

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

JOE NATHAN NEAL,
Petitioner.

No. 2 CA-CR 2022-0119-PR
Filed November 21, 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NOT FOR PUBLICATION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 Pinal County
No. S1100CR202002134
The Honorable Christopher J. O'Neil, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Kent P. Volkmer, Pinal County Attorney
By Thomas C. McDermott, Deputy County Attorney, Florence
Counsel for Respondent

Czop Law Firm PLLC, Higley
By Steven Czop
Counsel for Petitioner

STATE v. NEAL
Decision of the Court

MEMORANDUM DECISION

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

BREARCLIFFE, Judge:

¶1 Joe Neal seeks review of the trial court’s ruling dismissing his petition for post-conviction relief, filed pursuant to Rule 33, Ariz. R. Crim. P. We will not disturb that ruling unless the court abused its discretion. *See State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). Neal has not met his burden of establishing such abuse here.

¶2 Pursuant to a plea agreement, Neal was convicted of possession of a narcotic drug for sale and failure to comply with sex offender registration requirements. He also admitted to having one prior felony conviction. The trial court sentenced Neal, as a repetitive offender, to four years’ imprisonment for failing to register, and, for possessing a narcotic drug for sale, it suspended the imposition of sentence and placed him on a consecutive seven-year term of probation.

¶3 Thereafter, Neal sought post-conviction relief, raising a claim of actual innocence in his petition. Neal pointed out that the prior convictions alleged by the state did not include “any offense that would require Neal to register as a sex offender.” And he argued that, despite counsel’s “best efforts,” he could not locate any conviction for a sexual offense requiring him to register. Neal therefore reasoned that the state could not prove beyond a reasonable doubt his guilt for failing to comply with sex offender registration requirements.

¶4 The trial court summarily dismissed Neal’s petition. Even assuming the state failed to “allege with particularity a prior conviction requiring sex offender registration” and the court clerk “was unable to locate a record of any sexual offense,” the court explained that Neal had failed to demonstrate that he “is not ‘subject to registration’ as provided in A.R.S. § 13-3824.” The court observed that the state had alleged Neal was required to register as a sex offender, Neal had “admitted this was true” and had “admitted he was aware of the requirement,” and Neal “was actually registered as a sex offender, albeit at a different address than the one where he was living.” The court therefore concluded that Neal had

STATE v. NEAL
Decision of the Court

failed to meet his burden of demonstrating “by clear and convincing evidence that no reasonable fact-finder would find him guilty.” This petition for review followed.

¶5 On review, Neal argues the trial court erred by summarily dismissing his petition without an evidentiary hearing. He points out that he provided documentation showing counsel’s unsuccessful attempts to find a conviction that would require him to register as a sex offender, and he maintains “[t]his information . . . is new information not part of the original record.” Neal therefore reasons that he “supported his assertions with exhibits and legal analysis,” meeting “his preliminary requirement to raise doubt.”

¶6 Rule 33.1(h) provides post-conviction relief if “the defendant demonstrates by clear and convincing evidence that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would find the defendant guilty of the offense beyond a reasonable doubt.” This claim of actual innocence requires “factual innocence, not mere legal insufficiency.” *Bousley v. United States*, 523 U.S. 614, 623 (1998). The trial court must summarily dismiss a petition if no claim therein “presents a material issue of fact or law that would entitle the defendant to relief.” Ariz. R. Crim. P. 33.11(a). A defendant is entitled to an evidentiary hearing if he presents a colorable claim—that is, “one that, if the allegations are true, might have changed the outcome.” *State v. Runningeagle*, 176 Ariz. 59, 63 (1993); see Ariz. R. Crim. P. 33.13(a) (defendant entitled to evidentiary hearing to determine issues of material fact).

¶7 Although Neal supported his claim with evidence establishing counsel’s unsuccessful attempts to locate a conviction requiring Neal to register as a sex offender, such evidence does not establish a material issue of fact, particularly in light of Neal’s concession that he “may have a conviction from 1974 in Pinal County related to some form of sexual offense.” To warrant an evidentiary hearing, Neal needed to come forward with evidence showing he was actually innocent because he had not been convicted of an offense requiring him to register. See *State v. Krum*, 183 Ariz. 288, 292 (1995) (“To obtain an evidentiary hearing, a petitioner must make a colorable showing that the [factual] allegations, if true, would have changed the verdict.”); *State v. Boldrey*, 176 Ariz. 378, 380 (App. 1993) (to be colorable, claim must have “appearance of validity”). Contrary to Neal’s suggestion, “an unknown conviction from 1974” and “a legal analysis that he may not actually be required to register” do not meet this burden. Cf. *State v. Denz*, 232 Ariz. 441, ¶ 22 (App. 2013) (summary dismissal appropriate where evidence identified in defendant’s

STATE v. NEAL
Decision of the Court

actual-innocence claim “does nothing more than contradict some of the evidence presented at trial” and “does not conclusively demonstrate [defendant’s] innocence”).

¶8 Neal’s claim is more appropriately characterized as one of legal insufficiency, not factual innocence. *See Bousley*, 523 U.S. at 623. As the trial court pointed out, Neal has not asserted that “he has never been convicted of any crime that subjected him to mandatory sex offender registration.” Instead, he argues that he cannot find proof of a conviction, suggesting merely that the state cannot “prove every element of a charged crime beyond a reasonable doubt,” rather than actual innocence. The court therefore did not abuse its discretion in summarily dismissing Neal’s petition. *See Roseberry*, 237 Ariz. 507, ¶ 7.

¶9 Accordingly, we grant review but deny relief.