

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

RUBEN CASILLAS BRITO,
Petitioner.

No. 2 CA-CR 2023-0163-PR
Filed November 2, 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NOT FOR PUBLICATION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 Pima County
No. CR20142136001
The Honorable Howard Fell, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

Ruben Casillas Brito, Florence
In Propria Persona

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MEMORANDUM DECISION

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

G A R D, Judge:

¶1 Petitioner Ruben Brito seeks review of the trial court’s ruling summarily dismissing his successive petition for post-conviction relief, filed pursuant to Rule 33, Ariz. R. Crim. P. We will not disturb that ruling absent an abuse of discretion. *See State v. Mendoza*, 249 Ariz. 180, ¶ 1 (App. 2020). Brito has not met his burden of establishing such abuse here.

¶2 Brito pleaded guilty to child molestation, second-degree child molestation, and second-degree sexual conduct with a minor. The superior court sentenced Brito to a minimum prison term of ten years on the child molestation charge and suspended the imposition of sentence on the remaining charges, placing him on concurrent twenty-year terms of probation to begin upon his release from prison.

¶3 Brito sought post-conviction relief, appointed counsel filed a notice that she was unable to find any colorable claims to raise, Brito did not file a supplemental pro se petition, and the superior court dismissed his notice in July 2017. A few months later, Brito filed a second notice of post-conviction relief, and the court again appointed counsel, who was also unable to find any colorable claims to raise. Brito filed a pro se petition, raising claims that he had received ineffective assistance of trial counsel, had been “denied his right to a speedy trial,” and had been “forced and coerced” to enter his guilty plea. The superior court denied relief, and this court denied review. *State v. Brito*, No. 2 CA-CR 2020-0102-PR (Ariz. App. Aug. 31, 2020) (mem. decision).

¶4 In October 2022, Brito filed a third notice of post-conviction relief, and the superior court denied his request for counsel. In his subsequently filed pro se petition, Brito raised five claims for relief, several of which overlap: (1) ineffective assistance of trial counsel, (2) “[a]n unlawful[ly] induced plea of guilty,” (3) violations of his right against double jeopardy based on duplicitous charging, (4) “[t]he existence of newly discovered material,” and (5) the use of an improper prior conviction

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from Santa Cruz County to enhance his sentence. Thereafter, Brito filed numerous motions and requests seeking disclosure and discovery.

¶5 In May 2023, the superior court summarily dismissed Brito’s petition. It concluded that his first two claims were precluded because they “were finally adjudicated on the merits” in his last proceeding. As to his third claim, the court determined that his indictment was not duplicitous because the document Brito had challenged “merely group[ed] the counts in the indictment for potential sentencing purposes” and the dates and victims were properly identified relative to each count. Regarding his fourth claim, the court explained that the “newly discovered material” was “not new” and either not “material” or “already precluded.” The court additionally pointed out that Brito had “re-raised claims of ineffective assistance of counsel, prosecutorial misconduct, and duplicitous indictment under the umbrella of newly discovered material.” Finally, as to his fifth claim, the court reviewed the record and concluded that his sentence had not been improperly enhanced based on a Santa Cruz County conviction. The court also declined to address Brito’s other discovery motions and requests, explaining that he had relied upon improper rules. This petition for review followed.

¶6 Brito contends the superior court erred by dismissing his petition for post-conviction relief without an evidentiary hearing. But he misapprehends the proper standard. “A defendant is entitled to an evidentiary hearing when he presents a colorable claim, that is a claim which, if defendant’s allegations are true, might have changed the outcome.” *State v. Gutierrez*, 229 Ariz. 573, ¶ 25 (2012) (quoting *State v. Watton*, 164 Ariz. 323, 328 (1990)); *see also* Ariz. R. Crim. P. 33.11(a) (“If, after identifying all precluded and untimely claims, the court determines that no remaining claim presents a material issue of fact or law that would entitle the defendant to relief under this rule, the court must summarily dismiss the petition.”). Because the court concluded that Brito had presented no such claim, it was not required to conduct an evidentiary hearing.

¶7 Turning to the substance of Brito’s arguments, he first contends the superior court erred by finding his claims of ineffective assistance of trial counsel precluded.¹ He suggests he could not have raised

¹We do not address Brito’s claims that were raised below but have not been meaningfully reasserted on review. *See* Ariz. R. Crim. P. 33.16(c)(4) (“A party’s failure to raise any issue that could be raised in the

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his claims sooner because he did not receive his case file until his second Rule 33 counsel had “surrendered what he could.” Even assuming that were true, Brito overlooks the court’s determination that he raised the same ineffective assistance claims in his last proceeding. Because Brito has not challenged that determination, we cannot say the court erred. *See* Ariz. R. Crim. P. 33.2(a)(2) (defendant precluded from relief under Rule 33.1(a) based on ground “finally adjudicated on the merits in any previous post-conviction proceeding”). Simply put, “[t]he ground of ineffective assistance of counsel cannot be raised repeatedly.” *Stewart v. Smith*, 202 Ariz. 446, ¶ 12 (2002).

¶8 Brito next contends that his conviction and sentence are “unconstitutional” because the state had “no hard evidence or factual basis.” But Brito does not appear to have raised this claim below. We therefore need not address it. *See State v. Ramirez*, 126 Ariz. 464, 468 (App. 1980) (appellate court will not consider on review claims not raised below); *see also* Ariz. R. Crim. P. 33.16(c)(2)(B) (petition for review must contain “issues the trial court decided that the defendant is presenting for appellate review”). Even assuming this claim was raised below, and it is not otherwise precluded, *see* Ariz. R. Crim. P. 33.2(a), Brito has offered nothing but speculation that his convictions are based on “false accusations.” *See State v. Leyva*, 241 Ariz. 521, ¶ 22 (App. 2017) (speculation insufficient to state colorable claim).

¶9 Brito also suggests the superior court erred by denying his various requests for disclosure and discovery. But we agree with that court that Brito improperly relied on both federal and state rules of civil procedure. Such rules are not applicable in this state proceeding for post-conviction relief. *See* Ariz. R. Crim. P. 33.3(a) (“A post-conviction proceeding is part of the original criminal action and is not a separate action.”). Moreover, given that the court properly dismissed the proceeding, we cannot say it erred by declining to address his related requests.

¶10 Accordingly, we grant review but deny relief.

petition for review or cross-petition for review constitutes a waiver of appellate review of that issue.”).