IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

MICHAEL EDWARD FINCK,
Petitioner.

No. 2 CA-CR 2018-0334-PR
Filed March 26, 2019

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NOT FOR PUBLICATION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. 31.19(e).

Petition for Review from the Superior Court in Pima County
No. CR20103802002
The Honorable Casey F. McGinley, Judge

REVIEW GRANTED; RELIEF DENIED

Michael Edward Finck, Buckeye
In Propria Persona

MEMORANDUM DECISION

Judge Brearcliffe authored the decision of the Court, in which Presiding Judge Staring and Judge Vásquez concurred.

B R E A R C L I F F E, Judge:

¶1 Michael Finck 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 will not disturb that order unless the court abused its discretion. *See State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). Finck has not shown such abuse here.

¶2 After a jury trial, Finck was convicted of four counts of third-degree burglary and one count each of possession of burglary tools, criminal damage, and attempted theft by control. The trial court sentenced him to concurrent prison terms, the longest of which is twelve years. On appeal, we affirmed his convictions, vacated a criminal restitution order, and otherwise affirmed his sentences. *State v. Finck*, No. 2 CA-CR 2012-0186 (Ariz. App. Dec. 5, 2013) (mem. decision). Finck sought and was denied post-conviction relief in March 2014, and this court denied relief on review. *State v. Finck*, No. 2 CA-CR 2014-0239-PR (Ariz. App. Oct. 6, 2014) (mem. decision). Finck again sought and was denied post-conviction relief in June 2015, but did not seek review of that ruling.

¶3 In October 2015, Finck filed a petition for writ of habeas corpus, which he later sought to supplement with a claim that he had recently discovered that a detective who testified in his case, David Tarnow, had been arrested. He asserted the state's failure to disclose its investigation of Tarnow violated the principles set forth in *Brady v. Maryland*, 373 U.S. 83 (1963). The trial court denied the petition and Finck's supplemental claims, concluding the events cited by Finck "occurred long after his conviction."

¶4 Finck then filed what he titled "Defendant's Clarification of Notices," asserting among other claims that Tarnow had been under investigation in 2011—before he testified at Finck's trial. Based on that assertion, the trial court granted Finck leave to file a petition for post-conviction relief "limited to addressing the issue of the arrest of Detective

Tarno[w]." After numerous extensions, Finck filed that petition in May 2018, again arguing that Tarnow's criminal actions (which ultimately resulted in him pleading guilty to theft and fraudulent scheme and artifice) were newly discovered evidence, and the state's failure to disclose Tarnow's conduct violated its obligations under *Brady*. Regarding his *Brady* argument, Finck asserted that Tarnow's knowledge of his own wrongdoing should be imputed to the state; he did not allege the state had independent knowledge at the time of his trial.

¶5 The trial court summarily dismissed the proceeding.[1] It concluded the state had no knowledge of Tarnow's conduct at the time of trial and Tarnow's knowledge could not be imputed to the state. The court also observed that Tarnow's conduct "occurred in cases unrelated to [Finck]'s" and reasoned Tarnow had not been "working as an agent of the State, much less as an arm of the team prosecuting [Finck]" at the time of his crimes. This petition for review followed.

¶6 On review, Finck repeats his claim the state violated *Brady* by failing to disclose Tarnow's conduct, asserting he "was at a distinct disadvantage and significantly prejudiced because he was unable to assess and investigate impeachment evidence prior to his trial." Finck additionally asserts the trial court erred by declining to rule on various motions he had filed. A claim under *Brady* that the state violated its disclosure obligations is a constitutional claim and therefore is cognizable under Rule 32.1(a). *See Brady*, 373 U.S. 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"). As such, a *Brady* claim is subject to preclusion pursuant to Rule 32.2(a) and cannot be raised in an untimely proceeding like this one. *See* Ariz. R. Crim. P. 32.4(a)(2)(A).

¶7 To the extent Finck's petition for review may be read to assert a claim of newly discovered evidence independent of his *Brady* claim, that claim also fails. To make a colorable claim for relief, and thereby be entitled to an evidentiary hearing, Finck must have "alleged facts which, if true, would probably have changed" the outcome of his case. *State v. Amaral*, 239 Ariz. 217, ¶¶ 10-11 (2016) (emphasis omitted). To make a claim of newly discovered evidence under Rule 32.1(e), he must demonstrate that "newly

[1]The trial court noted that Finck had sought to raise other claims unrelated to his claim of newly discovered evidence. The court declined to address those claims, finding them precluded.

discovered material facts probably exist and those facts probably would have changed the verdict or sentence." Ariz. R. Crim. P. 32.1(e). He must additionally show "due diligence in discovering these facts" after trial. Ariz. R. Crim. P. 32.1(e)(1), (2). However, a claim based on facts that would be "used solely for impeachment" cannot prevail unless those facts "substantially undermine[] testimony that was of critical significance such that the evidence probably would have changed the verdict or sentence." Ariz. R. Crim. P. 32.1(e)(3).

¶8 Finck's convictions were based on his participation in a warehouse burglary; he and his accomplices were found hiding in crates inside the warehouse. Tarnow testified that he had searched the crate in which Finck was found and discovered a flashlight and two pairs of gloves, photographs of which were admitted into evidence at trial. Finck's position is that evidence of Tarnow's prior misconduct—which involved Tarnow removing evidence from the police property room and selling it—would support a theory that he had planted the evidence in the crates. But Tarnow's misconduct does not suggest he had at any time planted evidence to obtain a conviction, much less that he did so in Finck's case. And, although Tarnow's misconduct would clearly be relevant to his credibility, given his limited role in the case, we cannot conclude his testimony was of "critical significance" such that the evidence probably would have changed the outcome. Ariz. R. Crim. P. 32.1(e)(3).

¶9 Finck further asserts the trial court erred by failing to rule on various motions he had filed during the pendency of his petition, arguing the court was required to do so within sixty days pursuant to article VI, § 21 of the Arizona Constitution. The record shows that the court, in fact, denied the bulk of the motions Finck has identified in his petition for review. And, in any event, even if one of Finck's numerous filings were not effectively addressed by the court's ruling dismissing his petition, he has not developed any argument that he should thus be entitled to relief on review. We therefore do not address this issue further. *See State v. Stefanovich*, 232 Ariz. 154, ¶ 16 (App. 2013) (insufficient argument waives claim on review).

¶10 We grant review but deny relief.