IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

ROBERT ARTHUR ERGONIS,
Petitioner.

No. 2 CA-CR 2022-0042-PR
Filed June 7, 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NOT FOR PUBLICATION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. CR20074823
The Honorable Richard Gordon, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Mark Brnovich, Arizona Attorney General
By Nicholas Klingerman, Assistant Attorney General, Tucson
Counsel for Respondent

Robert A. Ergonis, Safford
In Propria Persona

MEMORANDUM DECISION

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

E S P I N O S A, Judge:

¶1 Robert Ergonis seeks review of the trial court's ruling dismissing his successive notice of post-conviction relief filed 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). Ergonis has not met his burden of establishing such abuse here.

¶2 After a 2010 jury trial, Ergonis was convicted of kidnapping, aggravated assault, armed robbery, assault, and aggravated robbery. The trial court imposed a combination of concurrent and consecutive prison terms totaling 22.5 years. On appeal, this court vacated a criminal restitution order but otherwise affirmed Ergonis's convictions and sentences. *State v. Ergonis*, No. 2 CA-CR 2012-0327 (Ariz. App. July 30, 2014) (mem. decision).

¶3 In separate petitions filed by both counsel and himself, Ergonis sought post-conviction relief, raising various claims, including that the state had violated *Brady v. Maryland*, 373 U.S. 83 (1963), in its disclosure of evidence. The trial court denied relief on all claims. This court denied relief on review. *State v. Ergonis*, No. 2 CA-CR 2019-0014-PR (Ariz. App. July 31, 2019) (mem. decision).

¶4 In January 2021, Ergonis filed a successive notice of post-conviction relief. He raised a claim of ineffective assistance of post-conviction counsel, asserting that "there was discoverable *Brady* . . . material," regarding a Tucson Police Department (TPD) detective who had investigated his case, that his first Rule 32 counsel had "failed to pursue." Ergonis subsequently filed a motion for discovery pursuant to Rule 32.6(b)(1).[1] After receiving the state's response and Ergonis's reply, the trial

[1]Rule 32.6(b)(1) provides: "After the filing of a notice but before the filing of a petition, and upon a showing of substantial need for material or

court denied his request for what the court characterized as an "open-ended court order allowing discovery" into the TPD detective's background. The court noted that Ergonis had failed to show a substantial need for the discovery because the information was available through a public records request, *see* A.R.S. § 39-121, which Ergonis had also submitted and was pending.

¶5 Based on the nature of Ergonis's claim and the state's argument that his notice was defective, the trial court ordered Ergonis to file a memorandum showing why the Rule 32 proceeding should not be dismissed. *See State v. Escareno-Meraz*, 232 Ariz. 586, ¶ 4 (App. 2013) (claim that Rule 32 counsel was ineffective not cognizable ground for relief in subsequent Rule 32 proceeding). Pursuant to Ergonis's request, the court mailed Ergonis copies of the relevant case law, including *Escareno-Meraz*. The court also granted Ergonis an extension of time to file his memorandum.

¶6 Ergonis sought a second extension of time to file his memorandum because he had "finally received" the requested public records from TPD. Although the state did not oppose the extension, the trial court denied the request, reasoning that Ergonis had failed to explain "how these documents could conceivably provide support for a claim of ineffective representation on behalf of his post-conviction counsel given the legal unavailability of such a claim." Accordingly, the court dismissed Ergonis's notice of post-conviction relief, noting, "If the documents ultimately do support some different type of claim, [Ergonis] may seek relief at that time." Ergonis filed a motion for reconsideration, which the court also denied. However, after receiving Ergonis's reply to the state's response to the motion for reconsideration, which was signed and mailed before the court had denied the motion, the court vacated its ruling and directed Ergonis to file a petition for post-conviction relief.

¶7 Days before his petition was due, however, Ergonis filed a motion "regarding dispute over requested public records," pursuant to Rule 32.10(b).[2] He sought a court order directing TPD to "reissue the

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information to prepare the defendant's case, the court may enter an order allowing discovery."

