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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THE STATE OF ARIZONA, Respondent, v. BRIAN BARRAZA, Petitioner.	2 CA-CR 2008-0281-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF GILA COUNTY

Cause No. CR20050004

Honorable Robert Duber, II, Judge

REVIEW GRANTED; RELIEF DENIED

Daisy Flores, Gila County Attorney
By June Ava Florescue — Globe
Attorneys for Respondent

Emily Danies — Tucson
Attorney for Petitioner

E C K E R S T R O M, Presiding Judge.

¶1 Petitioner Brian Barraza seeks review of the trial court's denial of relief on a petition for post-conviction relief he filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb the granting or denial of post-conviction relief unless the trial court has clearly abused

its discretion, *State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006), and we find no abuse here.

¶2 After a jury trial that he did not attend, Barraza was convicted of two felonies, possessing a deadly weapon as a prohibited possessor and disorderly conduct with a weapon, and one misdemeanor count of threatening and intimidating. The jury also found he had two historical prior felony convictions, had committed the present offenses while on probation, and had threatened serious physical injury in the course of the offenses. The trial court sentenced him to concurrent, aggravated, enhanced prison terms for the felonies, the longer for twelve years, and this court affirmed the convictions and sentences on appeal. *State v. Barraza*, No. 2 CA-CR 2006-0142 (memorandum decision filed Jan. 25, 2007).

¶3 Barraza then filed the petition for post-conviction relief from which this petition for review arises, asserting claims of newly discovered evidence and ineffective assistance of trial counsel. The trial court summarily ruled the newly discovered evidence claim was not meritorious because the "'evidence'" produced was "merely impeaching" and thus did not afford a valid ground for relief. *See* Ariz. R. Crim. P. 32.1(e)(3). But the court found Barraza had stated a colorable claim of ineffective assistance of counsel and therefore scheduled an evidentiary hearing pursuant to Rule 32.8.[1]

[1]"To state a colorable claim of ineffective assistance of counsel, a defendant must show both that counsel's performance fell below objectively reasonable standards and that this deficiency prejudiced the defendant. *Strickland* [*v. Washington*], 466 U.S. [668, 687

¶4 Barraza's assertions of ineffectiveness were twofold. He alleged counsel had failed to "properly inform him of his trial date," which led to his being tried in absentia. Second, he claimed counsel had failed to adequately explain the advantages of a plea agreement the state had offered. Had he been fully informed, Barraza contended, he would have accepted the offered plea agreement.

¶5 At the evidentiary hearing in April 2008, the trial court heard testimony from four witnesses—Barraza, his former wife, his former probation officer, and his trial counsel, Anna Ortiz—before concluding counsel had not been ineffective and thus denying relief. The court's minute entry ruling contains these specific factual findings:

> Testimony at the hearing demonstrated that Defendant was aware of the trial date, having been advised of that date on May 10, 2005. The Court resolves the credibility between Defendant and Defendant's counsel concerning whether or not Defendant was told that the trial was postponed in favor of Defendant's counsel.
>
> The Court further concludes that Defendant's lack of information about the trial date was a result of his willful failure to obtain information, despite his counsel's efforts in attempting to engage him in trial preparation. If Defendant was unaware of information in this case, it was the direct result of his failure to keep appointments, to make appointments, to provide proper contact information and to remain in touch with those persons

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(1984)] . . . . Failure to satisfy either prong of the *Strickland* test is fatal to an ineffective assistance of counsel claim. *Id.*; *State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985)." *Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d at 68 (citation omitted).

> . . . he knew Ms. Ortiz was attempting to utilize to connect with him.
>
> In like manner, Defendant was unaware of the full array of information in regard to the plea offer, because he failed to stay in contact with his attorney.
>
> The Court believes that it [is] most likely that Ms. Ortiz communicated new information to Defendant through her only source of contact, Defendant's ex-wife. If Defendant did not receive any information, his complaint is not with his counsel but with his former spouse.

Self-evidently, the trial court's findings rested on its assessment of the credibility of the witnesses who testified at the evidentiary hearing, an assessment to which this court necessarily defers. *State v. Moody*, 208 Ariz. 424, ¶ 81, 94 P.3d 1119, 1144 (2004); *State v. Hughes*, 13 Ariz. App. 391, 392-93, 477 P.2d 265, 266-67 (1970).

¶6 The trial court thus rejected the factual underpinnings of Barraza's claims of ineffectiveness, and the record supports its affirmative findings to the contrary. *See State v. Sasak*, 178 Ariz. 182, 186, 871 P.2d 729, 733 (App. 1993) ("[W]hen the trial court holds an evidentiary hearing, our review of the trial court's findings of fact is limited to a determination of whether those findings are clearly erroneous."). We therefore have no basis on which to say the court abused its discretion, either in finding trial counsel had not been ineffective or in denying post-conviction relief based on that finding.

