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AUG 20 2013
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

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| THE STATE OF ARIZONA,<br><br>Respondent,<br><br>v.<br><br>JOSEPH GUY STERN SR.,<br><br>Petitioner. | 2 CA-CR 2013-0030-PR<br>DEPARTMENT A<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Not for Publication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. CR043799

Honorable Javier Chon-Lopez, Judge

REVIEW GRANTED; RELIEF DENIED

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By Brick P. Storts, III
Tucson
Attorneys for Petitioner

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M I L L E R, Judge.

**¶1** Petitioner Joseph Stern Sr. seeks review of the trial court's order denying his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P., in which he alleged newly discovered evidence entitled him to relief. "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). Stern has not sustained his burden of establishing such abuse here.

**¶2** After a jury trial, Stern was convicted of two counts of child abuse and one count of first-degree murder based on the death of Stern's live-in girlfriend's two-year-old daughter, K. This court affirmed his convictions and sentences on appeal, *State v. Stern*, No. 2 CA-CR 94-0613 (memorandum decision filed Feb. 27, 1996), and denied relief on his three previous petitions for review of the trial court's denial of post-conviction relief. *State v. Stern*, No. 2 CA-CR 98-0410-PR (memorandum decision filed June 30, 1999); *State v. Stern*, No. 2 CA-CR 01-0084-PR (memorandum decision filed June 21, 2001); *State v. Stern*, No. 2 CA-CR 2003-0309-PR (decision order filed Sept. 13, 2004).

**¶3** In a fourth proceeding for post-conviction relief, Stern sought relief pursuant to Rule 32.1(e) and (h), claiming in his petition that newly discovered scientific evidence related to child brain injury, particularly "shaken baby syndrome," entitled him to relief. The trial court granted Stern an evidentiary hearing, during which two medical experts testified. The first, Dr. Patrick Hannon, a biomechanical expert, testified that simply shaking a two-and-a-half-year-old child like K. could not produce a severe brain injury and that recent studies have shown that death in small children can result from

short falls. The second, Dr. Peter Stephens, testified that he believed K. had died as a result of a short-distance fall and that shaking was insufficient to have caused K.'s injuries. The court found that the doctors' testimony was newly discovered evidence. It denied relief, however, concluding that the new evidence "probably would not have changed the jury verdict." *See* Ariz. R. Crim. P. 32.1(e)(3) (relief requires evidence of critical significance that "probably would have changed the verdict").

**¶4** On review, Stern asserts that "[t]he trial court abused its discretion in denying [his] petition for post-conviction relief by finding facts not justified by, and clearly against, reason and evidence." It is the defendant's burden to prove by a preponderance of the evidence all factual allegations raised in his petition for post-conviction relief. *See* Ariz. R. Crim. P. 32.8(c). Having raised a claim pursuant to Rule 32.1(e), Stern was required to establish the existence of newly discovered evidence that "probably would have changed the verdict." Likewise, to establish his claim under Rule 32.1(h), Stern had to "demonstrate[ ] by clear and convincing evidence that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would have found [him] guilty of the underlying offense[s] beyond a reasonable doubt."

**¶5** Thus, in reviewing a trial court's ruling after an evidentiary hearing, we defer to that court with respect to its assessment of the witnesses' credibility and its resolution of any conflicts in the evidence. *See State v. Fritz*, 157 Ariz. 139, 141, 755 P.2d 444, 446 (App. 1988). The trial court "'is in the best position to evaluate credibility and accuracy, as well as draw inferences, [and] weigh, and balance'" the evidence

presented at the evidentiary hearing.[1] *See 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). Consequently, we do not reweigh the evidence. *See State v. Sasak*, 178 Ariz. 182, 186, 871 P.2d 729, 733 (App. 1993) (appellate court reviews evidence at post-conviction-relief hearing favorable to trial court's ruling and defers to trial court in resolving conflicts in evidence). Rather, "[w]e examine a trial court's findings of fact after an evidentiary hearing to determine if they are clearly erroneous." *State v. Berryman*, 178 Ariz. 617, 620, 875 P.2d 850, 853 (App. 1994).

**¶6** In this case, even accepting that Stern's medical and biomechanical evidence qualified as newly discovered evidence, *see State v. Saenz*, 197 Ariz. 487, ¶ 7, 4 P.3d 1030, 1032 (App. 2000), and that the claim could not have been raised in one of his previous petitions, *see* Ariz. R. Crim. P. 32.2(a)(3), we cannot say the trial court abused its discretion in determining that Stern had not shown the evidence presented probably would have changed the verdict or that no reasonable fact finder would have found him guilty. The court's detailed factual findings are clearly supported by the record, including a multi-day evidentiary hearing. The court's ruling sets forth those findings, its analysis of case law relied upon by Stern, and its conclusion that Stern had not established that the evidence presented probably would have changed the verdict in an

[1]Stern asserts, without citation to authority, that because "the Rule 32 court in this case . . . was not [the] same court that presided over [his] trial," "the trial court's findings are not entitled to the same deference." And he maintains the trial court therefore was "in no better position than this Court to review the evidence." We disagree. The trial court is able to observe the witnesses at the evidentiary hearing and their demeanor, an opportunity that this court does not have.

exhaustive, detailed manner allowing for review by this or any court in the future. *State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993). We therefore see no reason to repeat the court's analysis here, but rather adopt that portion of the court's ruling. *Id.* Therefore, although we grant the petition for review, relief is denied.

/s/ Michael Miller
MICHAEL MILLER, Judge

CONCURRING:

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

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge*

*A retired judge of the Arizona Court of Appeals authorized and assigned to sit as a judge on the Court of Appeals, Division Two, pursuant to Arizona Supreme Court Order filed December 12, 2012.