Court of Criminal Appeals

State of Alabama
Judicial Building, 300 Dexter Avenue
P. O. Box 301555
Montgomery, AL 36130-1555

MEMORANDUM

CR-12-0847 Tuscaloosa Circuit Court CC-03-2648.63

Elvin Earl Darby, II v. State of Alabama

KELLUM, Judge.

Elvin Earl Darby, II appeals the circuit court's summary dismissal of his petition for postconviction relief filed pursuant to Rule 32, Ala. R. Crim. P., in which he attacked his 2005 convictions for two counts of first-degree sodomy and his resulting sentences of 50 years' imprisonment for each conviction. This Court affirmed Darby's convictions and sentences on appeal in an unpublished memorandum issued on March 17, 2006. Darby v. State, (No. CR-04-1994) 976 So. 2d 522 (Ala. Crim. App. 2006) (table). This Court issued a

certificate of judgment on April 4, 2006.[1]

Darby filed this, his fourth, Rule 32 petition on May 16, 2012.[2] Although disjointed and confusing, as best we can discern, Darby alleged in his petition:

> (1) That newly discovered material facts, which he allegedly discovered on April 3, 2012, required that his convictions and sentences be vacated, and substantiates that the victims and the district attorney conspired to present false and perjured testimony against him;
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> (2) That the trial court erred in allowing out-of-court statements from the victim to be admitted at his trial pursuant to § 15-25-30, Ala. Code 1975;
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> (3) That the Tuscaloosa County Sheriff's Department "failed to conduct an unbiased investigation" (C. 45);
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> (4) That in denying his first Rule 32 petition after an evidentiary hearing, the circuit court "misinterpreted the evidentiary hearing evidence" (C. 49); and
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> (5) That his trial counsel was ineffective.

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[1]This court may take judicial notice of its own records. See Nettles v. State, 731 So. 2d 626, 629 (Ala. Crim. App. 1998), and Hull v. State, 607 So. 2d 369, 371 n.1 (Ala. Crim. App. 1992).

[2]Darby filed his first petition in September 2006 and, after a hearing, the circuit court denied the petition. This Court affirmed the denial on appeal. Darby v. State, (No. CR-06-1281) 19 So. 3d 263 (Ala. Crim. App. 2007) (table). Darby filed his second petition in March 2008 and the circuit court summarily dismissed the petition. This Court affirmed the dismissal on appeal. Darby v. State, (No. CR-07-1432) 51 So. 3d 404 (Ala. Crim. App. 2009) (table). Darby filed his third petition in 2010 and the circuit court summarily dismissed the petition. Darby's appeal from that dismissal was dismissed by this Court on Darby's motion. (Case no. CR-09-0823.)

Darby attached to his petition various documents, including but not limited to: a copy of a page from the July 26, 2003, issue of The Tuscaloosa News listing the television broadcasts for the night of July 26, 2003; a copy of a report from the Alabama Department of Forensic Sciences; and a copy of the circuit court's order denying his first Rule 32 petition.

On May 25, 2012, before receiving a response from the State, the circuit court issued an order granting Darby's request to proceed in forma pauperis, noting that Darby's petition failed to sufficiently allege a claim of newly discovered material facts and that all other claims had been raised in his previous petition, but nonetheless giving Darby "30 days to amend if he so chooses to state a claim." (C. 70.) On or about August 13, 2012, the State filed a response and motion to dismiss Darby's petition, arguing that Darby failed to sufficiently allege a claim of newly discovered material facts, that he failed to sufficiently plead his claim of ineffective assistance of counsel, and that all of his claims were precluded by Rules 32.2(a)(4), (a)(5), (b), and (c).

On August 21, 2013, Darby filed a "Motion to Correct Clerical Mistake," in which he requested that the State provide a copy of its response and motion to dismiss with page numbers so that he would be able to reference the appropriate pages. (C. 78.) On August 27, 2013, Darby filed a "traverse" to the State's response and motion to dismiss, arguing that his claim of newly discovered material facts was valid because he had only discovered the evidence on April 3, 2012, and that his claim of ineffective assistance of counsel was based on the evidence presented at the hearing on his first Rule 32 petition and, thus, was made as soon as practicable and could not be precluded. (C. 79.) On August 31, 2013, Darby filed a "Motion to Receive Court Order," in which he requested a copy of "the court order that caused the State of Alabama to issue a 'State's Response to Petitioner's Rule 32 and Motion to Dismiss" as well as "time to respond to the State."[3] (C. 83.)

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[3]It is not clear why Darby requested time to respond when he had already filed his "traverse" to the State's response and motion to dismiss.

