IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

LARRY DONNELL DUNLAP,
Petitioner.

No. 2 CA-CR 2019-0271-PR
Filed May 11, 2020

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NOT FOR PUBLICATION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. CR052543001
The Honorable James E. Marner, Judge

REVIEW GRANTED; RELIEF DENIED

Larry Donnell Dunlap, Florence
In Propria Persona

MEMORANDUM DECISION

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

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

¶1 Petitioner Larry Dunlap seeks review of the trial court's ruling dismissing his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P.[1] We will not disturb that ruling unless the court has abused its discretion. *See State v. Martinez*, 226 Ariz. 464, ¶ 6 (App. 2011). Dunlap has not met his burden of establishing such abuse here.

¶2 Based on acts committed in 1995, Dunlap was convicted after a jury trial of one count of sexual abuse and five counts of child molestation. He had two direct appeals, resulting in a resentencing, *State v. Dunlap*, No. 2 CA-CR 96-0643 (Ariz. App. Apr. 21, 1998) (mem. decision), and a modification of his sentence upon resentencing, *State v. Dunlap*, No. 2 CA-CR 99-0084 (Ariz. App. Mar. 30, 2000) (mem. decision). The trial court imposed a combination of concurrent and consecutive prison sentences totaling 69.5 years. Dunlap has sought post-conviction relief on multiple occasions, but the trial court has denied relief, as has this court on review. *State v. Dunlap*, No. 2 CA-CR 2016-0209-PR (Ariz. App. Aug. 17, 2016) (mem. decision); *State v. Dunlap*, No. 2 CA-CR 2013-0215-PR (Ariz. App. Oct. 7, 2013) (mem. decision); *State v. Dunlap*, No. 2 CA-CR 2011-0196-PR (Ariz. App. Oct. 19, 2011) (mem. decision); *State v. Dunlap*, No. 2 CA-CR 2004-0276-PR (Ariz. App. Feb. 11, 2005) (mem. decision); *State v. Dunlap*, No. 2 CA-CR 2002-0215-PR (Ariz. App. Sept. 11, 2003) (mem. decision).

¶3 In April 2019, Dunlap initiated the current proceeding for post-conviction relief and requested counsel. The trial court denied Dunlap's request, explaining that the appointment of counsel in a

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[1] Effective January 1, 2020, our supreme court amended the post-conviction relief rules. Ariz. Sup. Ct. Order R-19-0012 (Aug. 29, 2019). The amendments apply to all cases pending on the effective date unless a court determines that "applying the rule or amendment would be infeasible or work an injustice." *Id.* Because it is neither infeasible nor works an injustice here, we cite to and apply the current version of the rules.

successive Rule 32 proceeding was discretionary and that, after reviewing Dunlap's previous filings, his request for counsel was "not warranted." Dunlap subsequently filed a pro se petition, seemingly asserting claims of newly discovered material facts and actual innocence under Rule 32.1(e) and (h), respectively.[2] The thrust of Dunlap's argument was that in December 2008 he learned "the victims . . . wanted to tell their side of the story" because they were "forced to change their stories" at the time of trial in 1996. Dunlap further argued that his trial counsel was ineffective in failing to subpoena defense witnesses who had been threatened with arrest for an "immigration violation." And Dunlap suggested the trial judge now assigned to the case was biased because he had repeatedly denied Dunlap's requests for evidentiary hearings in prior Rule 32 proceedings.[3]

¶4 The trial court summarily dismissed the petition, finding Dunlap had "raised the identical issues argued, and ruled upon, in his 4th and 5th Rule 32 petitions." The court further explained, "To the extent that these previous rulings do not specifically address[] the ineffective assistance of counsel and insufficiency of evidence claims, . . . they are untimely and defendant has failed to present colorable claims on these topics." And the court noted that the claim of judicial bias was "not properly brought pursuant to Rule 32." Dunlap filed a motion for reconsideration, which the court also denied. This petition for review followed.

