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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STATE OF ARIZONA, Respondent, v. WILLIAM J. MESA JR., Petitioner.	2 CA-CR 2011-0171-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR044583

Honorable Carmine Cornelio, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
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William J. Mesa Jr.
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In Propria Persona

K E L L Y, Judge.

¶1 Petitioner William Mesa was convicted after a jury trial of first-degree murder and five counts of child abuse of his fifteen-month-old daughter, M. We consolidated his direct appeal and his petition for review of the trial court's denial of his

petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., affirming his convictions and sentences and denying relief. *See State v. Mesa*, Nos. 2 CA-CR 95-0451, 2 CA-CR 97-0427-PR (consolidated) (memorandum decision filed July 23, 1998). Mesa commenced a second post-conviction proceeding and in the petition filed by appointed counsel he raised claims of ineffective assistance of trial counsel, newly discovered evidence, and actual innocence. *See* Ariz. R. Crim. P. 32.1(a), (e) and (h). After an evidentiary hearing, the trial court denied relief. This petition for review followed. We will not disturb the court's ruling absent a clear abuse of discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We see no such abuse here.

¶2 The evidence at trial established Mesa had carried M., who was unconscious, to a neighbor's apartment and said "something had happened." He and his neighbor called 9-1-1. Mesa claimed he had thrown M. up in the air to stop her from crying, that he had dropped her because she was slippery from the bath or shower, and that she had landed on her head. M. died as a result of brain injuries associated with blunt force head trauma that did not appear to be accidental. Mesa admitted to law enforcement officers he often shook M., that he had done so a few weeks earlier, and that he had thrown her into her crib. He also told his live-in girlfriend, he had thrown her onto the couch two weeks earlier and she had fallen off and onto the ground, hitting her head.

¶3 The state presented expert testimony at trial that M.'s extensive injuries could not have been the result of a single, low-level fall; rather she had sustained multiple blows or falls that could have happened only had she fallen from a second or third story

or down a flight of stairs. Testimony and other evidence supported the state's theory that M. was a victim of Shaken Baby Syndrome (SBS); she had not fallen, as Mesa maintained, but she had been shaken vigorously, probably with contact to a surface, and had been beaten about the head and probably the abdomen.

¶4 In this post-conviction proceeding, Mesa presented expert testimony and other evidence regarding SBS, suggesting current opinions and information in the medical community that was "largely unavailable" at the time of his trial casts doubt on SBS and is new evidence for purposes of Rule 32.1(e). He asserted the evidence would show a six-foot fall could have caused the kinds of injuries M. had sustained, even death, and that some of the injuries were the result of the heroic efforts by medical personnel to save her life. One such expert opined that medical science cannot distinguish accidental from non-accidental injuries. Mesa asserted this evidence was highly relevant and not merely impeaching, and had it been available at the time of his trial, the outcome would have been different. Rule 32 counsel David Euchner argued at the evidentiary hearing that SBS is currently regarded as "hogwash." As a corollary to these arguments, Mesa maintained that, in light of the recent medical literature discrediting SBS, under the standards of *Logerquist v. McVey*, 196 Ariz. 470, 1 P.3d 113 (2000), and *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), the evidence would not have been admissible at trial.

¶5 Mesa also asserted a claim of "actual innocence," pursuant to Rule 32.1(h). This claim was based on the newly discovered expert testimony, which Mesa maintained "completely undercut" the state's evidence. Mesa's last claim was that trial counsel had

been ineffective. Conceding he had raised a claim of ineffective assistance of counsel in his first post-conviction proceeding, Mesa elaborated on the claim, asserting counsel had failed to present testimony by certain physicians about bruising on other parts of M.'s body that they had not noticed when she was first examined, which would have suggested she had sustained these injuries as a result of emergency medical attention she received at the hospital. He also claimed counsel was ineffective because he did not raise hearsay objections to certain evidence.

¶6 At the hearing in January 2011, counsel presented final arguments following two days of expert testimony. Rule 32 counsel David Euchner argued that based on the prevailing view in the medical community in 1995, it was believed a "short fall" never resulted in the death of a child. Rather, at that time, SBS was "real" and "when you ha[d] a triad of symptoms," the child was determined to be the victim of SBS. He also argued the evidence, which included evidence introduced during the 1995 trial, suggested some of the multiple bruises on M.'s body could have been the result of emergency medical care.