¶7 In his petition for review, Barraza also contends the trial court erred in ruling that his claim of newly discovered evidence did not warrant an evidentiary hearing. A petitioner is entitled to a hearing pursuant to Rule 32.8 when he presents a colorable

claim—one "which[,] if his allegations are true[,] might have changed the outcome." *State v. Schrock*, 149 Ariz. 433, 441, 719 P.2d 1049, 1057 (1986). Whether a post-conviction claim is colorable "is, to some extent, a discretionary decision for the trial court," *State v. D'Ambrosio*, 156 Ariz. 71, 73, 750 P.2d 14, 16 (1988), and we review a finding that a claim is not colorable only for an abuse of the court's discretion. *See State v. Sanchez*, 200 Ariz. 163, ¶ 13, 24 P.3d 610, 614 (App. 2001).

¶8 The charges against Barraza stemmed from his having displayed and cocked a handgun during an altercation that occurred when he and his former wife were asked to leave a Globe motel where they had been staying. Jerald Brown, an employee of the motel, testified that, during the incident, he had seen Barraza reach behind his back and pull out the gun while yelling, "Nobody f___s with me." Brown and a second female who was present were able to take the gun away from Barraza, and Brown then helped the three adults "pick[] up all their stuff and . . . move everything out into the car." In a maroon duffel bag that Brown carried out to the car, police officers later found two handguns, one matching the description of the small, shiny, chrome-plated handgun Brown had seen Barraza brandish.

¶9 The allegedly newly discovered evidence Barraza wanted to present was the testimony of an "Ada Badiali." Attached to Barraza's petition for post-conviction relief was Badiali's affidavit, which states:

> I overheard a customer talking to another customer about a guy named Brian Barraza, saying that he got Barraza sent to prison by lying with his testimony in court. I asked if anyone knew the guy talking and I was told his name [was J]erald. I

> knew what he was saying was serious, so I told what I knew to Mr. Barraza's mother-in[-]law. She had me write this down and sign it. So I did.

Barraza asserted that, because Jerald Brown was the only witness who testified to having seen "Barraza with a gun during the verbal interchange at the motel[, i]f [Brown] was lying, his perjured testimony was the most damaging to Mr. Barraza's case."

¶10 For newly discovered evidence to justify post-conviction relief, "the material must meet five requirements: the evidence must be newly discovered, the motion must show due diligence, the evidence must not be merely cumulative or impeaching, the evidence must be material, and the evidence must be likely to change the verdict if it were introduced at trial." *State v. Nordstrom*, 200 Ariz. 229, ¶ 89, 25 P.3d 717, 743 (2001). The trial court summarily denied relief on Barraza's claim because, it wrote, "the 'evidence' is merely impeaching and . . . not a valid ground for relief [under] Rule 32.1(e)(3)."

¶11 We find no abuse of the court's discretion. "[Newly discovered] evidence must . . . be such that it does not merely bolster, impeach or contradict testimony offered at the trial." *State v. Morrow*, 111 Ariz. 268, 270, 528 P.2d 612, 614 (1974); *see also* Ariz. R. Crim. P. 32.1(e) cmt. (1992 amendment) ("Impeachment evidence will rarely be of a type which would probably have changed the verdict at trial."). "Rather it must appear probable that the admission of the evidence would have changed the verdict or findings of the court." *Morrow*, 111 Ariz. at 270, 528 P.2d at 614. Thus, the trial court's rejection of the proffered

"evidence" here was sustainable on the ground that the sole purpose of Badiali's testimony would have been to impeach or contradict the trial testimony of Jerald Brown.

¶12 In addition, however, the trial court's ruling was correct for another, more fundamental reason. To qualify as newly discovered evidence for purposes of Rule 32.1(e), "the evidence must appear on its face to have existed at the time of trial but be discovered after trial." *State v. Bilke*, 162 Ariz. 51, 52, 781 P.2d 28, 29 (1989). The purported statement Badiali claimed to have overheard Brown make—"that he got Barraza sent to prison by lying with his testimony in court"—could only have been made sometime after Barraza's trial. The hearsay "evidence," therefore, could not have "existed at the time of trial" and thus did not qualify as newly discovered evidence entitling Barraza to relief under Rule 32.1(e). *Bilke*, 162 Ariz. at 52, 781 P.2d at 29. The trial court did not abuse its discretion in summarily rejecting Barraza's claim.

¶13 Accordingly, although we grant the petition for review, we deny relief.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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J. WILLIAM BRAMMER, JR., Judge

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GARYE L. VÁSQUEZ, Judge