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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. MELVIN STANDISH WOPSCHALL, Petitioner.	)	2 CA-CR 2010-0091-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR61119

Honorable John S. Leonardo, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines
Tucson
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Melvin S. Wopschall
Buckeye
In Propria Persona

K E L L Y, Judge.

¶1 In this petition for review, petitioner Melvin Wopschall challenges the trial court's dismissal of a successive notice of post-conviction relief he filed pursuant to Rule

32, Ariz. R. Crim. P. We will not disturb the court's denial of post-conviction relief unless it plainly has abused its discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990).

¶2 Wopschall was convicted in 1998 of two counts each of kidnapping, sexual abuse, and sexual assault.[1] The trial court sentenced him to prison for 37.75 years. On appeal, this court affirmed his convictions and four of his sentences but remanded for resentencing on two counts. *State v. Wopschall*, No. 2 CA-CR 98-0520 (memorandum decision filed Nov. 10, 1999). After his resentencing, Wopschall filed a second appeal, which we consolidated with his petition for review of the trial court's denial of a petition for post-conviction relief he had filed in the interim. *State v. Wopschall*, Nos. 2 CA-CR 2000-0118, 2 CA-CR 2002-0003-PR (memorandum decision filed Feb. 26, 2004). In our February 2004 decision, we affirmed one of the two sentences, remanded for a second resentencing on the other, and upheld the court's denial of post-conviction relief. *Id.* ¶¶ 8, 13.

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[1]According to our memorandum decision on his first appeal, the essential underlying facts of his offenses are these:

> [Wopschall] was arrested after his former foster daughter reported to police that [he] had forced her to engage in various sexual acts with him during the course of one day, both at his home in Tucson and at a trailer he owned in Marana. . . . [His] primary defense at trial was that the victim had consented to the sexual conduct and, in fact, had initiated it.

State v. Wopschall, No. 2 CA-CR 98-0520, ¶ 2 (memorandum decision filed Nov. 10, 1999).

¶3 In April 2008, Wopschall filed a new notice of post-conviction relief in which he asserted there was newly discovered evidence showing he was innocent. The trial court "reject[ed]" the notice as untimely and denied Wopschall's subsequent motions to amend, for rehearing, and for clarification. He petitioned this court for review of those rulings, and we denied relief. *State v. Wopschall*, No. 2 CA-CR 2008-0380-PR (memorandum decision filed Apr. 10, 2009).

¶4 In December 2009, Wopschall filed yet another notice of post-conviction relief pursuant to Rule 32, again alleging "newly discovered factually documented evidence" that he argued "would have resulted in reasonable doubt and different verdicts." After the trial court summarily dismissed the notice as neither timely nor in compliance with the requirements of Rule 32.2(b) for asserting a successive or untimely post-conviction claim, Wopschall moved to extend the time to file a motion for rehearing. Although the court denied the motion to extend time, Wopschall nonetheless filed a motion for rehearing. The court denied the motion, and this petition for review followed.

¶5 In its written ruling dismissing Wopschall's latest notice, the trial court made the following findings:

> The court finds that Defendant's specific exception and meritorious reasons for not raising the claim in a timely manner [as required by Rule 32.2(b)] are not apparent from the notice. Defendant claims that the newly discovered evidence in this case consists of "newly discovered factually documented evidence that defendant received through due diligence from the Tucson Police Department . . . ." Defendant provides no indication as to what these documents are or what information they contain. Moreover, Defendant fails to demonstrate why it took over ten years to obtain the documents or why this notice was otherwise untimely.

> Finally, Defendant has failed to indicate why this claim was not raised in a previous petition. Defendant has therefore failed to make the necessary showing under Rule 32.2(b).

The record supports the court's findings. Although Wopschall subsequently has supplied incrementally more information—both in his motion for rehearing below[2] and in his petition for review[3]—about the evidence he claims to be newly discovered proof of his innocence, the court did not have the benefit of that information when it dismissed the notice of post-conviction relief for its failure to comply with Rule 32.2(b). We find no abuse of its discretion in dismissing Wopschall's latest notice of post-conviction relief. *See generally State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993) (when trial court has identified correctly and ruled on issues raised "in a fashion that will allow any court in the future to understand the resolution[, n]o useful purpose would be served by this court[']s rehashing the trial court's correct ruling in a written decision").

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[2]In his motion for rehearing, the evidence he primarily discussed was apparently the written report of a "tool mark test on . . . wire cutters." According to Wopschall, it showed "the cutters were not the ones that cut the black plastic ties recovered from [the victim's] ankles, wrists and neck," and thus was critical exculpatory evidence.

[3]In his petition for review, Wopschall describes the "newly discovered" evidence he claims to have gleaned from Tucson Police Department's "forensics unit and records section" as the following:

> 1. Fraudulent evidence admitted into record; . . . .
>
> 2. Blood trail that proved beyond reasonable doubt Defendant did not kidnap alleged victim, which was concealed from jurors.
>
> 3. Evidence tampering: . . . one pair of children's socks, turned into one adult white sock presented to jurors as actual evidence.

¶6 Although we grant the petition for review, we deny relief.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Judge