¶7 In its argument, the state cited Dr. Bruce Parks's hearing testimony that, at the time of trial, it was believed shaking alone could result in subdural hematomas, a theory now the subject of more vigorous debate than previously. But, the state argued, Parks did not believe this would have made a difference in the outcome of the trial because this case "never was a shaking alone case. This was a case where clearly there was shaking with impact." The state noted that "this is a child who had significant,

significant impact, and evidence of shaking, which even the defense experts would not dispute."

¶8 The trial court, which stated it had read the entire trial transcript, disagreed with defense counsel's characterization of the medical community's current view of SBS as "hogwash," explaining the evidence showed instead that "there seems to be a divergence of view[s] within various areas of specialty." With regard to evidence and arguments about bruises and injuries the child had sustained that were separate from head and neck injuries, the court subsequently concluded no new evidence had been presented that would entitle Mesa to relief pursuant to Rule 32. The court repeatedly pointed out that the evidence had existed and arguments had been made or could have been made at the time of trial.

¶9 The trial court subsequently issued a thorough, thoughtful, and well-reasoned minute entry. We will not repeat the court's order in its entirety here; rather because it is supported by the record before us and correctly resolves the complex issues raised in this proceeding, we adopt it. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993). The court's written decision, its comments during the hearing and its questioning of the witnesses at the evidentiary hearing reflect that, contrary to Mesa's claim on review, the court understood and carefully considered the evidence that had been presented and the arguments that had been made. The court denied relief only after it had familiarized itself with the trial evidence and the extensive, complex evidence presented in support of the Rule 32 petition, which included testimony, reports, and articles. The order demonstrates the court correctly applied Rule 32.1(e) and, based on

the record before us, did not abuse its discretion when it concluded that, even assuming the new medical evidence were to be regarded as new evidence for purposes of Rule 32.1(e), and that it would have been admissible, Mesa had not established it "would have probably changed" the outcome at trial. The court concluded, "While the development of opposing views on SBS would have significant potential impact in some SBS convictions, that is not true in all of them. Given the constellation of injuries, this case is not one of them."

¶10 The trial court also correctly concluded Mesa was not entitled to relief on the ground of actual innocence under Rule 32.1(h). The evidence cited in support of this claim either repeated evidence previously presented or, even if new, merely raised the level of the dispute about SBS. The court did not abuse its discretion in finding Mesa had not established clearly and convincingly "no reasonable fact-finder would have found defendant guilty of the underlying offense beyond a reasonable doubt." Ariz. R. Crim. P. 32.1(h).

¶11 Similarly, the trial court was correct that all claims of ineffective assistance of trial counsel are precluded. *See Swoopes*, 216 Ariz. 390, ¶¶ 23–25, 166 P.3d at 952–53 (finding precluded in successive proceeding claims of ineffective assistance of counsel raised in first post-conviction proceeding). "[W]hen 'ineffective assistance of counsel claims are raised . . . in a Rule 32 post-conviction relief proceeding, subsequent claims of ineffective assistance will be deemed waived and precluded.'" *Id.* ¶ 23, *quoting State v. Spreitz*, 202 Ariz. 1, ¶ 4, 39 P.3d 525, 526 (2002) (emphasis omitted). Mesa raised a claim of ineffective assistance of counsel in his first post-conviction proceeding and has

not established, either below or on review, any reason why the preclusive effect of Rule 32.2(a)(2) and (3) does not apply here. Ariz. R. Crim. P. 32.2(a)(2) (precluding defendant from relief based on ground "[f]inally adjudicated on the merits . . . in any previous collateral proceeding"); Ariz. R. Crim. P. 32.2(a)(3) (precluding defendant from relief based on ground waived "in any previous collateral proceeding").

¶12 As noted above, Mesa contends in his pro se petition for review that the trial court did not understand the evidence he had presented. But the record belies that contention. To the extent Mesa is asking this court to reweigh the evidence and second-guess the trial court's assessment of the evidence, we decline to do so. The trial court is "'in the best position to evaluate credibility and accuracy, as well as draw inferences, weigh, and balance'" evidence at an evidentiary hearing. *State v. Hoskins*, 199 Ariz. 127, ¶ 97, 14 P.3d 997, 1019 (2000), *quoting State v. Bible*, 175 Ariz. 549, 609, 858 P.2d 1152, 1212 (1993). We will not second guess the court's evaluation of the evidence.

