

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

NOV 18 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2010-0165-PR
)	DEPARTMENT B
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
IAN MICHAEL DAWKINS,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20061680

Honorable Michael J. Cruikshank, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
Attorneys for Respondent

Ian Michael Dawkins

Tucson
In Propria Persona

V Á S Q U E Z, Presiding Judge.

¶1 Petitioner Ian Dawkins seeks review of the trial court's order denying his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P., and the

court's order denying his motion for reconsideration of that order.¹ We will not disturb those rulings unless the court clearly has abused its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 In April 2006, then-sixteen-year-old Dawkins and Antoine King entered Dawkins's parents' home, and King shot Dawkins's father, killing him. Dawkins was charged with first-degree murder, but the jury found him guilty of the lesser-included offense of second-degree murder. The parties had stipulated at trial that King had shot and killed the victim; thus, Dawkins was apparently convicted on an accomplice liability theory.² The trial court sentenced him to a presumptive, sixteen-year prison term. We affirmed his convictions and sentences on appeal. *State v. Dawkins*, No. 2 CA-CR 2007-0212 (memorandum decision filed Jan. 22, 2009).

¶3 In a November 2009 interview with an investigator, King stated Dawkins had believed King had an empty gun or a "BB" gun and that the plan had been for King to only scare Dawkins's father to allow Dawkins to take some of his possessions and run away from home. He maintained that Dawkins had not wanted him to hurt anyone and that he had told law enforcement officers that Dawkins knew King had a loaded gun only because Dawkins "had basically turned [him] in" for the crime. Through counsel,

¹In his pro se petition for review, Dawkins states on the first page that he seeks review of the trial court's denial of his motion for reconsideration and does not mention the denial of his petition for post-conviction relief. However, because Dawkins appears to address both rulings in his petition for review, we will construe his petition as seeking review of both orders.

²Dawkins's and King's trials were severed, and King did not testify at Dawkins's trial. King pleaded guilty to second-degree murder.

Dawkins filed a petition for post-conviction relief, asserting King's interview constituted newly discovered evidence and was proof that Dawkins was innocent of second-degree murder. *See* Ariz. R. Crim. P. 32.1(e), (h).

¶4 The trial court summarily denied Dawkins's petition, concluding King's recent interview did not constitute newly discovered evidence under Rule 32.1(e) and, in any event, King was not credible and, therefore, the interview did not warrant relief under Rule 32.1(h). Again through counsel, Dawkins filed a motion for reconsideration, arguing he had presented a colorable claim of newly discovered evidence and was entitled to an evidentiary hearing. The court denied the motion, stating an evidentiary hearing was unnecessary and reiterating that it had found King was not credible based on his previous statements.

¶5 In his pro se petition for review, Dawkins asserts, as we understand his argument, that the trial court erred in rejecting his claim of newly discovered evidence because the court did not address all the authority cited in his petition for post-conviction relief and motion for reconsideration. Dawkins also claims he had "satisfied all 5 conditions to be entitled to relief" on his newly discovered evidence claim.³ *See State v. Serna*, 167 Ariz. 373, 374, 807 P.2d 1109, 1110 (1991) (describing five elements of successful newly discovered evidence claim).

³Dawkins does not discuss the trial court's denial of his claim of actual innocence pursuant to Rule 32.1(h). Accordingly, we do not address it. *See generally* Ariz. R. Crim. P. 32.9.

¶6 These arguments are unavailing. To be entitled to relief on a claim of newly discovered evidence, a petitioner first must demonstrate the evidence is, in fact, newly discovered. *See id.* The trial court correctly determined King’s statement was not newly discovered evidence because King was not unavailable to testify at trial but instead had declined to do so. *See State v. Dunlap*, 187 Ariz. 441, 466, 930 P.2d 518, 543 (App. 1996) (evidence not newly discovered “when a defendant who voluntarily chose not to testify comes forward later to offer testimony exculpating a co-defendant”). Dawkins does not otherwise address the court’s ruling in any meaningful way. *See Ariz. R. Crim. P. 32.9(c); State v. Bolton*, 182 Ariz. 290, 298, 838 P.2d 830, 838 (1995) (insufficient argument waives claim on review). Nor was the court required to explicitly address all of the authority Dawkins had cited below and, in any event, that authority does not suggest the court’s rulings were incorrect.

¶7 Therefore, although we grant review of Dawkins’s petition, we deny relief.

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

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge

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