

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

ALEC JORDAN HOLTZ,
Petitioner.

No. 2 CA-CR 2016-0015-PR
Filed May 31, 2016

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Pinal County
No. S1100CR200901265
The Honorable Karl C. Eppich, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

M. Lando Voyles, Pinal County Attorney
By Janina N. Walters, Deputy County Attorney, Florence
Counsel for Respondent

Harold L. Higgins, P.C., Tucson
By Harold Higgins
Counsel for Petitioner

STATE v. HOLTZ
Decision of the Court

MEMORANDUM DECISION

Judge Staring authored the decision of the Court, in which Presiding Judge Howard and Judge Espinosa concurred.

S T A R I N G, Judge:

¶1 Alec Holtz seeks review of the trial court's ruling denying his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that order unless the court clearly abused its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Holtz has not met his burden of demonstrating such abuse here.

¶2 Holtz pled guilty to kidnapping and two counts of sexual conduct with a minor. The trial court sentenced him to a twenty-four-year prison term, to be followed by concurrent lifetime terms of probation. He sought post-conviction relief, and appointed counsel filed a notice stating she had reviewed the record but had found no claims to raise in Rule 32 proceedings. Holtz filed a pro se petition raising various claims, including a claim of innocence pursuant to Rule 32.1(h), which the trial court summarily denied. We denied relief on review. *State v. Holtz*, No. 2 CA-CR 2012-0490 (memorandum decision filed June 6, 2013).

¶3 In July 2014, Holtz filed a notice of post-conviction relief, requesting that counsel be appointed. The court appointed counsel to "address[] any claim of ineffective assistance of prior post-conviction counsel." Appointed counsel subsequently filed a notice stating she had reviewed the record but had found no claims to raise in a successive proceeding. Holtz then retained counsel, who filed a petition claiming that trial and post-conviction counsel had been ineffective, Holtz was incompetent at the time of his plea, the state committed misconduct before his plea and during his first post-conviction proceeding, the trial court coerced Holtz to plead

STATE v. HOLTZ
Decision of the Court

guilty and improperly denied Holtz disclosure during his first Rule 32 proceeding, and Holtz “would obtain an acquittal if [his] case were to go to trial” based on “recently discovered” facts, citing Rule 32.1(e) and (h). The trial court summarily dismissed the petition, and this petition for review followed.

¶4 On review, Holtz repeats his various claims. The bulk of those claims, however, must be summarily denied because Holtz’s second notice of post-conviction relief was untimely. Our mandate in Holtz’s first Rule 32 proceeding issued on February 11, 2014. Holtz was required to file his new notice within thirty days of that mandate, and he did not do so.¹ *See* Ariz. R. Crim. P. 32.4(a). Accordingly, we address only Holtz’s claims brought pursuant to Rule 32.1(e) and (h).² *See Id.*

¶5 To make a colorable claim of newly discovered evidence pursuant to Rule 32.1(e), Holtz must show, inter alia, that the evidence existed at the time of trial but was not discovered until after trial and likely would have altered the verdict. *See State v. Amaral*, No. CR-15-0090-PR, ¶ 9, 2016 WL 423761 (Ariz. Feb. 4, 2016). Further, “[e]vidence is not newly discovered unless it was unknown to the trial court, the defendant, or counsel at the time of trial and

¹Holtz indicated in his notice that his petition for certiorari to the United States Supreme Court had been denied approximately two weeks before he filed that notice. But Rule 32.4(a) requires a notice be filed “within thirty days after the issuance of the final order or mandate by the appellate court in the petitioner’s first petition for post-conviction relief proceeding.” And Rule 31.23(b)(2), Ariz. R. Crim. P., requires a defendant to request a mandate be stayed due to a pending application to the United States Supreme Court for a writ of certiorari. Nothing in our record indicates Holtz sought or was granted a stay, or that he requested our mandate be withdrawn due to his pending petition.

² Although the trial court addressed several of Holtz’s untimely claims on the merits, it was not required to do so, and we may affirm the court for any reason supported by the record. *See State v. Banda*, 232 Ariz. 582, n.2, 307 P.3d 1009, 1012 n.2 (App. 2013).

STATE v. HOLTZ
Decision of the Court

neither the defendant nor counsel could have known about its existence by the exercise of due diligence.” *State v. Saenz*, 197 Ariz. 487, ¶ 13, 4 P.3d 1030, 1033 (App. 2000).

¶6 Holtz cites Rule 32.1(e), but he does not identify what evidence he believes meets these requirements. Nor does he assert any of the evidence could not have been discovered before trial by the exercise of due diligence. Indeed, he claims the opposite – that it was trial counsel’s ineffectiveness that prevented the evidence from being discovered, including evidence purportedly suppressed by the state. Accordingly, Holtz has not made a colorable claim of newly discovered evidence under Rule 32.1(e).

¶7 To obtain relief under Rule 32.1(h), Holtz must “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 defendant guilty of the underlying offense beyond a reasonable doubt.” But a guilty plea generally precludes a claim of innocence.³ See *State v. Norgard*, 92 Ariz. 313, 315, 376 P.2d 776, 778 (1962) (characterizing as “frivolous” motion to withdraw from plea when “the only basis given . . . was that the defendant apparently changed his mind and claimed to be innocent”); *State v. Quick*, 177 Ariz. 314, 316, 868 P.2d 327, 329 (App. 1993) (pleading defendant waives all nonjurisdictional defects unrelated to validity of plea). But, even assuming, without deciding, that a pleading defendant like Holtz may assert actual innocence pursuant to Rule 32.1(h), he ignores the trial court’s finding that his claim is essentially identical to the claim raised in his first Rule 32 proceeding and that it warranted rejection for the same reasons. See *State v. Little*, 87 Ariz. 295, 304, 350 P.2d 756, 761-62 (1960) (doctrine of res judicata generally applies in criminal cases).

³A defendant may claim pursuant to Rule 32 that the factual basis for a guilty plea was insufficient as a matter of law. See, e.g., *State v. Johnson*, 181 Ariz. 346, 348-51, 890 P.2d 641, 643-46 (App. 1995). Holtz has made no such claim here.

STATE v. HOLTZ
Decision of the Court

¶8 Even if we ignore that Holtz admitted his guilt during his plea colloquy and that his claim pursuant to Rule 32.1(h) has already been raised and rejected in a previous proceeding, the claim necessarily fails in light of his confession to police that he abducted a two-year-old child and inserted his finger in her vagina, causing her apparent pain. Although he insists he has made a “strong case that his statements to the police would have been suppressed,” that argument is precluded by his guilty plea, the fact he raised the same claim in his first proceeding, and his failure to timely initiate his second. Holtz cites no authority, and we find none, suggesting that he may relitigate precluded claims under the umbrella of Rule 32.1(h).

¶9 We grant review but deny relief.