¶13 Nor did the trial court demonstrate a lack of understanding of the evidence when it found evidence and arguments relating to the cause of multiple bruises the child had sustained over her body—specifically the testimony of Dr. Robert Mendelsohn—was not new evidence for purposes of Rule 32.1(e). The evidence either had been presented at trial or, even assuming it was new, would have made no difference. *See* Ariz. R. Crim. P. 32.1(e) (defendant must show new evidence probably would have changed outcome at trial). The court found the only evidence that was arguably new for purposes of the rule was the evidence questioning SBS, and the opinions by Drs. Kirk Thibault and John Plunkett, which the court noted were not available at the time of trial. Again, the court

did not abuse its discretion when it concluded such evidence probably would not have changed the outcome of the trial and was, to a certain extent, merely impeachment evidence. *See* Ariz. R. Crim. P. 32.1(e).

¶14 Mesa also contends on review that Euchner was ineffective, resulting in a violation of his "federal due process right to effective representation." As a non-pleading defendant, Mesa has no such right with respect to a Rule 32 proceeding. *See Osterkamp v. Browning*, 226 Ariz. 485, ¶ 18, 250 P.3d 551, 556 (App. 2011). Indeed, Mesa was not even entitled to the appointment of counsel in this second post-conviction proceeding. *See* Ariz. R. Crim. P. 32.4(c)(2).

¶15 Mesa also contends there were errors in the "pre/post judgment . . . process" entitling him to relief on review. Mesa filed his notice of post-conviction relief in February 2009, together with a memorandum and multiple exhibits. Shortly thereafter, he filed a motion to supplement the record with his "eighth pro bono expert." The trial court acknowledged the pro se filings in March 2009 and appointed Euchner to represent him, directing Euchner to file an amended petition. In October, Euchner filed a petition for post-conviction relief and extensive supporting exhibits. Mesa maintains Euchner "deleted 50-75% of the exonerating scientific evidence." Mesa filed a motion requesting that Euchner be withdrawn as counsel, and asked the court to strike Euchner's filings and replace them with his own exhibits.

¶16 At a hearing on November 2, 2009, the trial court questioned Mesa telephonically about proceeding without counsel. According to Mesa, the court "advised [him] of the dangers of going pro per and that his only choice was to go forward with or

without counsel," leaving him with the "Hobson's choice" of keeping Euchner as his counsel, despite an alleged conflict, and withdrawing the pro se filings, or insisting Euchner be removed in order to retain those filings. The court acknowledged to counsel during the hearing that it was having difficulty determining which of the petitions and supporting documents it was to consider. The court continued the hearing in order to secure Mesa's presence, as Euchner requested. But Mesa then filed a "motion to rescind" his motion to withdraw Euchner, and Euchner continued to represent him.

¶17 On review, Mesa claims the trial court erred by not considering his pro se filings before appointing counsel and by placing him in a position that required him to abandon his filings and exhibits. He contends this violated his right under A.R.S. § 13-4231 "to petition the court and the [A.R.S. §] 13-4236(D) 'Extraordinary Circumstances' clause." We see no error and no basis for granting relief on review. In his notice of post-conviction relief, Mesa had requested that counsel be appointed to represent him if the court were to grant an evidentiary hearing. In its March 2, 2009, minute entry, a copy of which was mailed to Mesa, the court exercised its discretion and appointed Euchner. Although the court did not limit the representation to an evidentiary hearing, Mesa did not object. Indeed, Euchner initially filed a motion to withdraw based on a conflict of interest involving the Pima County Public Defender's office, but subsequently withdrew that motion, avowing to the court he had been in contact with Mesa and Mesa stated he would waive all conflicts. Based on the expectation that Euchner would file a petition as directed after the court appointed him, the court did not err by failing to consider Mesa's pro se filings first.

¶18 We note, moreover, that Mesa seems to fault the trial court for not permitting him to represent himself and present the court with his own memoranda and exhibits at the same time he was represented by counsel. But Mesa chose to proceed with counsel. Having made that decision, he had no right to expect the court to accept and consider his pro se filings because a defendant is generally not entitled to hybrid representation. *See State v. Murray*, 184 Ariz. 9, 27, 906 P.2d 542, 560 (1995). And although the court may permit such representation in its discretion, *see State v. Dixon*, 226 Ariz. 545, ¶¶ 38-39, 250 P.3d 1174, 1182 (2011), the court did not abuse its discretion by focusing on the issues as framed by Euchner. It was for Euchner to decide what claims to present, which arguments to make, and which exhibits to submit. *Cf. State v. Febles*, 210 Ariz. 589, ¶ 20, 115 P.3d 629, 636 (App. 2005) (it is appellate counsel's responsibility to "'winnow[] out weaker arguments on appeal and focus[] on' those more likely to prevail"), *quoting Jones v. Barnes*, 463 U.S. 745, 751-52 (1983). Mesa essentially was asking the court to permit him to supplement the petition Euchner was expected to file, notwithstanding that hybrid representation generally is unacceptable. Moreover, a party is not permitted to amend a petition without leave of the trial court based on good cause. Ariz. R. Crim. P. 32.6(d). The court did not abuse its discretion here in implicitly finding good cause did not exist, given that Mesa chose to have Euchner represent him.

