

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

JAMES LEE HESS,
Petitioner.

No. 2 CA-CR 2021-0018-PR
Filed April 21, 2021

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NOT FOR PUBLICATION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. CR026023
The Honorable D. Douglas Metcalf, Judge

REVIEW GRANTED; RELIEF DENIED

James Lee Hess, Florence
In Propria Persona

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MEMORANDUM DECISION

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

V Á S Q U E Z, Chief Judge:

¶1 James Hess seeks review of the trial court’s ruling summarily dismissing his request for post-conviction DNA testing and request for appointed counsel 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); *State v. Gutierrez*, 229 Ariz. 573, ¶ 19 (2012). Hess has not shown such abuse here.

¶2 “After a jury trial, Hess was convicted of four counts each of first-degree burglary, kidnapping, and armed robbery, two counts of sexual assault, and one count each of attempted sexual assault and public sexual indecency.” *State v. Hess*, 231 Ariz. 80, ¶ 2 (App. 2012). Hess’s convictions stemmed from four armed robberies he committed during a ten-day period in 1988. During one of those robberies, Hess ordered a female employee into the bathroom of the store, where he penetrated her vagina with his finger and penis. In another robbery, Hess attempted to sexually assault the employee but, after she resisted, he masturbated in front of her instead.

¶3 The trial court sentenced Hess to consecutive prison terms, including a life sentence.¹ We affirmed his convictions and sentences on appeal and denied relief on his petition for review after his first post-conviction proceeding. *State v. Hess*, Nos. 2 CA-CR 1996-0168, 2 CA-CR 2000-0402-PR (Ariz. App. Jan. 30, 2003) (consol. mem. decision). In 2003, Hess again sought post-conviction relief, raising various claims including a request for post-conviction DNA testing. The trial court granted his request for DNA testing but denied relief after an evidentiary hearing, and this court denied relief on review. *Hess*, 231 Ariz. 80. In a third post-conviction proceeding filed in 2016, Hess sought further DNA testing, which the trial court denied, and this court dismissed his subsequent

¹In Hess’s first post-conviction proceeding, the trial court modified several of his prison terms to run concurrently.

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petition for review as untimely. *State v. Hess*, No. 2 CA-CR 2017-0390-PR (Ariz. App. Dec. 12, 2017) (order).

¶4 In July 2020, Hess filed a motion citing Rule 32.17 seeking DNA testing and to have counsel appointed. Specifically, he claimed there was “an unidentified male profile” on one sample from a sexual assault kit, as well as “two boxes of slides containing vaginal smears,” and other evidence from the scene of the sexual assaults that had not been tested. He claimed that “new technologies” in DNA testing and analysis could “identify the true perpetrator of these crimes.” The trial court summarily dismissed the proceeding, finding the issue precluded as previously raised. Hess filed a motion for rehearing, arguing the court was required to order the state to respond and asserting Rule 32 did not allow the court to dismiss his claim as precluded. The court then ordered the state to respond to Hess’s testing request and, after the state’s response and Hess’s reply, denied Hess’s request for testing and for counsel. The court concluded Hess had not shown a reasonable probability “that DNA testing would change the outcome of the case.” This petition for review followed.

¶5 On review, Hess asserts the trial court erred by rejecting his request for DNA testing. Pursuant to Rule 32.17(d)(1), a trial court is required to order post-conviction DNA testing of evidence only if that evidence “is still in existence,” was either not tested or a different type of testing could “resolve an issue not resolved by previous testing,” and “a reasonable probability exists that the defendant would not have been prosecuted, or the defendant’s verdict or sentence would have been more favorable, if DNA testing would produce exculpatory evidence.” As we understand his argument, Hess asserts the court only evaluated the “old” results from DNA testing in determining whether there was “a reasonable probability that the verdict or sentence would have been different.” We cannot agree. The court identified Hess’s claim – that further testing might “identify the perpetrator” – and correctly concluded this bare assertion was insufficient for Hess to meet his burden. See *State v. Carriger*, 143 Ariz. 142, 146 (1984) (“It is the petitioner’s burden to assert grounds that bring him within the provisions of [Rule 32] in order to obtain relief.”). Hess has identified no evidence suggesting further testing would identify a specific person. Moreover, Hess has already unsuccessfully sought post-conviction relief based on substantially the same theory. See *Hess*, 231 Ariz. 80, ¶¶ 4, 12-13. Previous testing excluded him as a contributor to the DNA found in samples taken from the victim’s vagina and from the toilet in the bathroom where Hess assaulted her. *Id.* ¶ 4. In that proceeding, the trial court determined that evidence would not alter the verdict because Hess did not

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ejaculate and had no contact with the toilet, and we denied relief on review. *Id.* ¶¶ 12-13, 17. If excluding Hess from those samples would not change the verdict, neither would identifying a specific individual from those samples.

¶6 Hess also asserts the trial court erred by rejecting his request to appoint counsel. Rule 32.17(c) permits a trial court to appoint counsel when a defendant seeks post-conviction DNA testing. But the sole reason Hess identifies in his petition for review is that this case presents a matter of “first impression” and “statewide importance.” Hess presumably refers to the fact that the rules governing post-conviction DNA testing were amended effective January 2020. Ariz. Sup. Ct. Order R-19-0012 (Aug. 29, 2019). But he has not identified any material difference between the former rule and the current rule. Nor has he identified any other reason requiring the court to appoint counsel in this case. In sum, Hess has not established the court erred in denying his request for counsel.

¶7 We grant review but deny relief.