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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STATE OF ARIZONA, Respondent, v. LARRY DEAN DeYOUNG, Petitioner.	2 CA-CR 2009-0216-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR93018872

Honorable Bradley M. Soos, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

Larry Dean DeYoung
Tucson
In Propria Persona

E S P I N O S A, Presiding Judge.

¶1 Petitioner Larry DeYoung seeks review of the trial court's order summarily dismissing his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. For the reasons stated below, we grant review but deny relief.

¶2 After a 1996 jury trial, DeYoung was convicted of five counts of aggravated assault, two counts of attempted first-degree murder, one count of attempted second-degree murder, three counts of endangerment, five counts of misconduct involving a weapon, and one count each of possession of drug paraphernalia and possession of dangerous drugs. The trial court sentenced him to consecutive and concurrent prison terms totaling 145 years.

¶3 We affirmed DeYoung's conviction and sentence on appeal. *State v. DeYoung*, Nos. 2 CA-CR 96-0716, 2 CA-CR 99-0447-PR, and 2 CA-CR 00-0358-PR (consolidated) (memorandum decision filed Sep. 20, 2001). As we summarized in that decision,

> DeYoung's convictions arose from two incidents that occurred on the same day in December 1993 at his home. First, he threatened to shoot his then wife, Christina. After she reported that incident to law enforcement, he shot at officers who arrived to search DeYoung's home, wounding two of them.

Id. ¶ 2. In the same decision, we denied relief on consolidated petitions for review of the court's denial of the first two petitions for post-conviction relief. DeYoung has initiated at least three other Rule 32 proceedings in which the trial court denied relief, as have we, on review. *See State v. DeYoung*, No. 2 CA-CR 01-0386-PR (memorandum decision filed Feb. 12, 2002); *State v. DeYoung*, Nos. 2 CA-CR 01-0252-PR, and 2 CA-CR 00-0293-PR (consolidated) (memorandum decision filed Jan. 22, 2002).[1]

[1]From the record before us, we are unable to determine whether DeYoung has initiated other Rule 32 proceedings in the trial court.

¶4 At issue here is the propriety of the trial court's ruling on the petition DeYoung filed in February 2009. In that petition, he claimed he was entitled to relief based on newly discovered evidence and a significant change in the law. *See* Ariz. R. Crim. P. 32.1(e), (g).[2] First, DeYoung argued he was deprived of a fair and impartial jury, alleging he has recently discovered evidence that a member of the jury "failed to answer honestly a material question" during voir dire, which DeYoung contended was presumptively prejudicial. In addition, he maintained evidence used at his trial was the result of an unlawful search under the rule announced in *Georgia v. Randolph*, 547 U.S. 103, 114-15 (2006), which he asserted was a significant change in the law contemplated by Rule 32.1(g). The state did not file a response to DeYoung's petition, and the trial court summarily dismissed it, denying relief.[3] *See* Ariz. R. Crim. P. 32.6(c) (court shall dismiss petition when "no [non-precluded] claim presents a material issue of fact or law which would entitle the defendant to relief . . . and . . . no purpose would be served by any further proceedings"). The court subsequently denied DeYoung's motion for rehearing, and he has petitioned for review of both decisions.

¶5 On review, DeYoung argues he raised colorable claims entitling him to an evidentiary hearing, and that the trial court therefore erred in summarily dismissing his

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[2]Claims meeting the requirements of these grounds are not subject to preclusion under Rule 32.2(a). *See* Ariz. R. Crim. P. 32.2(b).

[3]We reject DeYoung's argument on review that he is entitled to relief because the state failed to file a response to his petition for post-conviction relief. *See State v. Curtis*, 185 Ariz. 112, 114-15, 912 P.2d 1341, 1343-44 (App.1995) ("[t]rial courts . . . have inherent power to dismiss facially invalid [Rule 32] claims" before state files response), *disapproved on other grounds by Stewart v. Smith*, 202 Ariz. 446, ¶ 10, 46 P.3d 1067, 1071 (2002).

petition. We will not disturb a court's determination that a defendant has failed to state a colorable claim for Rule 32 relief absent an abuse of discretion. *State v. Krum*, 183 Ariz. 288, 293, 903 P.2d 596, 601 (1995). We find no abuse of discretion here.

