

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

REY DAVID AGUIRRE,
Petitioner.

No. 2 CA-CR 2019-0306-PR
Filed May 27, 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NOT FOR PUBLICATION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. CR20120302001
The Honorable Christopher Browning, Judge

REVIEW GRANTED; RELIEF DENIED

Rey D. Aguirre, Safford
In Propria Persona

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MEMORANDUM DECISION

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

S T A R I N G, Presiding Judge:

¶1 Rey Aguirre seeks review of the trial court’s ruling denying 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). Aguirre has not met his burden of establishing such abuse here.

¶2 After a jury trial, Aguirre was convicted of conspiracy, illegally conducting an enterprise, transporting more than two pounds of marijuana for sale, two counts of transporting less than two pounds of marijuana for sale, two counts of money laundering, and thirty-three counts of use of a wire or electronic communication in drug-related transactions. He was sentenced to a combination of consecutive and concurrent prison terms totaling 10.5 years, to be followed by a seven-year term of probation. We affirmed his convictions and sentences on appeal. *State v. Aguirre*, No. 2 CA-CR 2013-0399 (Ariz. App. June 17, 2014) (mem. decision). Thereafter, Aguirre sought post-conviction relief, raising several claims of ineffective assistance of trial counsel. The trial court denied relief, as did this court on review. *State v. Aguirre*, No. 2 CA-CR 2015-0048-PR (Ariz. App. Apr. 29, 2015) (mem. decision).

¶3 In May 2019, Aguirre initiated this proceeding for post-conviction relief. Appointed counsel filed a notice that he had reviewed the record and was “unable to find a meritorious issue of law or fact” to raise in a Rule 32 petition. In his subsequently filed pro se petition, Aguirre cited Rule 32.1(a) and (e) and argued that he had recently

¹Effective 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.

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discovered documents showing he had been indicted using evidence from an unrelated case. He reasoned that the state's use of such evidence violated his constitutional rights. The court denied Aguirre's petition, concluding that the documents were "not newly discovered" because Aguirre had been "provided this evidence before his trial." In addition, the court noted that "any correlated argument is untimely and precluded."

¶4 On review, Aguirre argues that his Rule 32.1(e) claim was timely raised because although the "documents were given to the defense" before trial, he did not receive them "until recently." Contrary to Aguirre's suggestion otherwise, the trial court did not dismiss this claim on preclusion grounds. As Aguirre points out, claims under Rule 32.1(e) are excepted from the rule of preclusion to the extent they are waived at trial, on appeal, or in a prior Rule 32 proceeding. *See* Ariz. R. Crim. P. 32.2(b). Instead, the court seemed to find this claim not colorable.

¶5 There are five requirements for presenting a colorable claim under Rule 32.1(e) that warrants an evidentiary hearing:

(1) the evidence must appear on its face to have existed at the time of trial but be discovered after trial;

(2) the motion must allege facts from which the court could conclude the defendant was diligent in discovering the facts and bringing them to the court's attention;

(3) the evidence must not simply be cumulative or impeaching;

(4) the evidence must be relevant to the case;

(5) the evidence must be such that it would likely have altered the verdict, finding, or sentence if known at the time of trial.

State v. Amaral, 239 Ariz. 217, ¶ 9 (2016). First, we fail to see how evidence that was disclosed to defense counsel before trial constitutes evidence that was "discovered after trial" because the defendant personally did not learn of it until later. *See id.*; *cf. Bates & Springer of Ariz., Inc. v. Frierhood*, 109 Ariz.

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203, 208 (1973) (attorney's knowledge imputed to client). But even assuming it does, Aguirre has not met his burden of establishing due diligence. *See Amaral*, 239 Ariz. 217, ¶ 9. The state disclosed the evidence by October 2012, yet Aguirre did not raise his claim for almost seven years. He does not adequately explain why he could not have discovered it earlier. Accordingly, the trial court did not abuse its discretion in concluding Aguirre failed to present a colorable claim under Rule 32.1(e).

¶6 Aguirre also argues the trial court erred in denying his claim of ineffective assistance under Rule 32.1(a) because trial counsel "had knowledge that evidence used to indict and convict [him] was taken from a separate case having no connection to [Aguirre's] case." Although Aguirre cited Rule 32.1(a) in his petition below, he did not raise a claim of ineffective assistance of counsel. And we do not address arguments raised for the first time on review. *See State v. Ramirez*, 126 Ariz. 464, 468 (App. 1980); *see also* Ariz. R. Crim. P. 32.16(c)(2)(B) (appellate court reviews issues presented to trial court). Even assuming this claim was raised below, however, it is precluded and untimely, as the trial court suggested. *See* Ariz. R. Crim. P. 32.2(a)(3), 32.4(b)(3)(A); *see also State v. Spreitz*, 202 Ariz. 1, ¶ 4 (2002).

¶7 Accordingly, we grant review but deny relief.