[2]Rule 32.10(b) provides: "The assigned judge may hear and decide a dispute within its jurisdiction, whether the dispute is raised by motion or by special action, that concerns access to public records requested for a post-conviction proceeding."

documents previously produced . . . without the unlawful redactions." He additionally requested the appointment of Rule 32 counsel and a stay of the current proceeding. After receiving the state's untimely response, which the trial court later struck, and Ergonis's supplement, the court denied Ergonis's motion, observing, "To date [Ergonis] has not provided any foundation for his suspicion concerning undisclosed *Brady* material." The court further explained that it would not "exercise its discretion under [Rule] 32.10(b) or appoint counsel to resolve a public records dispute based" on a notice of post-conviction relief that was "grounded in conjecture." And because "[e]nough time ha[d] passed without a properly filed . . . petition," the court dismissed Ergonis's notice. This petition for review followed.

¶8 On review, Ergonis maintains the trial court abused its discretion by dismissing his notice of post-conviction relief after denying his motions pursuant to Rule 32.6(b)(1) and Rule 32.10(b). By denying those motions, Ergonis maintains the court denied him necessary "factual development" for his petition. As a preliminary matter, however, Ergonis fails to appreciate the nature of his claim.

¶9 At bottom, the claim in Ergonis's notice of post-conviction relief was one of ineffective assistance of Rule 32 counsel. But Ergonis, as a non-pleading defendant, is not entitled to raise a claim of ineffective assistance of Rule 32 counsel in a successive proceeding. *See Escareno-Meraz*, 232 Ariz. 586, ¶¶ 4-6. In addition, a claim of ineffective assistance of counsel falls within Rule 32.1(a) and, as such, cannot be raised in an untimely proceeding like this one. *See* Ariz. R. Crim. P. 32.4(b)(3)(A); *State v. Petty*, 225 Ariz. 369, ¶ 11 (App. 2010) (ineffective assistance claim raised under Rule 32.1(a)).

¶10 Ergonis nevertheless attempts to characterize his claim as one of newly discovered material facts under Rule 32.1(e). But in support of that assertion, Ergonis maintains, "In essence, his claim is one under *Brady*." A *Brady* claim is a constitutional claim that cannot be raised in an untimely proceeding and is subject to preclusion when the issue has been adjudicated in a previous post-conviction proceeding. *See* Ariz. R. Crim. P. 32.1(a), 32.2(a), 32.4(b)(3)(A).

¶11 And even assuming his claim could be construed as arising under Rule 32.1(e), Ergonis has failed to establish that the trial court abused its discretion in dismissing his notice. *See Martinez*, 226 Ariz. 464, ¶ 6. After almost a year had passed since the filing of his notice, Ergonis was still seeking information to develop his claim and had yet to file a petition. *See*

Ariz. R. Crim. P. 32.7(a)(1)(A) (defendants generally have sixty days after filing notice or appointment of counsel to file petition). No purpose would be served in continuing this proceeding indefinitely. *See* Ariz. R. Crim. P. 32.7(a)(1)(B) (court may grant extensions to filing petition upon "good cause and after considering the rights of the victim"). As the trial court pointed out, if Ergonis later discovers a viable claim, he may initiate a Rule 32 proceeding at that time. *See* Ariz. R. Crim. P. 32.1(e), 32.2(b).

¶12 To the extent Ergonis challenges the denial of his motions pursuant to Rule 32.6(b)(1) and Rule 32.10(b), we cannot say the trial court erred. *See State v. Fields*, 196 Ariz. 580, ¶ 4 (App. 1999) (trial court has "broad discretion" on discovery matters). To obtain discovery under Rule 32.6(b)(1), Ergonis was required to demonstrate that he could not "obtain the substantial equivalent by other means without undue hardship." But, by his own admission, Ergonis had sought the same information through a public records request under § 39-121. Later, in filing his Rule 32.10(b) motion, Ergonis admitted he had received 152 pages of public records but wanted the records to be reissued without "the unlawful redactions." Public records, however, may be redacted. *See, e.g.*, A.R.S. § 39-123(A) ("Nothing in this chapter requires disclosure from a personnel file by a law enforcement agency or employing state or local governmental entity of the home address or home telephone number of eligible persons.").

¶13 Moreover, as the trial court pointed out, in support of his requests for information, Ergonis offered only speculative, unsupported assertions about the TPD detective and a supposed "*Brady* list." Such assertions were insufficient. *See Strickler v. Greene*, 527 U.S. 263, 286 (1999) ("Mere speculation that some exculpatory material may have been withheld is unlikely to establish good cause for a discovery request on collateral review."); *see also Canion v. Cole*, 210 Ariz. 598, ¶ 17 (App. 2005) (unsupported allegations insufficient to overcome presumptions that materials were made available before trial).

¶14 Accordingly, although we grant review, relief is denied.