Newly Discovered Evidence

¶6 A colorable claim is one that has the "'appearance of validity,'" *State v. Adamson*, 136 Ariz. 250, 265, 665 P.2d 972, 987 (1983), *quoting State v. Richmond*, 114 Ariz. 186, 194, 560 P.2d 41, 49 (1976), such that, "if the allegations are true," it "might have changed the outcome," *State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993). But a petitioner is entitled to relief pursuant to Rule 32.1(e) only if he shows that "[n]ewly discovered material facts probably exist and such facts probably would have changed the verdict or sentence." Applying these rules together, a petitioner is entitled to an evidentiary hearing on a claim of newly discovered evidence if he has "plausibly show[n]" that newly discovered facts exist and probably would have changed the verdict. *Krum*, 183 Ariz. at 292-93, 903 P.2d at 600-01 (combining rules); *see also State v. Bilke*, 162 Ariz. 51, 52-53, 781 P.2d 28, 29-30 (1989) (colorable claim of newly-discovered evidence requires showing that "it would likely have altered the verdict, finding, or sentence if known at the time of trial").

¶7 DeYoung maintains that, in 2006, his attorney sent him copies of Arizona Department of Corrections (ADOC) records, including a 1997 report from a prison nurse requesting DeYoung's cell reassignment. According to her report, the nurse realized in February 1997 that "[she] knew Inmate DeYoung," explaining she had served as a juror in

his lengthy criminal trial the year before. She further reported she feared for her safety if DeYoung continued to be placed in the prison yard to which she had been assigned.

¶8 After seeing this report, DeYoung searched his full ADOC medical record and discovered a note in his medical chart indicating that the same nurse had "irrigated [DeYoung's] ear" in June 1985, "during his previous incarceration" in ADOC. Based on this evidence, DeYoung claims the nurse was guilty of jury misconduct because she failed to disclose during voir dire that she had once treated him. He further argues her failure to disclose this information was material because it necessarily involved knowledge that DeYoung had previously been incarcerated for a felony conviction, a fact which, he maintains, was never introduced at trial.

¶9 Although DeYoung suggests the juror had "failed to answer honestly a material question on voir dire," neither his petition for post-conviction relief nor his petition for review identifies the allegedly material question asked or the allegedly dishonest answer given. Based on our review of the juror's statements during voir dire, DeYoung can only be referring to her failure to raise her hand when the court asked if any panel member knew DeYoung. But DeYoung provides no basis for his suggestion that, during voir dire, the juror had recognized him as a convicted felon she had treated on one occasion eleven years earlier. *Cf. State v. Hoskins*, 199 Ariz. 127, ¶ 52, 14 P.3d 997, 1012 (2000) (conviction affirmed where defendant showed no prejudice from juror's failure to disclose "a single, wholly impersonal exchange" with state's witness that juror did not recall).

¶10 Indeed, in maintaining his claim is "newly discovered," and therefore not precluded, DeYoung acknowledges his own failure to recognize the juror at the time of his trial. But to warrant an evidentiary hearing, a claim "must consist of more than conclusory assertions," *State v. Donald*, 198 Ariz. 406, ¶ 21, 10 P.3d 1193, 1201 (App. 2000), and mere "[s]peculation as to juror bias is insufficient to establish that [a] defendant was denied a fair trial," *State v. Soule*, 164 Ariz. 165, 168-69, 791 P.2d 1048, 1051-52 (App. 1989). Moreover, belying DeYoung's claim that he was prejudiced by the juror's knowledge he had been convicted of a felony, evidence of his prior felony conviction was admitted by stipulation to establish a required element of the weapons misconduct charges he was convicted of. In sum, the trial court reasonably could have found it wholly implausible that a juror's provision of an incidental medical service to DeYoung on a single occasion in the distant past was a "newly discovered material fact[]" that "probably would have changed the verdict," Ariz. R. Crim. P. 32.1(e). The court therefore did not abuse its discretion in summarily denying relief.

