IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

MICHAEL CARMINE MICOLO,
Petitioner.

No. 2 CA-CR 2017-0119-PR
Filed July 14, 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NOT FOR PUBLICATION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 Pinal County
No. S1100CR201402030
The Honorable Kevin D. White, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Kent Volkmer, Pinal County Attorney
By Rodney States, Deputy County Attorney, Florence
Counsel for Respondent

Michael Carmine Micolo, San Tan Valley
In Propria Persona

MEMORANDUM DECISION

Presiding Judge Vásquez authored the decision of the Court, in which Judge Staring and Judge Howard[1] concurred.

V Á S Q U E Z, Presiding Judge:

¶1 Michael Micolo seeks review of the trial court's orders summarily denying his petition for post-conviction relief and his motion for rehearing, filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb those rulings unless the court clearly has abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We find no such abuse here.

¶2 Pursuant to a plea agreement in November 2015, Micolo was convicted of resisting arrest. The trial court suspended the imposition of sentence and placed him on probation for twelve months.[2] Micolo then initiated a post-conviction relief proceeding, arguing the state had suppressed evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), his plea had been unlawfully induced, and there was newly discovered evidence.[3] Micolo argued the state had failed to disclose "powerful impeachment material," specifically, records of "Taser" gun usage by officers on the night in question and the complete recordings of the 9-1-1 telephone call, which were also the subject of Micolo's request under the Freedom of Information Act

[1]The Hon. Joseph W. Howard, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and our supreme court.

[2]In January 2017, the trial court corrected the sentencing order to reflect probation of twelve, rather than eighteen months, and in April 2017, it ordered Micolo discharged from probation.

[3]Appointed counsel filed a Rule 32 petition incorporating by reference Micolo's pro se petition.

(FOIA). The court summarily denied relief and denied Micolo's motion for rehearing, finding he had not only waived his claims by pleading guilty, but he had failed to state a colorable claim for relief.[4]

¶3 On review, Micolo requests a hearing and presents three "issues." He first asserts that although he was advised he "gave up his right to [an a]ppeal" by pleading guilty, he was nonetheless advised he had the right to file a petition for post-conviction relief. We clarify for Micolo that a pleading defendant has no right of direct appeal and can challenge a conviction or disposition entered pursuant to a plea agreement only under Rule 32, the proceeding now before us. *See* A.R.S. § 13-4033(B); *see also State v. Smith*, 184 Ariz. 456, 458, 910 P.2d 1, 3 (1996). We also clarify that merely by filing a Rule 32 petition, a defendant is not guaranteed he will be granted relief.

¶4 Second, Micolo argues he is entitled to relief based on what he characterizes as a *Brady* violation, suggesting his claim is based on newly discovered evidence that "could have been damaging" to the arresting officer's testimony at trial.[5] Pursuant to *Brady*, the state is required to disclose any evidence favorable to the accused and its failure to do so violates a defendant's due process rights. *State v. O'Dell*, 202 Ariz. 453, ¶ 10, 46 P.3d 1074, 1078 (App. 2002). Micolo contends that if the state had timely provided him with

---

[4]To the extent Micolo argues on review that the trial court "has not rendered an order" on his motion for rehearing, the record indicates the court ruled on that motion on both March 3, 2017 and March 15, 2017.

[5]To the extent Micolo also argues for the first time in his reply to the state's response to the petition for review that the sentencing order contained an error, we note the trial court corrected that error, and in any event, we do not consider claims raised for the first time on review. *See* Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review must contain "issues which were decided by the trial court and which the defendant wishes to present to the appellate court for review"); *see also State v. Ramirez*, 126 Ariz. 464, 467-68, 616 P.2d 924, 927-28 (App. 1980).

the complete 9-1-1 recordings and the stun gun records, he would not have been "forc[ed]" to plead guilty.[6]

¶5 As a pleading defendant, Micolo waived all non-jurisdictional defects, as the trial court correctly found. *See State v. Flores*, 218 Ariz. 407, ¶ 6, 188 P.3d 706, 708-09 (App. 2008) (plea agreement waives all non-jurisdictional defects unrelated to validity of plea, including constitutional claims); *see also State v. Reed*, 121 Ariz. 547, 548-49, 592 P.2d 381, 382-83 (App. 1979) (state's failure to disclose alleged *Brady* evidence to grand jury is non-jurisdictional defect waived by defendant upon entering guilty plea). By pleading guilty, Micolo waived, inter alia, the right to raise any "motions, defenses, [or] objections" related to his conviction and sentence; the court also found his guilty plea was knowingly, intelligently and voluntarily entered. In addition, at a settlement conference held on June 1, 2015, more than five months before Micolo pled guilty, defense counsel informed the judge that because there was "a separate civil suit [against the arresting officer]" in this matter, she had been unable to conduct the defense interviews of the officers, and also expressed concern with the accuracy of the arresting officer's report. Despite this, Micolo was willing to enter into a guilty plea. Further, as the court noted in its Rule 32 ruling below, Micolo "elected to plead guilty instead of proceeding with his [then pending] request to continue the trial date," thereby "waiv[ing] the claims he now asserts."

¶6 Moreover, Micolo did not establish that the evidence regarding the use of a stun gun or the unidentified discrepancies between the 9-1-1 recordings were exculpatory, material to his case, or had any bearing on the voluntariness of his plea. Thus, Micolo has

[6]The state consistently has maintained that both versions of the 9-1-1 call, one of which Micolo apparently had in his possession well before he pled guilty and the other which was provided pursuant to the FOIA request, contain the same "'blank' or soundless periods for a matter of seconds in the exact same portions of the respective recordings," and that those gaps did not result from "any wrongful withholding or deletion of any evidence" by the state. Notably, Micolo has not provided a meaningful response to this argument.

not demonstrated that the state was required to disclose the information pursuant to *Brady* or that it would have been material to a decision to accept or reject the plea instead of proceeding to trial. Accordingly, the trial court correctly found he had failed to assert a colorable claim meriting post-conviction relief.

¶7 In addition, as the trial court correctly found, Micolo did not establish a colorable claim of newly discovered evidence. Rule 32.1(e) provides that "[n]ewly discovered material facts exist if" the facts existed at the time of trial, but "were discovered after the trial," the "defendant exercised due diligence in securing the newly discovered material facts" and the "newly discovered material facts are not . . . used solely for impeachment, unless the impeachment evidence substantially undermines testimony which was of critical significance at trial such that the evidence probably would have changed the verdict." *See also State v. Amaral*, 239 Ariz. 217, ¶ 9, 368 P.3d 925, 927 (2016). As the court accurately found, Micolo did "not explain[] what new information is revealed by the [9-1-1] recording . . . or how it would be materially helpful to his defense." The court also found, "even if the recording initially disclosed to him was not complete . . . he has not shown that it prejudiced him in any way. Similarly, [Micolo] has not shown that the [T]aser records would have made any material difference to the outcome of the case."

¶8 Finally, Micolo raises as an "issue[]" on review that Rule 32 counsel should have filed a reply to the state's response to the petition below, contending this would have made the petition "more colorful." In the absence of any meaningful argument on this claim, we decline to address it. *See generally* Ariz. R. Crim. P. 32.9(c)(1); *cf. State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (insufficient argument waives claim on appeal).

¶9 For the reasons stated, we grant review but deny relief.