¶5 On review, Dunlap argues the trial court erred in summarily dismissing his petition because "the state waived preclusion." He also challenges the court's "continuous denial of an evidentiary hearing and appointment of counsel" after "years and years of filing the same request," suggesting that the rulings are the result of judicial bias.[4] And he reasserts

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[2] Dunlap's Rule 32.1(h) claim also included a challenge to the sufficiency of the evidence. But the actual innocence and sufficiency of the evidence arguments were apparently grounded in the same facts.

[3] In his petition below, Dunlap repeatedly requested a "*Donald* hearing." However, a hearing pursuant to *State v. Donald*, 198 Ariz. 406 (App. 2000), is a pretrial proceeding at which a formal plea offer—and the defendant's rejection of it—can be made part of the record. *See Missouri v. Frye*, 566 U.S. 134, 146-47 (2012).

[4] To the extent Dunlap asserts a standalone claim of judicial bias, he has not indicated under which Rule 32.1 ground for relief his claim falls. And we agree with the trial court that Rule 32 appears to provide no

his claims of newly discovered evidence, actual innocence, and ineffective assistance of trial counsel.

¶6 "[A]fter identifying all precluded and untimely claims," the trial court "must summarily dismiss" a Rule 32 petition without an evidentiary hearing if it "determines that no remaining claim presents a material issue of fact or law that would entitle the defendant to relief." Ariz. R. Crim. P. 32.11(a); *see also State v. Speers*, 238 Ariz. 423, ¶ 9 (App. 2015) (defendant only entitled to evidentiary hearing if non-precluded claim colorable). And the court may determine at any time "by a preponderance of the evidence that an issue is precluded, even if the State does not raise preclusion." Ariz. R. Crim. P. 32.2(b).

¶7 As Dunlap seems to admit, his claim of newly discovered evidence of victim recantation and threats to witnesses was raised and addressed in previous Rule 32 proceedings. *See, e.g.*, *Dunlap*, No. 2 CA-CR 2013-0215-PR, ¶¶ 3-4. The trial court thus did not err in finding this claim precluded. *See* Ariz. R. Crim. P. 32.1(e), 32.2(a)(2), (b). Dunlap's actual innocence claim is seemingly premised on the same evidence and also appears to have been previously raised. *See Dunlap*, No. 2 CA-CR 2013-0215-PR, ¶ 1. But even assuming it is not precluded under Rule 32.2(a)(2), Dunlap has failed to "explain the reasons for not raising the claim in a previous notice or petition, or for not raising the claim in a timely manner." Ariz. R. Crim. P. 32.2(b); *see also* Ariz. R. Crim. P. 32.4(b)(3)(B) (Rule 32.1(h) claim must be filed "within a reasonable time after discovering the basis of the claim"). Likewise, any claim of ineffective assistance of counsel is precluded and untimely in this successive proceeding. *See* Ariz. R. Crim. P. 32.1(a), 32.2(a)(3), 32.4(b)(3)(A); *State v. Petty*, 225 Ariz. 369, ¶ 11 (App. 2010) (ineffective assistance of counsel claim "cognizable under Rule 32.1(a)"); *see also State v. Spreitz*, 202 Ariz. 1, ¶ 4 (2002) ("Our basic rule is that where ineffective assistance of counsel claims are raised, or could have been raised, *in a Rule 32 post-conviction relief proceeding*, subsequent claims of ineffective assistance will be deemed waived and precluded."). Accordingly, the court did not abuse its discretion in summarily dismissing these claims.

¶8 Because summary dismissal of Dunlap's petition for post-conviction relief was proper, the trial court also "did not err in refusing

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procedural avenue for a defendant to present a claim of judicial bias in prior post-conviction proceedings. Dunlap also has not asserted that he should be allowed to pursue this claim by any other procedural avenue.

to appoint new counsel." *State v. Smith*, 169 Ariz. 243, 246 (App. 1991); *see also* Ariz. R. Crim. P. 32.5(a) (in successive and untimely proceeding, appointment of counsel discretionary). Finally, to the extent Dunlap is asserting new claims for the first time on review, we do not consider them. *See* Ariz. R. Crim. P. 32.16(c)(2)(B) (appellate court reviews issues presented to trial court); *State v. Ramirez*, 126 Ariz. 464, 468 (App. 1980) (appellate court will not address arguments asserted for first time in petition for review).

¶9 Accordingly, we grant review but deny relief.