IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

JOSHUA EDWARD SYMONETTE,
Petitioner.

No. 2 CA-CR 2017-0193-PR
Filed September 22, 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NOT FOR PUBLICATION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 Pima County
No. CR20131066001
The Honorable Richard D. Nichols, Judge

REVIEW GRANTED; RELIEF GRANTED IN PART AND DENIED IN PART

COUNSEL

Law Office of Henry L. Jacobs, PLLC, Tucson
By Henry L. Jacobs
Counsel for Petitioner

MEMORANDUM DECISION

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

V Á S Q U E Z, Presiding Judge:

¶1 Petitioner Joshua Symonette seeks review of the trial court's order summarily dismissing his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. We grant review and, for the reasons that follow, we grant relief in part, vacating the court's ruling and remanding the case for further proceedings.

¶2 Following a jury trial, Symonette was convicted of possession of a deadly weapon by a prohibited possessor, and the trial court sentenced him to eight years' imprisonment. On appeal, we affirmed Symonette's conviction but vacated his sentence and remanded the case for resentencing. *State v. Symonette*, No. 2 CA-CR 2014-0111, ¶ 32 (Ariz. App. July 31, 2015) (mem. decision). On remand, the court again imposed an eight-year prison term. Symonette then sought post-conviction relief after resentencing; the trial court summarily dismissed his petition and we denied relief on review. *State v. Symonette*, No. 2 CA-CR 2017-0013-PR, ¶¶ 3, 6 (Ariz. App. Apr. 13, 2017) (mem. decision).

¶3 Shortly after the trial court ruled on his previous Rule 32 petition, Symonette filed a notice of and petition for post-conviction relief alleging a claim of newly discovered material facts that "probably would have changed the verdict or sentence," Ariz. R. Crim. P. Rule 32.1(e). According to Symonette, the state had informed his Rule 32 attorney that one of its witnesses, Scott Cushing, was terminated from the Tucson Police Department in July 2016 for acts

of malfeasance that "involve[d] untruthfulness," some of which occurred while Symonette's case was pending.[1]

¶4 In its ruling on the petition, the trial court summarized the relevant facts as follows:

> The defendant was the subject of a traffic stop on February 26, 2013, at which time Officer Cushing reportedly asked him for permission to conduct a search/pat down. This led to the discovery of a holster on his waist which supported his conviction for possession of a deadly weapon by a prohibited possessor.
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> A motion to suppress the fruits of the search was held on January 6, 2014. Officer Cushing testified that the defendant gave consent for the search, and the defendant testified that the search was conducted without his consent. Officer Cushing offered similar testimony at trial in February 2014; in addition, he testified to finding the gun in the car which led to the defendant's conviction.

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[1]Symonette also asserted he was entitled to a new trial pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), a claim the trial court did not address. But a claim under *Brady* is a constitutional claim and therefore is cognizable under Rule 32.1(a). *See id.* at 87 (suppression of evidence by state "of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment"). Accordingly, a *Brady* claim is subject to preclusion pursuant to Rule 32.2(a) and cannot be raised in an untimely proceeding like this one. Ariz. R. Crim. P. 32.4(a). Like the trial court, we therefore address Symonette's claim only in the context of Rule 32.1(e), a non-precluded claim. His *Brady* claim is time-barred.

> In September 2016, the State informed defense counsel that Officer Cushing resigned from the police department following an investigation which concluded he had committed misconduct forgery, being paid for hours he did not work, and other acts of malfeasance. The investigation cites 37 dates when pay discrepancies occurred; two of these were prior to the Motion To Suppress hearing and five were prior to the trial. The forgeries occurred between March 2014 and September 2015. The investigation was concluded in April 2016 with a recommendation that Officer Cushing's employment be terminated.

Symonette does not challenge these findings in any way material to our consideration.[2]

¶5 The trial court then identified the requirements of Rule 32.1(e)[3] and, citing *State v. Orantez*, 183 Ariz. 218, 902 P.2d 824 (1995),

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[2] Symonette notes an ambiguous entry in the investigation report suggesting there were three incidents of Cushing's misreporting his time records, rather than two, before the motion to suppress hearing. This discrepancy is immaterial to the trial court's analysis or this court's review.

[3] Rule 32.1(e) provides as follows:

> Newly discovered material facts probably exist and such facts probably would have changed the verdict or sentence. Newly discovered material facts exist if:
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> (1) The newly discovered material facts were discovered after the trial.

found Symonette had met criteria that the proffered evidence was "not . . . simply cumulative or impeaching." *See* Ariz. R. Crim. P. 32.1(e)(3). The court then stated,

> As to whether it existed at the time of trial [as required by Rule 32.1(e)(1)], the Court must determine whether it would be admissible pursuant to Rule 608(b), Arizona Rules of Evidence. The Court finds that the police department investigation concluded in April 2016, recommending termination, and Officer Cushing's resignation in July 2016 would be admissible. The individual instances regarding pay discrepancies prior to February 2014 would not be admissible.

