

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

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2013-0215-PR
)	DEPARTMENT B
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
LARRY DONNELL DUNLAP,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR052543

Honorable James E. Marner, Judge

REVIEW GRANTED; RELIEF DENIED

Thomas C. Horne, Arizona Attorney General
By Douglas L. Clark

Tucson
Attorneys for Respondent

Larry Dunlap

Florence
In Propria Persona

K E L L Y, Presiding Judge.

¶1 Based on acts he committed in 1995, petitioner Larry Dunlap was convicted after a jury trial of one count of sexual abuse and five counts of child molestation. He has had two direct appeals, resulting in a resentencing, *State v. Dunlap*, No. 2 CA-CR 96-

0643 (memorandum decision filed Apr. 21, 1998), and a modification of his sentence upon resentencing, *State v. Dunlap*, No. 2 CA-CR 99-0084 (memorandum decision filed Mar. 30, 2000). Before seeking post-conviction relief in this proceeding, it appears Dunlap sought relief pursuant to Rule 32, Ariz. R. Crim. P., three times. The trial court denied relief, as did this court on review. See *State v. Dunlap*, No. 2 CA-CR 2011-0196-PR (memorandum decision filed Oct. 19, 2011); *State v. Dunlap*, No. 2 CA-CR 2004-0276-PR (decision order filed Feb. 11, 2005); *State v. Dunlap*, No. 2 CA-CR 2002-0215-PR (memorandum decision filed Sept. 11, 2003). Dunlap now challenges the trial court's orders dismissing his fourth notice of post-conviction relief and his motion for rehearing. In his notice, he stated he wished to raise a claim of ineffective assistance of counsel and newly discovered evidence, and a related claim of actual innocence. Ariz. R. Crim. P. 32.1(e), (h). We will not disturb the court's rulings unless it clearly has abused its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We see no such abuse here.

¶2 A defendant like Dunlap, who files a successive notice of post-conviction relief, may only assert claims that fall within Rule 32.1(d), (e), (f), (g), or (h), and must state in the notice “meritorious reasons . . . substantiating the claim and indicating why the claim was not stated in the previous petition or in a timely manner.” Ariz. R. Crim. P. 32.2(b); see also *State v. Petty*, 225 Ariz. 369, ¶ 10, 238 P.3d 637, 640-41 (App. 2010) (explaining defendants seeking to raise non-precluded claims in untimely or successive petition may do so if able to state meritorious reasons for failing to assert claims in timely

manner or in previous proceeding). Because Dunlap failed to state meritorious reasons for not having asserted his claim of ineffective assistance of counsel in his previous proceedings, the trial court properly determined that it was precluded. *See* Ariz. R. Crim. P. 32.2(a)(2), (3); *see also State v. Spreitz*, 202 Ariz. 1, ¶ 4, 39 P.3d 525, 526 (2002) (“Our basic rule is that where ineffective assistance of counsel claims are raised, or could have been raised, in a Rule 32 post-conviction relief proceeding, subsequent claims of ineffective assistance will be deemed waived and precluded.”) (emphasis omitted).

¶3 With respect to Dunlap’s remaining claims of newly discovered evidence, the trial court found some subject to summary dismissal because the proposed evidence did not, on its face, constitute newly discovered evidence and was, in any event, cumulative. The court found as to the claim that he had discovered new evidence regarding threats to witnesses, recantation by some witnesses, and false testimony previously made, Dunlap had failed to show how he had exercised diligence in trying to discover the evidence previously. The court directed Dunlap to supplement his notice of post-conviction relief with a short statement, no more than five pages in length, explaining when he had learned about this evidence and other information from which the court could determine whether he had “exercised due diligence in securing the newly discovered evidence.” After giving Dunlap three extensions, the court denied the last request and dismissed the notice of post-conviction relief because he had failed to substantiate his only non-precluded claim.

¶4 Dunlap filed a motion for rehearing together with the supplemental notice the trial court had ordered him to file previously. The court denied the motion, finding it had given Dunlap multiple extensions of time for filing the supplemental notice and rejecting Dunlap's explanations for having failed to do so. The court, nevertheless, concluded Dunlap's supplement did not provide a sufficient basis for withstanding the summary dismissal of the notice of post-conviction relief. The court noted the evidence, which purportedly would have been the testimony of witnesses who had recently returned from Spain, was not newly discovered. As the court pointed out, these witnesses could not have been newly discovered as contemplated by Rule 32.1(e) because they were the subject of Dunlap's third notice of post-conviction relief filed in December 2010.

¶5 In his petition for review, Dunlap challenges the trial court's initial dismissal of his notice of post-conviction relief and its denial of his motion for rehearing. But he has not established the court abused its discretion. Rather, he essentially reasserts the same arguments he had raised below. And to the extent he is asserting new claims and arguments for the first time in his petition for review, we do not address them. *See* Ariz. R. Crim. P. 32.9(c)(1) (appellate court reviews issues presented to trial court); *State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (appellate court will not address arguments asserted for first time in petition for review). Thus, finding no error,

we adopt the court's rulings, *State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993),¹ and although we grant Dunlap's petition for review, we deny relief.

/s/ Virginia C. Kelly

VIRGINIA C. KELLY, Presiding Judge

CONCURRING:

/s/ Philip G. Espinosa

PHILIP G. ESPINOSA, Judge

/s/ Peter J. Eckerstrom

PETER J. ECKERSTROM, Judge

¹We adopt the trial court's rulings with one clarification. As we pointed out in our memorandum decision in Dunlap's third post-conviction proceeding, throughout the convoluted and protracted procedural history of that proceeding Dunlap had failed to comply with the court's repeated requests to supplement his notice and specify the nature of the purported newly discovered evidence. *Dunlap*, No. 2 CA-CR 2011-0196. Thus, to the extent the court in this proceeding rejected the claim as having been adjudicated on the merits of whether such evidence warranted relief after a full presentation of the claim, that did not occur; rather, the court had rejected the claim because Dunlap did not make a threshold showing in the earlier case that he had exercised due diligence in presenting the evidence. *See* Ariz. R. Crim. P. 32.1(e). Here, the court ruled Dunlap had neither made the threshold showing of due diligence nor established the evidence was newly discovered, given that he had known about it at least as long ago as when he had commenced his third post-conviction proceeding in December 2010. As a result, in this proceeding the court did not abuse its discretion in finding Dunlap had failed to present a sufficient threshold claim of newly discovered evidence under Rule 32.1(e), or Rule 32.1(h) based on that evidence, to permit the filing of a petition. *See* Ariz. R. Crim. P. 32.2(b).