

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

TEODORO GOMEZ-TORRES,
Petitioner.

No. 2 CA-CR 2020-0181-PR
Filed October 22, 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NOT FOR PUBLICATION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 Mohave County
No. CR201301013
The Honorable Billy K. Sipe Jr., Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Ronald S. Gilleo, Mohave County Legal Defender
By Eric Devany, Deputy Legal Defender, Kingman
Counsel for Petitioner

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MEMORANDUM DECISION

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

E P P I C H, Presiding Judge:

¶1 Teodoro Gomez-Torres seeks review of the trial court’s ruling denying his petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P.¹ We will not disturb that ruling unless the court abused its discretion. *See State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). Gomez-Torres has not met his burden of establishing such abuse here.

¶2 After a jury trial, Gomez-Torres was convicted of child molestation, sexual abuse, and four counts of aggravated assault. The trial court sentenced him to a combination of consecutive and concurrent prison terms totaling twenty years. This court affirmed his convictions and sentences on appeal. *State v. Gomez-Torres*, No. 1 CA-CR 14-0761 (Ariz. App. Oct. 22, 2015) (mem. decision). Gomez-Torres twice sought post-conviction relief, but the trial court denied his first petition after an evidentiary hearing and summarily dismissed his second notice. This court denied relief in both proceedings. *State v. Gomez-Torres*, No. 1 CA-CR 18-0478 PRPC (Ariz. App. Dec. 18, 2018) (mem. decision); *State v. Gomez-Torres*, No. 2 CA-CR 2017-0360-PR (Ariz. App. Feb. 26, 2018) (mem. decision).

¶3 In September 2018, Gomez-Torres initiated this proceeding for post-conviction relief. He raised three claims: (1) whether guilty pleas to perjury and theft by the state’s expert witness, C.M., constituted newly discovered material facts that probably would have changed the verdicts; (2) whether there had been a violation pursuant to *Brady v. Maryland*, 373

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 in this case, we cite to and apply the current version of the rules. *See State v. Mendoza*, 249 Ariz. 180, n.1 (App. 2020).

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U.S. 83, 87 (1963), because the state purportedly failed to disclose payment arrangements with C.M.; and (3) whether Gomez-Torres was denied his due process rights under the state and federal constitutions because his convictions were based on “perjured testimony” by C.M. The facts underlying these claims are generally undisputed. C.M. worked as a forensic interviewer for the Safe Child Center (SCC) and testified at several trials, including Gomez-Torres’s, as a cold expert on child victims of sexual abuse. At Gomez-Torres’s trial, C.M. stated that she was being compensated “[j]ust [her] typical daily salary” for her testimony. Her guilty pleas arose from her privately billing various government agencies, including the Mohave County Attorney’s Office, for her work as an expert witness, while she was also paid by SCC.

¶4 In its response, the state asserted that it had been “completely candid” regarding C.M.’s misconduct and had “immediately alerted the bench, defendants and defense counsel . . . as soon as [it] became aware of the issue.” The state also pointed out that C.M. was not convicted of perjury arising from her testimony at Gomez-Torres’s trial. It further argued that Gomez-Torres had failed to establish any prejudice because he had made “no good faith claims as to the accuracy or validity of any of [C.M.’s] substantive cold expert testimony.”

¶5 After an evidentiary hearing, the trial court denied Gomez-Torres’s petition. As to the claim of newly discovered material facts, the court concluded that C.M.’s misconduct was “impeaching and not material” and “would not have changed the result.” The court observed that C.M.’s “substantive testimony was accurate” and “based predominantly on known literature in her field.” The court also determined that there was no *Brady* violation because the prosecutor “was unaware of the manner in which [C.M.] billed or was being paid” and therefore “did not withhold any evidence favorable to the defendant.” As to the due process claim, the court observed that Gomez-Torres “failed to show that the Mohave County Attorney’s Office knew or should have known that C.M.’s testimony was false.” This petition for review followed.

¶6 On review, Gomez-Torres re-asserts his three claims. However, we need not substantively address two of them. *See State v. Lopez*, 234 Ariz. 513, ¶ 10 (App. 2014) (this court need not reach merits of time-barred claims).

¶7 Rule 32.1(a) provides post-conviction relief when “the defendant’s conviction was obtained, or the sentence was imposed, in

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violation of the United States or Arizona constitutions.” Such claims, however, must be raised “within 90 days after the oral pronouncement of sentence or within 30 days after the issuance of the mandate in the direct appeal, whichever is later.” Ariz. R. Crim. P. 32.4(b)(3)(A). In addition, a defendant is generally precluded from relief under Rule 32.1(a) based on any ground waived in a previous post-conviction proceeding. Ariz. R. Crim. P. 32.2(a)(3).

