CA-CR 96-0230 (memorandum decision filed Aug. 26, 1997); *State v. Garcia*, No. 2 CA-CR 99-0532-PR (memorandum decision filed Mar. 21, 2000); *State v. Garcia*, No. 2 CA-CR 2003-0020-PR (memorandum decision filed Feb. 12, 2004); *State v. Garcia*, No. 2 CA-CR 2005-0403-PR (memorandum decision filed Sep. 15, 2006).

¶3 Garcia's convictions stemmed from a 1995 incident in which he and two others pushed the fifteen-year-old victim, C., against a fence, shot him twice, and stripped him of his Green Bay Packers jacket and his athletic shoes. At trial, R. testified that, the day before Garcia had robbed C., R. had been accosted outside a bar by several individuals including Garcia, that one of those individuals had been carrying a black automatic pistol, and that R. had been shot when he tried to escape. R. did not see which person shot him. Forensic analysis showed the bullet that struck R. had come from the same gun used to kill H. The trial court determined that evidence of the robbery of R., including the forensic evidence, would be inadmissible without testimony by Charlie

Konczak linking the two incidents. Konczak testified that he had seen Garcia with a small chrome handgun and that he had seen a Green Bay Packers jacket in his apartment, which Garcia frequented. He also testified he had overheard Garcia say he had shot a man at a bar during a robbery attempt when the man had tried to flee.

¶4 In 2010, Garcia filed a petition for post-conviction relief based on newly discovered material facts pursuant to Rule 32.1(e), based on Konczak's recantation of his trial testimony. He included an affidavit by Konczak in which Konczak avowed his statements to police had been false "regarding . . . Garcia carrying a chrome . . . handgun; his statements about having shot someone . . . [i]n a bar, and having killed someone else" and that he had falsely affirmed those statements at trial. He asserted he had made the false statements to police due to "fear of being charged with crimes [he] had committed" and wished to "shift blame to others," and "curry favor with the authorities by telling them what they wanted to hear." He explained he had affirmed those statements at trial in order to obtain a favorable plea agreement with the state and now wished to recant those statements because of his "born again Christian religious conversion."

¶5 The trial court summarily denied Garcia's petition. The court first determined that, had Konczak been lying at trial, Garcia must have been aware of that fact because he knew whether he had possessed a chrome handgun, whether the jacket had been at the apartment, and whether he had told Konczak about shooting R. The court also noted the fact Konczak was testifying pursuant to a plea agreement "was a matter of public record." Thus, it reasoned, Garcia had ample opportunity to investigate Konczak's statements. Accordingly, the court concluded Konczak's affidavit "does not represent

newly-discovered evidence" and Garcia had not attempted to show he had taken "diligent steps to reveal that Mr. Konczak was lying at trial."

¶6 The trial court also stated it was "unconvinced that the verdict would have been altered if Mr. Konczak had never testified," noting Garcia had been convicted despite "holes in the State's case." The court qualified that comment, however, stating that had Garcia's claim otherwise been adequate, it possibly would have conducted an evidentiary hearing. But the court further determined Konczak's affidavit was "unbelievable" and a hearing "would likely do nothing to change his nearly total lack of credibility." It stated that Konczak had not explained how he came to know the facts he stated to police or how he knew what facts the police "wanted to hear." The court observed that Konczak had offered no explanation of how he knew those facts "if he had not gotten them directly from" Garcia. And, the court further observed that Konczak had offered to recant only after having been placed in the same prison as Garcia, and that the state had provided information from another post-conviction proceeding suggesting Garcia "had others intimidate a witness into filing a false affidavit recanting testimony."

¶7 On review, Garcia asserts the trial court erred in summarily dismissing his petition, contending he had raised a colorable claim and was entitled to an evidentiary hearing. *See* Ariz. R. Crim. P. 32.8; *State v. Spreitz*, 202 Ariz. 1, ¶ 5, 39 P.3d 525, 526 (2002) (defendant entitled to evidentiary hearing if "colorable claim is presented"). A colorable claim for relief is one that, "if the [defendant's] allegations are true, might have changed the outcome." *State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993).

> A colorable claim in a newly-discovered evidence case is presented if the following five requirements are met: (1) the evidence must appear on its face to have existed at the time of trial but be discovered after trial; (2) the motion must allege facts from which the court could conclude the defendant was diligent in discovering the facts and bringing them to the court's attention; (3) the evidence must not simply be cumulative or impeaching; (4) the evidence must be relevant to the case; (5) the evidence must be such that it would likely have altered the verdict, finding, or sentence if known at the time of trial.

State v. Bilke, 162 Ariz. 51, 52-53, 781 P.2d 28, 29-30 (1989); *see also* Ariz. R. Crim. P. 32.1(e) (newly discovered material facts exist if discovered after trial, defendant exercised due diligence, and facts "are not merely cumulative or used solely for impeachment").

