

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

LARRY DONNELL DUNLAP,
Petitioner.

No. 2 CA-CR 2021-0106-PR
Filed February 2, 2022

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NOT FOR PUBLICATION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

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MEMORANDUM DECISION

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

ESPINOSA, Judge:

¶1 Petitioner Larry Dunlap seeks review of the trial court’s ruling denying his proceeding for post-conviction relief, initiated pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that ruling unless the court 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 and been denied post-conviction relief on numerous occasions. *State v. Dunlap*, No. 2 CA-CR 2021-0030-PR (Ariz. App. May 26, 2021) (mem. decision); *State v. Dunlap*, No. 2 CA-CR 2020-0112-PR (Ariz. App. July 6, 2020) (mem. decision); *State v. Dunlap*, No. 2 CA-CR 2019-0271-PR (Ariz. App. May 11, 2020) (mem. decision); *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) (decision order); *State v. Dunlap*, No. 2 CA-CR 2002-0215-PR (Ariz. App. Sept. 11, 2003) (mem. decision).

¶3 In August 2021, Dunlap filed a “Motion for Prosecution of Writ of Habeas Corpus Special Action Petition,” citing A.R.S. § 13-4121.¹

¹ Section 13-4121 provides: “A person unlawfully committed, detained, confined or restrained of his liberty, under any pretense whatever, may petition for and prosecute a writ of habeas corpus to inquire into the cause of such imprisonment or restraint.”

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He argued that the Pima County Attorney's office and the Arizona Attorney General's office have "in their possession exculpatory evidence," including videos, journals, letters, and victim recantations. He asked the trial court to vacate his convictions and order his immediate release from prison. Dunlap also filed a motion for appointment of counsel, a motion for the assigned judge to recuse himself, and a notice of post-conviction relief pursuant to Rule 32. His Rule 32 notice, which had his "Motion for Prosecution of Writ of Habeas Corpus Special Action Petition" attached thereto, indicated that he was raising claims of constitutionality, newly discovered evidence, and actual innocence. *See* Ariz. R. Crim. P. 32.1(a), (e), (h).

¶4 The trial court summarily denied Dunlap's "Motion for Prosecution of Writ of Habeas Corpus Special Action Petition." It noted that Dunlap's allegations therein had "been argued several times in previous pleadings that have been ruled upon . . . in repetitive petitions for post-conviction relief brought pursuant to Rule 32." The court further explained, "The fact that [Dunlap] now makes the same claims in a statutory *habeas corpus* pleading does not provide grounds for relief that has already been denied in these earlier rulings." The court thus concluded that Dunlap had "presented no credible claim." The court also denied Dunlap's motion for recusal and motion for appointment of counsel. This petition for review followed.

¶5 On review, Dunlap repeats his claim that the Pima County Attorney's office has exculpatory evidence pertaining to his case, specifically victim recantations. He claims that the trial court "continues to punish him by preventing the state from releasing this evidence." He further maintains that the court "prevented the state from answering his motion" and improperly found his claim under § 13-4121 precluded because "the state did not raise the issue of preclusion," thereby violating his Fourteenth Amendment rights.

¶6 As a preliminary matter, Dunlap's motion, despite being titled, "Motion for Prosecution of Writ of Habeas Corpus Special Action Petition," is properly considered a petition for post-conviction relief. *See* Ariz. R. Crim. P. 32.3(b) ("If a court receives any type of application or request for relief—however titled—that challenges the validity of the defendant's conviction or sentence following a trial, it must treat the application as a petition for post-conviction relief."). A habeas corpus proceeding is civil in nature, *State v. Montez*, 102 Ariz. 444, 447 (1967), and "may be used only to review matters affecting a court's jurisdiction," *Applications of Oppenheimer*, 95 Ariz. 292, 297 (1964). Dunlap's

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evidentiary-based claims do not affect the court's jurisdiction. *See Application of Anderson*, 7 Ariz. App. 443, 444-45 (1968) (allegations were directed at defendant's guilt or innocence, which was not within province of trial court at habeas corpus hearing).

¶7 Turning to the substance of his petition, as the trial court pointed out, Dunlap has previously raised – and the court has rejected – similar claims of victim recantation, newly discovered evidence, and actual innocence, rendering them precluded in this proceeding. *See* Ariz. R. Crim. P. 32.2(a)(2). To the extent his claims are exempt from preclusion under Rule 32.2(b), Dunlap 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.” *See also* Ariz. R. Crim. P. 32.4(b)(3)(B). Moreover, any constitutional claims are precluded and untimely. *See* Ariz. R. Crim. P. 32.2(a), 32.4(b)(3)(A). Despite Dunlap's assertion otherwise, the court may determine that a claim is precluded “[a]t any time . . . even if the State does not raise preclusion.” Ariz. R. Crim. P. 32.2(b).

¶8 Although Dunlap asserts that the judge assigned to his case is “bias[ed],” he does not support that claim or otherwise challenge the trial court's ruling denying the motion for recusal. We therefore do not address it. *See State v. Stefanovich*, 232 Ariz. 154, ¶ 16 (App. 2013) (insufficient argument waives claim on review). In addition, to the extent Dunlap suggests that the court erred in not appointing him counsel, he was not entitled to counsel in this successive Rule 32 proceeding. *See* Ariz. R. Crim. P. 32.5(a). And based on the record before us, the court did not abuse its discretion by denying Dunlap's request for counsel after considering – and finding unmeritorious – Dunlap's underlying claims raised in his petition. *See State v. Smith*, 169 Ariz. 243, 246 (App. 1991).

¶9 Accordingly, we grant review, but relief is denied.