

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

CARL EDWARD LANE,
Petitioner.

No. 2 CA-CR 2021-0060-PR
Filed August 30, 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NOT FOR PUBLICATION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. CR20072360001
The Honorable Howard Fell, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

Carl Edward Lane, Florence
In Propria Persona

STATE v. LANE
Decision of the Court

MEMORANDUM DECISION

Judge Brearcliffe authored the decision of the Court, in which Presiding Judge Eppich and Chief Judge Vàsquez concurred.

BREARCLIFFE, Judge:

¶1 Carl Lane seeks review of the trial court's order summarily dismissing his notice of 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. Martinez*, 226 Ariz. 464, ¶ 6 (App. 2011). Lane has not met his burden of establishing such abuse here.

¶2 After a jury trial, Lane was convicted of continuous sexual abuse of a child under the age of twelve, commercial sexual exploitation of a minor under the age of twelve, sexual exploitation of a minor under the age of fifteen, and sexual conduct with a minor under the age of fifteen. On appeal, this court vacated his conviction for commercial sexual exploitation and all of his sentences. *State v. Lane*, No. 2 CA-CR 2008-0283 (Ariz. App. Aug. 13, 2009) (mem. decision). The trial court resentenced Lane to consecutive prison terms totaling sixty years. This court modified the restitution award but otherwise affirmed those sentences. *State v. Lane*, No. 2 CA-CR 2010-0162 (Ariz. App. Mar. 23, 2011) (mem. decision).

¶3 Lane filed a notice of post-conviction relief, and in August 2010, appointed counsel filed a notice that he had reviewed the record but was unable to find any colorable claims to raise in a Rule 32 petition. Despite being granted multiple extensions, Lane did not file a pro se petition. In June 2011, through counsel assigned for resentencing, Lane filed another notice of post-conviction relief, and the trial court appointed counsel, treating it as a new Rule 32 proceeding. In March 2014, through appointed counsel, Lane filed a Rule 32 petition, asserting various claims of ineffective assistance of counsel, which the trial court rejected after an evidentiary hearing. This court denied relief on review. *State v. Lane*, No. 2 CA-CR 2015-0062-PR (Ariz. App. June 4, 2015) (mem. decision).

¶4 In May 2021, Lane filed a third notice of post-conviction relief. Citing Rule 32.1(e), he asserted he had obtained newly discovered evidence, specifically a memorandum showing he was in the custody of the Arizona Department of Corrections (ADOC) on October 30, 1995—the date of the

STATE v. LANE
Decision of the Court

allegations in count one of the indictment. He further argued that the state had suppressed this information before trial and that “such concealment does garner equitable tolling in proving up due diligence.” Finally, he maintained the evidence “substantially undermines testimony which was of critical significance at trial such that [it] probably would have changed the verdict.” Attached to his notice was a petition for post-conviction relief, which raised the same claim of newly discovered evidence, as well as a claim that the “digital camera” the prosecutor argued was the “means by which Counts (3) Three and (4) Four were undertaken” was “utterly false.” Lane also filed a motion requesting that the presiding judge reassign the case because “the sentencing judge’s testimony will be relevant” to his petition.¹

¶5 Later that month, the trial court summarily dismissed Lane’s notice, explaining that evidence of his ADOC release date was “not a newly discovered fact because [Lane] knew or reasonably should have known before now when he was released from prison after his Maricopa case.” The court pointed out that a presentence report showed he “was released on work furlough on March 21, 1994 and paroled on September 18, 1998,” although the report also noted that Lane claimed he was not released until March 21, 1995. And because “this was already information in [Lane’s] possession,” the court rejected his argument that the state had suppressed evidence of it. The court also found Lane’s claim that the digital camera used by the state was “false evidence” precluded. Lastly, the court denied the motion for assignment of judge as moot. This petition for review followed.

¶6 On review, Lane contends the trial court abused its discretion by dismissing his claim of newly discovered evidence. There are five requirements for presenting a colorable claim under Rule 32.1(e):

- (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;

¹Rule 32.10(a) provides: “The presiding judge must, if possible, assign a proceeding for post-conviction relief to the sentencing judge.”

STATE v. LANE
Decision of the Court

- (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). “Our supreme court has described this ground for post-conviction relief as ‘disfavored’ and warned courts to proceed ‘cautiously’ before granting new trials based on newly discovered evidence.” *State v. King*, 250 Ariz. 433, ¶ 20 (App. 2021) (quoting *State v. Serna*, 167 Ariz. 373, 374 (1991)).

¶7 Lane contends the trial court erred in finding his ADOC release date was not newly discovered evidence because Lane knew or should have known of this fact beforehand. Specifically, Lane asserts he has “always” remembered the term of his ADOC custody but has only now obtained the “necessary proof” of his “work furlough” status. But such evidence, by its very nature, cannot be “newly discovered.” *See Amaral*, 239 Ariz. 217, ¶ 9. Evidence is not newly discovered “merely because it was not introduced at a defendant’s trial.” *King*, 250 Ariz. 433, ¶ 33. The court therefore did not abuse its discretion in rejecting this claim. *See Martinez*, 226 Ariz. 464, ¶ 6. And, because Lane cannot establish that this evidence was discovered after his trial, we need not address his remaining claims that the evidence was discovered with due diligence, is material, and is not merely cumulative. *See King*, 250 Ariz. 433, ¶ 24 (to secure post-conviction relief, defendant must prove each requirement under Rule 32.1(e)).

¶8 Lane also contends the trial court erred in finding his claim concerning the digital camera precluded because there was “ample reference to the false evidence” in his first petition for post-conviction relief. But, as discussed above, in his first proceeding for post-conviction relief, Lane’s counsel filed a notice that he could not find any colorable claims to raise, and Lane failed to file a pro se petition. As part of his second proceeding, Lane only raised claims of ineffective assistance of counsel. *Lane*, No. 2 CA-CR 2015-0062-PR, ¶ 5. Mere mention of the camera evidence in that context did not preserve the issue currently raised. In any event, the claim was also not raised on appeal, and, as the trial court pointed out, Lane failed to explain why it could not have been raised sooner. It is therefore precluded. *See Ariz. R. Crim. P. 32.2(a)(3), (b)*. No abuse of discretion occurred. *See Martinez*, 226 Ariz. 464, ¶ 6.

STATE v. LANE
Decision of the Court

¶9 Accordingly, we grant review but deny relief.