¶8 Garcia first argues the trial court incorrectly determined Konczak's recantation was not newly discovered. As we noted above, in order to be "newly discovered," the evidence must have existed at the time of trial but have been discovered after trial. *Id*. Testimony recanted long after trial, however, does not squarely meet this definition—although the falsity of the witness's statement plainly "existed" at trial, the recantation of that testimony did not. Our supreme court nonetheless has recognized that recanted testimony may form the basis of a claim for post-conviction relief under Rule 32.1(e). *State v. Hickle*, 133 Ariz. 234, 238, 650 P.2d 1216, 1220 (1982) ("[E]vidence indicating [a witness] lied at trial qualifies as 'newly discovered material facts' pursuant to Rule 32.1 . . . .").

¶9 Generally, in order to raise a claim based on newly discovered material facts, a defendant must "allege facts from which the court could conclude the defendant

was diligent in discovering the facts and bringing them to the court's attention." *Bilke*, 162 Ariz. at 52-53, 781 P.2d at 29-30. But it is difficult to assess that required diligence in the context of recanted testimony. Although the defendant in *Hickle*, like here, plainly would have known at trial that the witness was lying or mistaken, our supreme court did not suggest the defendant there had failed to demonstrate diligence, instead stating only that "[t]he newly discovered evidence in the form of recanted testimony could not have been discovered with the exercise of due diligence prior to trial." *Hickle*, 133 Ariz. at 238, 650 P.2d at 1220. And other courts have noted the difficulty in applying due diligence requirements to the discovery of recanted testimony. *See Pacheco v. Artuz*, 193 F. Supp. 2d 756, 761 (S.D.N.Y. 2002) ("In many cases, no amount of due diligence on the part of a petitioner can compel a witness to come forward and admit to prevaricated testimony."); *Cammarano v. State*, 602 So. 2d 1369, 1371 (Fla. Dist. Ct. App. 1992) ("Without [the witness's] cooperation, any prior interviews with him would not have brought forth his recantation, however diligently his interviewer questioned him."). Nothing in the record suggests Garcia had any prior indication Konczak would recant his testimony, or that he failed to bring that recantation promptly to the trial court's attention.

¶10 We nonetheless find no abuse of discretion in the trial court's summary rejection of Garcia's claim. As noted above, the court determined Konczak's affidavit was facially unbelievable. Recanted testimony is "inherently unreliable," *Hickle*, 133 Ariz. at 238, 650 P.2d at 1220, and courts therefore "have long been skeptical of recanted testimony claims." *State v. Krum*, 183 Ariz. 288, 294, 903 P.2d 596, 602 (1995). We agree with the court that Konczak's affidavit is insufficient to overcome the inherent

unreliability of his recantation. As the court observed, Konczak's affidavit did not explain, if he had lied during his interview and at trial, how he had known the facts he told police or how he had known what the police "wanted to hear" concerning the gun, jacket, and Garcia's admission regarding shooting R.

¶11 Garcia asserts that he would have been able to explain these omissions at an evidentiary hearing. In evaluating whether a defendant has presented a colorable claim, a trial court must treat the defendant's factual assertions as true. *Runningeagle*, 176 Ariz. at 63, 859 P.2d at 173. But that standard necessarily must be viewed in light of the inherent unreliability of recanted testimony. And an affidavit that is "conclusory and completely lacking in detail" does not entitle a defendant to an evidentiary hearing. *Krum*, 183 Ariz. at 294, 903 P.2d at 602. Konczak's conclusory assertion that his statements at his police interview and at trial were false, without some explanation of how he knew to make those statements initially, is insufficient to entitle Garcia to an evidentiary hearing.[1]

[1]Garcia asserts we should review the trial court's consideration of Konczak's affidavit de novo because that judge did not preside over his trial. *See State v. Sims*, 99 Ariz. 302, 310, 409 P.2d 17, 22 (1966) ("The credibility of the recanted evidence is a controlling factor which can best be made in the court that heard the original testimony."). Even assuming, without deciding, that we owe the court's determination here no deference, we reach the same result for the same reasons. We question, however, the court's conclusion that the outcome of the trial would have been the same had Konczak not testified as he did. His testimony linked Garcia to the murder as well as the earlier shooting, and provided the basis for forensic evidence that the same gun was used in both crimes. Because Konczak's affidavit was insufficient, however, we need not address this issue further. For the same reason, we do not address Garcia's argument that the court erred in relying on evidence submitted by the state suggesting Garcia had coerced a witness to recant in an unrelated case.

¶12 For the reasons stated, although we grant Garcia's petition for review, we deny relief.

/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