IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

GARY JAY KARPIN SR.,
Petitioner.

No. 2 CA-CR 2017-0327-PR
Filed December 18, 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NOT FOR PUBLICATION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 Maricopa County
No. CR2006031057001SE
The Honorable Warren J. Granville, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

William G. Montgomery, Maricopa County Attorney
By Lisa Marie Martin, Deputy County Attorney, Phoenix
Counsel for Respondent

Gary Karpin, Tucson
In Propria Persona

MEMORANDUM DECISION

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

E C K E R S T R O M, Chief Judge:

¶1 Petitioner Gary Karpin Sr. seeks review of the trial court's order dismissing what appears to be his third petition for post-conviction relief, pursuant to Rule 32, Ariz. R. Crim. P., in which he raised a claim of newly discovered evidence that he suffered brain trauma as a result of an accident. We will not disturb the ruling absent a clear abuse by the trial court of its discretion in determining whether to grant post-conviction relief. *See State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). We find no such abuse here.

¶2 In 2008, Karpin, a licensed attorney who had been disbarred in Vermont and suspended from the practice of law in Maine, was convicted after a jury trial of twenty-three counts of theft by means of material misrepresentation and one count of fraudulent schemes and artifices; the victims had retained his services in marital dissolution proceedings. He was sentenced to a combination of concurrent and consecutive, presumptive prison terms totaling 15.75 years, followed by a five-year term of probation. On appeal, this court affirmed the convictions and sentences, *State v. Karpin*, No. 1 CA-CR 08-1047 (Ariz. App. Oct. 12, 2010) (mem. decision), and the order of restitution, *State v. Karpin*, No. 1 CA-CR 10-0158 (Ariz. App. Feb. 17, 2011) (mem. decision). We also denied relief on review of two previous Rule 32 proceedings. *State v. Karpin*, No. 2 CA-CR 2013-0309-PR (Ariz. App. Nov. 13, 2013) (mem. decision); *State v. Karpin*, No. 2 CA-CR 2017-0074-PR (Ariz. App. Mar. 21, 2017) (mem. decision).

¶3 In this proceeding, Karpin filed a notice of post-conviction relief identifying claims of ineffective assistance of counsel at sentencing and newly discovered evidence; the latter was based on memories of physical and sexual abuse he experienced as a child that were purportedly repressed because of a traumatic brain injury he sustained in a motorcycle accident. Karpin asserted if this information had been known at the time of sentencing, the trial court would have imposed lesser, mitigated sentences. The court found the claim of ineffective assistance of counsel precluded, *see*

Ariz. R. Crim. P. 32.2, but permitted the claim of newly discovered evidence to proceed, appointing counsel to assist Karpin.

¶4 In the petition that followed, Karpin asserted the memories began to surface in 2014, after his mother passed away, prompting him to file the notice of post-conviction relief in December 2015. The state conceded that had Karpin presented medical records or other documentation to substantiate his claim, the claim would have been colorable. In its December 2016 ruling, the trial court stated that, putting aside its "skepticism that Defendant actually had repressed the fact that he had a major accident that cause[d] a traumatic brain injury years before," and "[a]ccepting as true Defendant's proffer" of evidence, a jury nevertheless had found beyond a reasonable doubt that Karpin had misled twenty-three victims "into paying him money, took their money, and did not do what he had promised and what these people had paid him to do." The court noted that one of those victims suffered from a debilitating disease and had been required to file for bankruptcy relief because of Karpin's conduct. The court concluded "beyond a reasonable doubt" that even if the "proffered newly discovered evidence" had been presented at sentencing, it would not have imposed a lesser sentence.

¶5 In his petition for review, Karpin argues the trial court misunderstood and mischaracterized his argument as having been based on repressed memories of the accident rather than repressed memories of physical and sexual abuse. Even if we agreed with Karpin that parts of the court's ruling support his interpretation, when considered in its entirety and in the context of the arguments Karpin made in his petition, the ruling is clear. It reflects the court understood the gravamen of Karpin's claim and evaluated it properly under Rule 32.1(e) and the applicable case law, including *State v. Bilke*, 162 Ariz. 51 (1989). The court found the "proffered evidence" would not have resulted in a lesser sentence given the nature of the offenses and the harm the victims suffered after trusting him with their money. The "proffered evidence" referred to the physical and sexual abuse. The court was plainly aware that the accident and the resulting injuries were the bases for Karpin's claim that the memories were newly discovered for purposes of Rule 32.1(e).

¶6 Karpin also contends the trial court erred by denying his petition without an evidentiary hearing. A defendant is entitled to an evidentiary hearing pursuant to Rule 32.8 and Rule 32.6(c), only if he raises a colorable claim for relief, which is one that, if taken as true, likely would have changed the outcome. *State v. Watton*, 164 Ariz. 323, 328 (1990); *see also*

State v. Lemieux, 137 Ariz. 143, 147 (App. 1983).[1] The determination of whether a defendant has raised a colorable claim warranting an evidentiary hearing or whether summary disposition was proper under Rule 32.6(c) "is, to some extent, a discretionary decision for the trial court." *State v. D'Ambrosio*, 156 Ariz. 71, 73 (1988). The court acted within its discretion in determining that even if the evidence of abuse had been presented at sentencing, the court would not have imposed less than the presumptive prison terms. *See* Ariz. R. Crim. P. 32.1(e) (defendant may obtain post-conviction relief by showing "[n]ewly discovered material facts probably exist and such facts probably would have changed the verdict or sentence."). No material issue of fact remained and there was no need for an evidentiary hearing.

¶7 We also reject Karpin's claim that the trial court erred by finding his ineffective assistance of counsel claim precluded with respect to advisory counsel at sentencing. The claim was raised in a prior proceeding and, in any event, cannot be raised in a successive or untimely proceeding. *See* Ariz. R. Crim. P. 32.2, 32.4(a); *see also State v. Swoopes*, 216 Ariz. 390, ¶¶ 23-24 (App. 2007).

¶8 Karpin also challenges the trial court's refusal to recuse itself after Karpin filed a complaint about the court with the Commission on Judicial Conduct. First, Rule 32 states that when possible, the same judge who presided over the sentencing should rule on the post-conviction petitions. Ariz. R. Crim. P. 32.4(e). Second, Karpin has not persuaded this court that the trial court was biased against him in any respect. The court applied the relevant law appropriately and we find nothing in the court's rulings suggesting otherwise. *See Scheehle v. Justices of the Supreme Court of the State of Arizona*, 211 Ariz. 282, 300 (2005) ("The mere fact that a complaint has been made against a judge alleging the judge is biased and cannot be impartial does not require automatic disqualification or recusal by the judge."), *quoting* Disqualification Considerations When Complaints Are

[1]The trial court used the term "colorable claim" in its March 2016 order. But given the context in which the term was used, it is clear the court only intended to permit the claim of newly discovered evidence to move forward, unlike the ineffective assistance of counsel claim, which was precluded and subject to summary dismissal. The court appointed counsel on the Rule 32.1(e) claim, and set a briefing schedule. Karpin's suggestion that the court had already found the claim colorable, entitling him to an evidentiary hearing, is incorrect.

Filed Against Judges, Op. 98-2 Ariz. Supreme Ct. Jud. Ethics Advis. Comm. (Mar. 24, 1998).

¶9 We grant the petition for review but, because Karpin has not sustained his burden of establishing the trial court abused its discretion, we deny relief.