Based on this finding, the court concluded "that the newly discovered evidence occurred after the Motion To Suppress and the trial, and did not exist at those times. It does not, therefore, entitle the defendant to relief." This petition for review followed.

> (2) The defendant exercised due diligence in securing the newly discovered material facts.
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> (3) The newly discovered material facts are not merely cumulative or 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 or sentence.

Although not expressly stated in Rule 32.1(e), "the evidence must appear on its face *to have existed at the time of trial* but be discovered after trial." *State v. Amaral*, 239 Ariz. 217, ¶ 13, 368 P.3d 925, 928 (2016), *quoting State v. Bilke*, 162 Ariz. 51, 52, 781 P.2d 28, 29 (1989) (emphasis in *Amaral*).

¶6 We review a trial court's summary dismissal of a Rule 32 petition for an abuse of discretion. *State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006). Symonette argues the trial court abused its discretion and misapplied the law in concluding that, because the newly discovered information would not have been admissible under Rule 608(b), Ariz. R. Evid., it did not exist at the time of trial for the purpose of Rule 32.1(e). As explained below, we agree, and we remand the case for further consideration of whether Symonette has stated a colorable claim and, if so, for further proceedings. *See* Ariz. R. Crim. P. 32.6(c).

¶7 In the absence of a criminal conviction, Rule 608(b) precludes the admission of extrinsic evidence "to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness." Ariz. R. Evid. 608(b). "But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of . . . the witness." *Id.* In disclosing the information related to Officer Cushing's termination, the state indicated "that findings in the underlying Office of Professional Standards investigations did involve untruthfulness," and we assume this applies to the "pay discrepancies" resulting from Cushing's claims for payment from both the Tucson Police Department and his special duty assignment employer for "overlap[ping]" hours. Thus, had Symonette known of the incidents that occurred before the motion to suppress hearing and trial, and the court found, under Rule 403, Ariz. R. Evid., that the probative value of the incidents was not substantially outweighed by the danger of unfair prejudice, Symonette could have asked Cushing about those events during cross-examination. *See State v. Woods*, 141 Ariz. 446, 450, 687 P.2d 1201, 1205 (1984). Symonette would have been bound by Cushing's answers, and, although he could "apply pressure during cross by, for example, reminding the witness of the penalties for perjury," 1 McCormick On Evid. § 49 (7th ed.), he would be unable to produce extrinsic evidence to contradict Cushing's testimony, *State v. Hill*, 174 Ariz. 313, 325, 848 P.2d 1375, 1387 (1993). Thus, if Cushing admitted falsifying the records, his reliability would have been impugned; if he denied the conduct, Symonette would not have been able to impeach his testimony through extrinsic evidence.

¶8 In finding that the proffered evidence was not simply impeachment, the trial court appears to have found the newly discovered facts, had they been admissible, could have "substantially undermine[d] testimony which was of critical significance at trial," Ariz. R. Crim. P. 32.1(e)(3). *See also Orantez*, 183 Ariz. at 223, 902 P.2d at 829 (finding evidence of drug use not merely impeachment when witness's testimony "critical to the prosecution"). As the court stated in its ruling, Cushing testified about evidence found during the search of Symonette and the vehicle, and, at the motion to suppress hearing, Symonette disputed Cushing's testimony, denying he had given consent to be searched. In his petition below, Symonette also noted the state's argument at the hearing that Cushing was "unimpeached in his credibility."

¶9 The question remains whether those same facts, if a subject of inquiry during cross-examination at the suppression hearing and at trial, probably would have affected the verdict. We see nothing in the language of Rule 32.1(e) suggesting newly discovered material facts must have been admissible without restriction as to scope in order to have existed at the time of trial. The relevant question, for purposes of Rule 32.1(e)(1), is whether, under such circumstances, the newly discovered facts of Cushing's malfeasance "probably would have changed the verdict or sentence," Ariz. R. Crim. P. 32.1(e), had inquiry been permitted at the motion to suppress hearing or at trial.

¶10 Although we remand this matter to the trial court for further consideration under Rule 32.1(e), we reject Symonette's assertion that the trial court has already found that the newly discovered evidence would likely have altered the verdict or sentence, and denied the petition based only on its mistaken finding that these material facts did not exist at the time of trial. We do not read the court's order so broadly. The court clearly acknowledged that Cushing's testimony was of "critical significance" at trial, and that, therefore, evidence related to his credibility was not merely impeaching. Ariz. R. Crim. P. 32.1(e)(3). But it appears that, having erroneously concluded that relief was unavailable because the newly discovered facts would have been inadmissible, the court did not

complete its analysis of other Rule 32.1(e) factors. We remand the case to afford it an opportunity to do so.

¶11 For the foregoing reasons, we grant review and grant relief in part. We vacate the trial court's ruling denying relief and remand the case for further consideration consistent with this decision.