

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

AUG 27 2013

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2013-0205-PR
)	DEPARTMENT B
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
DANIEL LUGO PEREZ,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20042382001

Honorable Paul E. Tang, Judge

REVIEW GRANTED; RELIEF DENIED

Daniel Lugo Perez

Florence
In Propria Persona

E S P I N O S A, Judge.

¶1 Daniel Perez petitions this court for 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 that ruling unless the court clearly has abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Perez has not sustained his burden of establishing such abuse here.

¶2 Perez was convicted after a jury trial of two counts of sexual abuse and five counts of sexual assault and sentenced to a total of 57.5 years' imprisonment. On appeal, we affirmed his convictions and sentences as modified, ordering that the sentences for three of his counts of sexual assault be reduced to presumptive, seven-year terms, for a total prison term of 36.5 years. *State v. Perez*, No. 2 CA-CR 2005-0083 (memorandum decision filed Nov. 25, 2008). Before his appeal, he had filed a notice of post-conviction relief, which was stayed pending the outcome of that appeal. After we issued our mandate in February 2009, appointed counsel filed a notice stating he had reviewed the record and found "no tenable issue for review." Despite being afforded numerous extensions, Perez did not file a pro se petition for post-conviction relief, and the trial court dismissed the notice in June 2010. Perez did not seek review of that ruling.

¶3 In January 2012, Perez filed a notice of post-conviction relief raising, inter alia, claims of actual innocence and newly discovered evidence. The trial court appointed counsel, who subsequently filed a notice stating he had reviewed the record and consulted with Perez but had found no "meritorious issue of law or fact which can be raised as a basis for relief." Perez then filed a pro se petition for post-conviction relief,

which the court summarily denied. This court denied relief on review. *State v. Perez*, No. 2 CA-CR 2013-0122-PR (memorandum decision filed Aug. 15, 2013).

¶4 In March 2013, Perez filed another notice of post-conviction relief, arguing that a victim's statement to police that he had touched her "on her bottom area" constituted newly discovered material facts rendering him actually innocent of one of his convictions of sexual assault and suggested the victim had committed perjury by testifying he had penetrated her vagina and anus. He claimed he had discovered this statement in March 2013 in a police report, and further suggested that his previous Rule 32 counsel had been ineffective for not discovering the statement earlier and that the prosecution had committed misconduct because the "Tucson Police Department tr[ie]d to cover [the] statement with a black marker" in the report.

¶5 The trial court summarily dismissed the notice. The court concluded Perez's ineffective assistance of counsel claim was not cognizable because he was not entitled to the effective assistance of counsel in post-conviction proceedings and that his claim of newly discovered evidence was precluded because he did not "explain why he did not raise the claim in a prior petition" despite his counsel having had possession of the police report. The court further observed that Perez's claims of newly discovered evidence and actual innocence both lacked merit because the victim's statement would not have altered Perez's verdict or sentence and was, in fact, entirely consistent with Perez's guilt.

¶6 On review, Perez again claims the victim committed "perjury" based on the police interview, and the state committed misconduct because that portion of the

interview was “black[ed] out” in the report he received.¹ We find no error in the trial court’s summary dismissal of Perez’s notice. A successive notice of post-conviction relief raising a claim of newly discovered material facts pursuant to Rule 32.1(e), Ariz. R. Crim. P., like Perez’s purported to do here, must “set forth the substance of the specific exception and the reasons for not raising the claim in the previous petition or in a timely manner” to be exempt from preclusion. Ariz. R. Crim. P. 32.2(b). Perez has had two previous Rule 32 proceedings in which he did not raise an argument based on the witness’s statement in the police report—despite having had the opportunity in both to file a pro se petition. And he has not asserted that he or his counsel did not have the relevant police report at trial or during his previous Rule 32 proceedings—only that he failed to review it until recently. *Cf. State v. Saenz*, 197 Ariz. 487, ¶ 13, 4 P.3d 1030, 1033 (App. 2000) (“Evidence is not newly discovered unless it was unknown to the trial court, the defendant, or counsel at the time of trial and neither the defendant nor counsel could have known about its existence by the exercise of due diligence.”). Perez has not identified a sufficient reason justifying his belated attempt to raise these arguments, nor has he identified anything substantiating his claim that the report constitutes newly discovered evidence, as required by Rule 32.2(b). And, to the extent Perez intends to raise these arguments independently of his claim of newly discovered evidence, they

¹Perez does not assert the trial court erred in rejecting his claim of ineffective assistance of counsel, nor his claim of actual innocence. We therefore do not address those claims. *See* Ariz. R. Crim. P. 32.9(c)(1) (“Failure to raise any issue that could be raised in the petition or the cross-petition for review shall constitute waiver of appellate review of that issue.”).

clearly are precluded pursuant to Rule 32.2(a)(3) because he did not raise them on appeal or in his previous Rule 32 proceedings.

¶7 For the reasons stated, although review is granted, relief is denied.

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

CONCURRING:

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

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