Significant Change in the Law

¶11 DeYoung's second contention, below and here, is that the Supreme Court's decision in *Georgia v. Randolph*, 547 U.S. 103 (2006), constitutes a significant change in the law, applicable to his case, that "would probably overturn [his] conviction." Ariz. R. Crim. P. 32.1(g). *Randolph* affirmed a decision suppressing evidence recovered during a warrantless search conducted "over the express refusal of consent by a physically present

resident," even though another resident had consented to the search. 547 U.S. at 120. DeYoung does not dispute that Christina had given deputies a signed consent to search her home, but contends Pinal County Sheriff's deputies entered and searched the premises unlawfully. Although DeYoung's conviction was final in 2002, he argues the rule announced in *Randolph* should apply retroactively to his case, entitling him to a new trial.

¶12 We need not decide whether *Randolph* was a "watershed" decision that must be given retroactive effect. *See Teague v. Lane*, 489 U.S. 288, 311 (1989); *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004) (applying *Teague* analysis to determine whether new criminal rule should be applied retroactively); *State v. Towery*, 204 Ariz. 386, ¶ 14, 64 P.3d 828, 833 (2003) (same); *State v. Sepulveda*, 201 Ariz. 158, ¶ 6, 32 P.3d 1085, 1087 (App. 2001) (same).

¶13 *Randolph* is factually distinguishable from this case and would not entitle DeYoung to relief even if the case were given retroactive application. In *Randolph*, the defendant had "unequivocally refused" consent to search the premises. 547 U.S. at 107. In contrast here, DeYoung, who contends he did not hear a deputy knock and announce his identity, did not expressly refuse entry. The Court in *Randolph* explained it was "drawing a fine line": "[I]f a potential defendant with self-interest in objecting is in fact at the door and objects, the co-tenant's permission does not suffice for a reasonable search, whereas the potential objector, nearby but not invited to take part in the threshold colloquy, loses out." *Id.* at 121. Thus, the officers were not required "to take affirmative steps to find a potentially

objecting co-tenant[, here, DeYoung,] before acting on the permission they had already received." *Id.* at 122. The facts in this case simply do not fall within *Randolph*'s narrow exception to lawful searches based on third-party consent.

¶14 Additionally, DeYoung's primary claim does not appear to be that evidence from the search was erroneously admitted, which is the issue the Court addressed in *Randolph*. Instead, DeYoung relies on *Randolph* to argue the trial court improperly excluded evidence that he had acted in self defense when he fired shots at the officers who had entered the home. According to DeYoung, the trial court's determination that the search was lawful, based on Christina's consent, "resulted in the complete exclusion of [DeYoung's] self-defense witnesses [and] evidence at trial." But *Randolph* is irrelevant to DeYoung's claim, because that case does not address when the force used by police during a search or arrest is excessive, as required to justify a defendant's actions in self defense. *See* A.R.S. § 13-404(B)(2) ("The threat or use of physical force against another is not justified . . . [t]o resist an arrest that the person knows or should know is being made by a peace officer . . . *whether the arrest is lawful or unlawful*, unless the physical force used by the peace officer exceeds that allowed by law") (emphasis added).

¶15 Finally, DeYoung does not clearly identify the court's allegedly wrongful exclusion of evidence or testimony by citation to the record, much less demonstrate how this unidentified, excluded evidence probably would have changed the jury's verdict. Instead, he cites only the court's warning, outside the presence of the jury, that DeYoung's broad

questions to police officers about probable cause and exigent circumstances were not relevant to his claim of self defense and were confusing to the jury.[4] DeYoung thus failed to state a colorable claim that the rule announced in *Randolph*, even were it to apply retroactively to his long-final conviction, would probably overturn it. *See* Ariz. R. Civ. P. 32.1(g).

¶16 For the foregoing reasons, DeYoung has failed to sustain his burden of showing the trial court abused its discretion in summarily denying Rule 32 relief. Accordingly, we grant review, but deny relief.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

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

[4]DeYoung represented himself during trial, with the assistance of appointed counsel. At DeYoung's request, the trial court instructed the jury on his claim of self defense.