IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

DYWAYNE EARL MADISON,
Petitioner.

No. 2 CA-CR 2022-0185-PR
Filed January 26, 2023

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NOT FOR PUBLICATION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 Maricopa County
No. CR2010006355001DT
The Honorable Kathleen Mead, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Rachel Mitchell, Maricopa County Attorney
By Daniel Strange, Deputy County Attorney, Phoenix
Counsel for Respondent

Dywayne E. Madison, Winslow
In Propria Persona

MEMORANDUM DECISION

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

S T A R I N G, Vice Chief Judge:

¶1 Dywayne Madison seeks review of the trial court's order summarily dismissing his successive petition for 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. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). Madison has not met his burden of establishing such abuse here.

¶2 In March 2011, after a jury trial, Madison was convicted of three counts of kidnapping, two counts of aggravated assault, one count of weapons misconduct, one count of receiving the earnings of a prostitute, and fourteen counts of pandering. The trial court sentenced Madison to concurrent and consecutive sentences totaling 30.75 years. On appeal, we vacated the conviction and sentence for one count of kidnapping but otherwise affirmed Madison's convictions and sentences. *State v. Madison*, No. 1 CA-CR 11-0157, ¶ 23 (Ariz. App. Aug. 21, 2012) (mem. decision). Madison has previously sought and been denied post-conviction relief several times.

¶3 In July 2018, Madison filed a pro se notice of post-conviction relief in his third Rule 32 proceeding, stating he was raising claims under

Rule 32.1(e), (f), and (h). In September 2018, the trial court summarily dismissed Madison's claims raised pursuant to Rule 32.1(a) and (f). The court specifically precluded Madison from raising new claims under Rule 32.1(a) in a successive proceeding, and noted that his claims raised under *Brady v. Maryland*, 373 U.S. 83 (1963), were also precluded. *See* Ariz. R. Crim. P. 32.2(a)(3) (defendant "precluded from relief under Rule 32.1(a) based on any ground . . . waived at trial or on appeal, or in any previous post-conviction proceeding"). However, the court permitted Madison to file a Rule 32 petition to address two discrete claims under Rule 32.1(e) and (h).[1] It noted that its ruling did not constitute an expression of the merits of those claims or whether Madison was precluded from raising them.

¶4 Madison filed a successive petition in October 2021, asserting his claims were "brought pursuant to" Rule 32.1(e) and (h). However, other than a single oblique reference as to why he could not have discovered certain evidence before trial, Madison did not mention Rule 32.1(e) or (h), much less explain why he was entitled to relief thereunder.[2] He instead

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[1]Those claims involved police records related to the victim's arrest, which Madison maintained were relevant to the timing of the commission of Counts 21 and 22, and "allegedly withheld impeachment evidence concerning misconduct" by Detective Christi Bill, who had testified at the trial in this matter.

[2]We note that Madison also asserted in his reply to the state's response to his Rule 32 petition that the subject evidence was rendered newly discovered "by definition" because it was "based on evidence known

argued the state had violated his due process rights in several ways, including withholding documents related to the victim's September 2009 police records and impeachment evidence related to Detective Christi Bill, both in violation of *Brady*; withholding the victim's October 2009 statement to police until three weeks before trial and filing a motion to suppress that statement at trial; and, knowingly "sponsor[ing]" Detective Bill's "perjured and false testimony." The trial court summarily dismissed Madison's petition in May 2022, and this petition for review followed.

¶5 On review, Madison asserts the trial court's factual findings were erroneous and seems to argue that his previous efforts to obtain the subject evidence made it newly discovered once he obtained it. However, as the state has consistently and correctly asserted, despite Madison's attempt to characterize his claims as falling under Rule 32.1(e) and (h), they are nonetheless Rule 32.1(a) claims, and are thus precluded under Rule 32.2(a)(3). *See State v. Banda*, 232 Ariz. 582, n.2 (App. 2013) ("We can affirm the trial court's ruling for any reason supported by the record."). Additionally, the court noted in its May 2022 ruling that Madison's petition included "some claims that were already precluded by the Court in" its

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about by the State, and withheld and or suppressed before and during trial."

September 2018 ruling.[3] It explained that the only two claims that had not been previously dismissed were those based on "newly discovered evidence . . . regarding the victim's arrest record and regarding Detective Bill's 'false prosecution and false testimony,'" which it then dismissed on the merits.[4]

¶6 Moreover, Madison has not shown that the trial court abused its discretion by concluding he failed to establish claims of newly discovered evidence, and by inference, a claim of actual innocence. The court explained that the purported evidence would not have changed the verdict at trial and that, in reference to the argument regarding Detective

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[3]Notably, in his first Rule 32 proceeding in 2014, Madison also asserted several claims related to those he now raises. Those claims included ones based on newly discovered evidence that would have permitted him to impeach the victim's testimony, claims based on *Brady*, and claims based on his assertion that Detective Bill had presented false testimony in this matter. He likewise indicated he intended to assert claims based on Rule 32.1(e) and (h) in his second Rule 32 proceeding in 2017, prompting the trial court there to conclude that Madison's "Rule 32.1(e) claim is more properly characterized as a claim that his convictions and sentences were obtained in violation of his constitutional rights under Rule 32.1(a)," a claim the court noted was precluded.

[4]Madison nonetheless argues on review that he was entitled to raise claims outside those expressly permitted by the trial court in its 2018 ruling, asserting the court did not identify his additional claims in its ruling because he had not yet received the evidence upon which they were based. We do not address those claims. Not only were they outside the scope of the specific claims the court permitted Madison to raise in this proceeding, but they were raised as due process claims and *Brady* violations, rather than claims pursuant to Rule 32.1(e) or (h), as the court specifically had authorized.

Bill, it was unable to determine to which evidence Madison was referring. *See* Ariz. R. Crim. P. 33.1(e), (h); *see also State v. Saenz*, 197 Ariz. 487, ¶ 7 (App. 2000) (to establish claim of newly discovered evidence, defendant must show "that the evidence was discovered after trial although it existed before trial; that it could not have been discovered and produced at trial through reasonable diligence; that it is neither cumulative nor impeaching; that it is material; and that it probably would have changed the verdict"). In summary, because Madison failed to meaningfully address, much less establish, the required elements of his purported claims of newly discovered evidence or actual innocence, we conclude the court did not abuse its discretion by dismissing his petition. *See Banda*, 232 Ariz. 582, n.2.

¶7 Finally, Madison maintains he is entitled to an evidentiary hearing. He specifically asserts he is entitled to a hearing to "afford him the opportunity to present the evidence and witnesses to prove the allegations made in [his] petition," including those allegations the trial court concluded were unclear. However, other than so asserting, he has not meaningfully sustained his burden to show why he is correct, particularly in light of the court's finding that the purported evidence would not have changed the verdict at trial. *See State v. Amaral*, 239 Ariz. 217, ¶¶ 10-12 (2016) (to be entitled to evidentiary hearing, defendant must make "colorable claim" by alleging "facts which, if true, would probably have changed" the outcome

of case). We thus conclude the court did not abuse its discretion by dismissing his petition without conducting an evidentiary hearing.

¶8 We grant review, but deny relief.