IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

MARIANO VALENZUELA,
Petitioner.

No. 2 CA-CR 2017-0007-PR
Filed April 13, 2017

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NOT FOR PUBLICATION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 Cochise County
No. CR201500181
The Honorable James L. Conlogue, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Barton & Storts, P.C., Tucson
By Brick P. Storts, III
Counsel for Petitioner

MEMORANDUM DECISION

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

V Á S Q U E Z, Judge:

¶1 Mariano Valenzuela seeks review of the trial court's order summarily dismissing his successive petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. Because the court correctly found his claim precluded, we grant review, but we deny relief.

¶2 Pursuant to a plea agreement entered at an early resolution hearing in March 2015, Valenzuela was convicted of attempted transportation of a narcotic drug for sale and sentenced to a somewhat mitigated, three-year prison term, as stipulated in his agreement. He filed a timely, of-right notice of post-conviction relief, and counsel filed a petition alleging Valenzuela's Fourth Amendment rights had been violated during the traffic stop and canine search that led to his arrest.

¶3 In a motion to amend his first petition, Valenzuela also alleged, as newly discovered material facts under Rule 32.1(e), that the officer who had deployed the drug detection canine during his traffic stop had been placed on administrative leave for allegations of gross misconduct and would be unavailable as a witness "in any further prosecutions" by the Cochise County Attorney's Office. He argued that, had he known of the officer's alleged misconduct, the charges against him "would have been dismissed by the State." In its order dismissing the petition, the trial court addressed the merits of both of Valenzuela's claims.

¶4 After the trial court denied Valenzuela's motion for rehearing challenging the dismissal of his first petition, he filed a motion asking the court to reconsider that ruling "because the State

violated Rule 15.1(b)(8) of the Rules of Criminal Procedure," as well as the principles of *Brady v. Maryland*, 373 U.S. 83 (1963), when it failed to disclose alleged misconduct by the officer from 2002. In his motion, Valenzuela stated he had "presented this information" in his reply to the state's response to his petition, adding that it "was, apparently, not considered by the Court in making its rulings in these Rule 32 proceedings."

¶5 The trial court denied Valenzuela's motion for reconsideration, which it characterized as an argument that "he should be permitted to withdraw from his plea of guilty because the State did not disclose impeachment evidence" related to the officer. Relying on *United States v. Ruiz*, 536 U.S. 622, 633 (2002), the court concluded, "The Constitution did not require the State to disclose material impeachment evidence prior to entering a plea agreement" with Valenzuela, and it noted, "There is no claimed violation of Rule 15.8." Valenzuela did not file a petition for review.

¶6 Instead, he filed a successive notice of post-conviction relief and petition in which he alleged the officer's conduct between 2000 and 2002 was newly discovered evidence under Rule 32.1(e) and, had he known of that evidence, he would not have accepted the plea offer. He argued the state had violated his right to due process by failing to disclose this evidence pursuant to *Brady*. The trial court dismissed the petition, finding the claim precluded under Rule 32.2(a)(2), which precludes a defendant from raising any claim that has been "[f]inally adjudicated on the merits . . . in any previous collateral proceeding." The court wrote, "The exact claim made in the petition now before the Court was finally adjudicated in the previous post-conviction relief proceeding. That claim is precluded." This petition for review followed. We review a trial court's summary dismissal, based on the lack of a colorable claim, for an abuse of discretion. *State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006). We find none here.

¶7 On review, Valenzuela argues the trial court abused its discretion by finding his claim of newly discovered evidence was precluded. As we understand his argument, he maintains the court could not have decided the claim "on the merits" in his first Rule 32

proceeding because it was not alleged in that amended petition, but had first been identified in his reply on that petition and first argued in his motion for reconsideration of the denial of rehearing. He thus maintains "[t]he newly discovered evidence claim relating to the [officer's] 2000-2002 illegal acts . . . was presented in a Rule 32 petition for the first time in the instant post-conviction petition" and therefore "was not subject to preclusion." He further argues the presentation of the claim was not as well "developed []or supported" in his nine-page motion for reconsideration "as it was in the instant Rule 32 petition."[1]

¶8 But the reference in Rule 32.2(a)(2) to preclusion of a ground for relief "[f]inally adjudicated on the merits . . . in any previous collateral proceeding" contains no such limitation, and Valenzuela chose to raise "a whole new claim of newly discovered evidence" in a motion for reconsideration filed in his first Rule 32 proceeding. Even if the trial court had not been required to consider evidence first identified in Valenzuela's reply or an argument first raised in his motion for reconsideration, *see* Ariz. R. Crim. P. 32.6(d), it considered that evidence and argument—at Valenzuela's urging—and rejected the claim on its merits. The state, not Valenzuela, would have been aggrieved by any impropriety in the court ruling on the merits of the belated claim. Valenzuela did not challenge on review any portion of the court's rulings in his first Rule 32 proceeding, and those rulings are not before us now. *See* Ariz. R. Crim. P. 32.9(c)(1) ("Failure to raise any issue that could be raised in [a] petition . . . for review shall constitute waiver of appellate review of that issue.").

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[1]We reject any suggestion that a defendant who has identified a claim of newly discovered material facts under Rule 32.1(e) in one Rule 32 proceeding may, in a successive proceeding, assert a new, non-precluded "argument as to the legal application of those facts." *See* Ariz. R. Crim. P. 32.2(b) (successive notice of post-conviction relief raising claim under Rule 32.1(e) subject to summary dismissal unless it sets forth "meritorious reasons" "for not raising the claim in the previous petition"); *State v. Shrum*, 220 Ariz. 115, ¶¶ 11-12, 203 P.3d 1175, 1178 (2009) (discussing policies supporting preclusion).

¶9 The trial court correctly found Valenzuela's claim of newly discovered evidence, as it related to the officer's alleged misconduct in 2000 to 2002, precluded. Accordingly, although we grant review, we deny relief.