¶19 Similarly, the trial court did not abuse its discretion when it denied certain motions Mesa filed after the conclusion of the evidentiary hearing. Mesa filed a "Supplemental Corrective Brief to Correct, Clarify, Expand PCR Record," asking the

court to accept the filings. Mesa criticized Euchner's representation of him in the post-conviction proceeding, claiming he and the prosecutor had misinformed the court. He also attempted to add additional research questioning the validity of SBS and "clarifying" and "correcting" the issues and the evidence. Mesa also challenged expert testimony that had been presented at the December 2009 evidentiary hearing based on the research he submitted. He presented what he characterized as new evidence regarding other bruises found on M.'s body that he claimed was relevant to the question whether these artifacts could be used to determine how they were sustained, including whether they were the result of medical attention or abuse. Mesa requested that attorney Brick Storts be appointed to represent him.

¶20 The court denied all of Mesa's requests, refusing to "reopen[]" the proceeding, and suggested that Mesa reconsider his request to have Euchner withdrawn in light of its rulings. Mesa then withdrew the motion seeking to have Euchner withdrawn. The court did not abuse its discretion by refusing Mesa's attempt, through hybrid representation, to supplement the extensive amount of information it had been provided. Moreover, given the court's subsequently issued order and its rulings on the evidence Euchner had presented—rulings we have concluded are correct—the information Mesa attempted to separately introduce was not newly discovered evidence for purposes of Rule 32.1(e). It was either an extension of evidence that had already been or could have been presented at trial, or it was merely impeaching and probably would not have changed the jury's verdicts. Ariz. R. Crim. P. 32.1(e). The court clearly reviewed the materials, as its comments in its March 24, 2011, minute entry reflect and

declined to exercise its discretion to permit the filing. *See Dixon*, 226 Ariz. 545, ¶¶ 38-39, 250 P.3d at 1182 (although hybrid representation discouraged, trial court has discretion to permit it).

¶21 On March 7, 2011, after the trial court denied Mesa post-conviction relief, Euchner requested an extension of the time for filing a motion for rehearing from March 16 to March 23 to give Mesa additional time to file a pro se motion in light of mail-related delays. The court granted the extension and ordered Mesa to file the motion by March 23. On March 24 the court issued an order acknowledging it had received from Euchner's office Mesa's Motion to Proceed Pro Per, Motion to Transmit Records, Motion to Extend Due Date, and Motion to Extend Page Limitation.

¶22 The court then permitted Mesa to proceed in propria persona "[t]o the extent necessary," relieving Euchner of any further responsibility in the case. It denied Mesa's remaining motions, ruling as follows:

> Several things are abundantly clear . . . . First, Mr. Mesa is more than capable and has more than sufficient information in his possession to file a Motion for Rehearing. This is demonstrated by his exhaustive Supplement[al] Corrective Brief and Supplemental Exhibits as well as his original Rule 32 Petition. Second, Rule 32.9 provides 15 days for the timing of a Motion for Rehearing. This Court extended that time to March 23, 2011. It did so based on Mr. Euchner's Motion to Continue indicating that Mr. Mesa might be filing a pro se Motion for Rehearing and that he needed additional time for filing the motion because of mailing.

¶23 Mesa challenges these various rulings on review, claiming this "rendered the entire PCR process ineffective and inadequate." We disagree. The trial court is vested with discretion for determining whether to permit extensions of the time for filing

a motion for rehearing. *See State v. Pope*, 130 Ariz. 253, 255, 635 P.2d 846, 848 (1981). Based on the reasons the court articulated in its minute entry for denying these motions, the court did not abuse that discretion. And given the extensive amount of evidence submitted in support of the Rule 32 petition filed by Euchner, whose representation Mesa permitted, it is clear the proceeding was neither "ineffective" nor "inadequate."

¶24 For the reasons stated, we grant the petition for review but deny relief.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

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

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