

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

HAROLD MAURICE HUMMEL,
Petitioner.

No. 2 CA-CR 2016-0147-PR
Filed August 26, 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NOT FOR PUBLICATION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 Pima County
No. CR023599
The Honorable Jane L. Eikleberry, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Barbara LaWall, Pima County Attorney
By Jacob R. Lines, Deputy County Attorney, Tucson
Counsel for Respondent

Harold M. Hummel, Tucson
In Propria Persona

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MEMORANDUM DECISION

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

ESPINOSA, Judge:

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

¶2 After a jury trial, Hummel was convicted of five counts of armed robbery arising from two robberies committed in 1987 and 1988. He was sentenced to consecutive prison terms totaling 111 years. We affirmed his convictions and sentences on appeal and denied relief in a consolidated petition for review from the trial court's denial of his first petition for post-conviction relief. *State v. Hummel*, Nos. 2 CA-CR 90-0924, 2 CA-CR 92-0098-PR (Ariz. App. Mar. 4, 1994) (consol. mem. decision). Before this proceeding, Hummel sought and was denied post-conviction relief on four other occasions; and we have denied review or relief on his petition for review in each of those proceedings. *State v. Hummel*, No. 2 CA-CR 2013-0546-PR (Ariz. App. Apr. 28, 2014) (mem. decision); *State v. Hummel*, No. 2 CA-CR 2005-0280-PR (Ariz. App. Apr. 28, 2006) (mem. decision); *State v. Hummel*, No. 2 CA-CR 98-0039-PR (Ariz. App. Jun. 25, 1998) (mem. decision); *State v. Hummel*, No. 2 CA-CR 94-0244-PR (Ariz. App. Sep. 13, 1994) (mem. decision).

¶3 In May 2015, Hummel filed another notice of and petition for post-conviction relief asserting he had recently obtained forty-four exculpatory witness statements that were not disclosed before trial and that the state's failure to disclose those statements

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violated *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972). He thus reasoned he was entitled to have his convictions vacated due to the state's "extreme and improper misconduct." The trial court summarily dismissed the proceeding, concluding Hummel's claim was precluded because he had raised it previously. After the court denied Hummel's motion for rehearing, he filed this petition for review.

¶4 In his 2013 proceeding, Hummel claimed the state had violated *Brady* because it had failed to disclose two exculpatory witness statements, and that those statements constituted newly discovered evidence. On review, Hummel insists his most-recent claim is based on materials he only recently obtained. He explains that, at the time of his 2013 proceeding, he had only two witness statements and he did not obtain the remainder until April 2015, after he had filed a request under the Freedom of Information Act. His latest petition for post-conviction relief included numerous documents not included with his 2013 petition, including witness statements. However, were we to assume that Hummel's most-recent claim is meaningfully distinguishable from the claims raised and rejected in his 2013 proceeding, he is nonetheless not entitled to relief.

¶5 Hummel's central claim is that the state violated *Brady* by failing to disclose exculpatory evidence. But a claim under *Brady* is a constitutional claim and therefore arises under Rule 32.1(a), which permits relief when a defendant's "conviction . . . was in violation of the Constitution of the United States or of the State of Arizona." See 373 U.S. at 87 (suppression by state "of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment"). As such, it cannot be raised in an untimely petition like this one. See Ariz. R. Crim. P. 32.4(a) (only claims under Rule 32.1(d) through (h) may be raised in untimely proceeding).

¶6 Hummel, in passing, has characterized this claim as one of newly discovered evidence or of actual innocence. Such claims may be raised in an untimely proceeding. Ariz. R. Crim. P. 32.1(e), (h); Ariz. R. Crim. P. 32.4(a). But he has not adequately developed

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any argument that he is entitled to relief on those bases. He has not established, as required for a claim of newly discovered evidence, that he “exercised due diligence in securing the newly discovered material facts” or that the facts “probably would have changed the verdict.” Ariz. R. Crim. P. 32.1(e). Nor has he suggested, as required for a claim of actual innocence, that these witness statements “establish that no reasonable fact-finder would have found [him] guilty of the underlying offense beyond a reasonable doubt.” Ariz. R. Crim. P. 32.1(h).

¶7 Although we grant review, relief is denied.