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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OF ARIZONA, Respondent, v. CHRISTOPHER ADAM PENA, Petitioner.	2 CA-CR 2013-0232-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF MARICOPA COUNTY

Cause No. CR2006145534001DT

Honorable Bruce R. Cohen, Judge

REVIEW GRANTED; RELIEF DENIED

William G. Montgomery, Maricopa County Attorney
By Gerald R. Grant — Phoenix
Attorneys for Respondent

Christopher Pena — Florence
In Propria Persona

V Á S Q U E Z, Presiding Judge.

¶1 Following a jury trial, petitioner Christopher Pena was convicted of five counts of aggravated assault. The trial court sentenced him to a combination of mitigated, concurrent and consecutive terms of imprisonment totaling fifteen years. This

court affirmed Pena's convictions and modified the sentencing minute entry order on appeal. *State v. Pena*, No. 1 CA-CR 07-0439 (memorandum decision filed May 27, 2008). Pena then filed a notice of post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., which the court treated as a petition for post-conviction relief and dismissed. This court denied review on his petition for review from the trial court's dismissal of that petition. *State v. Pena*, No. 1 CA-CR 10-0119 PRPC (order filed Aug. 3, 2011).

¶2 In October 2011, Pena filed a "Motion to Secure DNA[1] Testing" pursuant to A.R.S. § 13-4240, asserting his claim as one of actual innocence under Rule 32.1(h). Treating his motion for DNA testing as a successive Rule 32 petition, the trial court summarily denied it. Pena now seeks review of that order. "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). We find no such abuse here.

¶3 In its ruling denying Pena's request for DNA testing, the trial court concluded that, even assuming the blood evidence that was the subject of Pena's motion was available and in suitable condition for testing, and further assuming the sample belonged to one of the victims as Pena asserts, it would serve only to challenge the credibility of the testimony provided at trial. Thus, the court concluded, Pena's request "does not nearly rise to the level required by statute [§ 13-4240]." On review, Pena repeats his arguments made below and argues that granting his motion will permit him to

[1]Deoxyribonucleic acid.

show the blood of one of the victims was on Pena's gun, supporting his assertion that he acted in self-defense.

¶4 Our supreme court has recently made clear that a petition for DNA testing pursuant to § 13-4240 "differs from a petition for post[-]conviction relief under Rule 32 and its statutory counterparts." *State v. Gutierrez*, 229 Ariz. 573, ¶ 21, 278 P.3d 1276, 1280 (2012). In *Gutierrez*, the court clarified that a petition for testing could be filed first, and, if the results of the testing were favorable, the petitioner could proceed either at a hearing pursuant to § 13-4240 or by filing a notice for post-conviction relief pursuant to Rule 32. 229 Ariz. 573, ¶¶ 23-26, 278 P.3d at 1280-81. Here, however, it is of no import that the trial court treated Pena's request as a Rule 32 petition, as it ultimately denied his request for testing in any event. And, we agree with its conclusion that Pena had failed to meet the requirements of § 13-4240.

¶5 That statute provides that "a person who was convicted of and sentenced for a felony offense" may, at any time, request DNA testing of "any evidence that is in the possession or control of the court or the state,[2] [and] that is related to the investigation or prosecution that resulted in the judgment of conviction" if he or she meets certain enumerated requirements. § 13-4240(A). Testing is required or permitted when (1) there is "[a] reasonable probability" the petitioner would not have been prosecuted or convicted if the results had been known, he or she would have received a "more favorable" verdict or sentence, or the testing "will produce exculpatory evidence"; (2) the evidence still

[2]In its response to the petition for review, the state acknowledges that "[a]ccording to the superior court clerk, the gun is still in the clerk's custody."

exists and is in a condition to allow testing; and (3) the evidence was not tested previously. § 13-4240(B), (C).

¶6 In this case, the record supports the trial court's finding that, having failed to establish "any of the other factors required for the Court to order further [DNA] testing[,] . . . at best, [Pena] is asserting that if the blood on the gun were analyzed and if the results secured were as predicted by [Pena] (i.e., linked to one of the victims), it could give rise to credibility issues as to what was testified to a[t] trial." Thus, even if we were to accept Pena's argument that the evidence exists and if the results of the DNA test had been known at trial, he has not shown there was a reasonable probability he would not have been prosecuted or convicted, or that he would have received a more favorable verdict or sentence, as § 13-4240 requires. Nor has Pena stated a colorable claim of clear and convincing evidence "that the facts underlying [his] 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." Ariz. R. Crim. P. 32.1(h). We therefore cannot say the court abused its discretion in denying his motion for DNA testing. *Cf. State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984) (appellate court obliged to affirm trial court's ruling if result correct for any reason).

¶7 Furthermore, to the extent Pena has raised a claim of ineffective assistance of counsel regarding trial counsel's failure to have the gun tested for DNA evidence or to adequately "bolster" his self-defense theory at trial, this claim is precluded. Not only did Pena raise a related claim of ineffective assistance of counsel in his first Rule 32 petition, but he could have raised the same claim now before us at that time. *See* Ariz. R. Crim. P.

32.2(a)(2), (3) (defendant precluded from relief based on claim adjudicated or that could have been raised in previous collateral proceeding); *see also State v. Spreitz*, 202 Ariz. 1, ¶ 4, 39 P.3d 525, 526 (2002) (where ineffective assistance of counsel claims are raised or could have been raised in Rule 32 proceeding, subsequent claims of ineffective assistance will be deemed waived and precluded).

¶8 Therefore, although we grant the petition for review, we deny relief.

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

CONCURRING:

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

/s/ Michael Miller
MICHAEL MILLER, Judge