¶8 Gomez-Torres’s *Brady* claim 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, it is precluded in this untimely, successive proceeding. See Ariz. R. Crim. P. 32.2(a)(3), 32.4(b)(3)(A). Similarly, Gomez-Torres’s due process claim arises under Rule 32.1(a). It too is therefore precluded. See Ariz. R. Crim. P. 32.2(a)(3), 32.4(b)(3)(A); see also *State v. Swoopes*, 216 Ariz. 390, ¶ 28 (App. 2007) (“An alleged violation of the general due process right of every defendant to a fair trial, without more, does not save that belated claim from preclusion.”). However, Gomez-Torres is entitled to seek relief based on newly discovered material facts. See Ariz. R. Crim. P. 32.1(e), 32.2(b), 32.4(b)(3)(B).

¶9 To establish a claim of newly discovered material facts under Rule 32.1(e), five requirements must be met:

- (1) the motion must show that the evidence relied on is, in fact, newly discovered;
- (2) the motion must allege facts from which the court can infer due diligence;
- (3) the evidence relied on must not be merely cumulative or impeaching;
- (4) the evidence must be material to the issue involved; and
- (5) it must be evidence which, if introduced, would probably change the verdict if a new trial were ordered.

State v. Acuna Valenzuela, 245 Ariz. 197, ¶ 58 (2018) (quoting *State v. Serna*, 167 Ariz. 373, 374 (1991)). “[E]vidence is material if it is relevant and goes to substantial matters in dispute or has a legitimate and effective influence or bearing on the decision of the case.” *Id.* (quoting *State v. Orantez*, 183 Ariz. 218, 221-22 (1995)). “[R]equests for a new trial based on newly discovered evidence are disfavored and should be granted cautiously.” *State v. Saenz*, 197 Ariz. 487, ¶ 13 (App. 2000).

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¶10 Gomez-Torres argues that the trial court erred in determining that evidence of C.M.'s misconduct was impeaching, not material, and would not have changed the outcome. He maintains C.M.'s "misconduct that resulted in her convictions and her misleading testimony in this case were both material to her credibility." He further contends that "the breadth of [C.M.'s] misbehavior" was not "merely impeaching" but instead would have "substantially undermined" her testimony, which in turn "probably would have changed the verdict[s]."

¶11 Evidence of C.M.'s misconduct was not material. *See Acuna Valenzuela*, 245 Ariz. 197, ¶ 58. Put another way, how much and by whom C.M. was paid for her work as an expert witness had no bearing on the jury's determination of guilt or innocence. *See id.* Indeed, at the evidentiary hearing, a detective who investigated C.M.'s misconduct testified that C.M.'s substantive testimony was "spot on" and "accurate." Even assuming such evidence was relevant and admissible, however, it would have been used to impeach C.M.'s testimony, which, as the trial court pointed out, also precludes this evidence from constituting newly discovered material facts under Rule 32.1(e)(3).

¶12 Gomez-Torres seems to acknowledge that this evidence would have been used primarily for impeachment, but he argues that the trial court failed to consider whether, under Rule 32.1(e)(3), it "was of such critical significance that the impeachment evidence probably would have changed the judgment or sentence." We disagree. C.M. testified as a cold expert witness with no specific knowledge of the facts of this case. Eliminating her testimony entirely, the trial court concluded that, in light of the victims' testimony, "the jury would have still convicted [Gomez-Torres] on all counts." *Cf. State v. Reese*, 26 Ariz. App. 251, 253 (1976) ("In determining whether the use of a prior invalid conviction for impeachment purposes is harmless in the circumstances of a given case, the courts have looked principally to the strength of the evidence against the defendant independent of the prior conviction.").

¶13 Moreover, if a new trial were granted, the state could call another cold expert witness to provide the same basic testimony as C.M. *See State v. Hess*, 231 Ariz. 80, ¶ 11 (App. 2012) ("Nothing in Rule 32.1(e) requires the court to artificially narrow the scope of its inquiry by ignoring evidence the state undoubtedly would offer at a new trial in response to the defendant's new evidence."). We therefore fail to see how the evidence "would probably change the verdict if a new trial were ordered." *Acuna Valenzuela*, 245 Ariz. 197, ¶ 58 (quoting *Serna*, 167 Ariz. at 374). The trial

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court thus did not abuse its discretion in rejecting Gomez-Torres's claim of newly discovered material facts. *See Roseberry*, 237 Ariz. 507, ¶ 7.

¶14 Accordingly, we grant review but deny relief.