On October 9, 2012, Darby filed a "Motion to Clarify Procedure," in which he requested that the circuit court explain why he had received a response from the State but had "not received a Court Order addressing the Rule 32 petition, in forma pauperis application, or an order for the State to respond" and questioned whether or not his petition was "now properly before this Honorable Court?" (C. 85.) On November 9, 2012, Darby filed an "Amendment to Clarify Pleading," in which he made additional arguments regarding his claim of newly discovered material facts, claim (1), as set out above. (C. 86.) On November 16, 2012, Darby filed a second "Amendment to Pleading," in which he appeared to expand on claim (4), as set out above, challenging the circuit court's denial of his first petition.[4] (C. 88.) Darby attached to his second amendment a copy of the State's answer and motion to dismiss his first petition. On December 7, 2012, Darby filed a third amendment to his petition, styled as a "Motion to Amend Rule 32 Petition By Adding a Pleading Pursuant to Rule 32.7(b), A. R. Cr. P.," in which he alleged that the jury was contaminated by extraneous influences. (C. 94.) This claim appeared to be nothing more than a restatement of claims (1), and (4), as set out above, but labeled differently.

On December 27, 2012, the circuit court issued an order summarily dismissing Darby's Rule 32 petition, stating:

> "It is difficult, even after all of the 'amendments' filed by the Petitioner, to precisely articulate what is being claimed in this 4th post-conviction Rule 32 proceeding. Essentially, the Petitioner is claiming that one or more witnesses lied at trial, and that the State somehow was complicit in this deceit by presenting the evidence. As noted in the May 25, 2012 order in the .00 case,[5] the allegations of the Petitioner in this 4th petition

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[4]We note that Darby requested that the circuit court "enter the above argument as issue (6) six" of his petition even though it appears to be nothing more than additional factual allegations to support claim (5), as set out above. (C. 89.)

[5]The case number listed on the circuit court's May 25, 2012, order was CC-03-2648.00.

> are successive. In addition, the Petitioner raises matters that were for the jury to decide (credibility). He fails to articulate any newly discovered evidence that would entitle him to relief, or how any of the allegations could not have been known at trial.
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> "To the extent the Petitioner is claiming that certain facts testified to by a witness were not correct -- which seems to be the sum and substance of his complaint -- the Rule 32 petition is dismissed as the claims were or could have been raised at trial or on appeal; that the pleadings as amended fail to set forth newly discovered evidence that would entitle him to relief nor how any such evidence could not have been known; that the claims are successive and repetitive of earlier claims and relief cannot be granted; that the claims are not timely; and that relief cannot be granted under 32.2(a)(4)."

(C. 93.)

On January 11, 2013, Darby filed a "Motion to Dismiss," in which he requested that his convictions and sentences be vacated based on the various claims he raised in his petition and three amendments. (C. 98.) On January 14, 2013, the circuit court issued an order denying Darby's December 7, 2012, "motion to amend" on the ground that it had been filed "after the conclusion of the case [and] does not set forth any grounds or assertions that justify" accepting it. (C. 101.) It does not appear that the circuit court ruled on Darby's motion to dismiss. On January 18, 2013, Darby filed a postjudgment motion to reconsider, in which he reasserted claim (1), as set out above, and then stated that he "would prefer not to answer amendments two thru seven in the .63 case" because, he said, he did not receive the circuit court's May 25, 2012, order.[6] (C. 107). The same day Darby also

[6]It appears that Darby's reference to "amendments two thru seven" was a reference to claims (2) through (5), as set out above, that were raised in his original petition, and to the claims raised in his November 16, 2012, and December 7, 2012,

filed a "Request for Court Order," in which he requested that the circuit court provide him with a copy of its May 25, 2012, order which, Darby said, he had never received. (C. 108.) On January 23, 2013, the circuit court issued on order denying Darby's motion to reconsider.

On February 4, 2013, Darby filed three motions: (1) a motion styled as a "Motion to Supplement the Record Under Rule 32.4," in which he appeared to reassert claims (1) and (2) from his petition, as set out above (C. 110); (2) a "Motion to Correct the Record Under Rule 32.4," requesting that the court correct the record to reflect that he had "not filed a 'Motion to Reconsider Court Order' ... [but] ha[d] filed a 'Motion to Supplement the Record'" (C. 114); and (3) a second "Motion to Supplement the Record Under Rule 32.4, A. R. Cr. P.," in which he argued that the fact that this was his fourth Rule 32 petition had "overshadowed" the facts alleged in his petition and then reiterated the claims he had raised in his petition. (C. 116.) On February 6, 2013, Darby filed a timely notice of appeal. On February 12, 2013, the circuit court issued an order purportedly denying Darby's Motion to Supplement the Record;[7] however, the circuit court lost jurisdiction over the Rule 32 proceedings 30 days after its December 27, 2012, summary dismissal of Darby's petition and its February 12, 2013, order was void. See Loggins v. State, 910 So. 2d 146, 149 (Ala. Crim. App. 2005) (a circuit court retains jurisdiction for only 30 days after its judgment in a Rule 32 proceeding). On February 23, 2013, Darby filed yet another pleading, styled, in part, as a "Motion to Clarify Petitioner's Purpose in Presenting Rule 32 Petition," in which Darby set out the procedural history of his fourth Rule 32 petition. (C. 144.) The circuit court purported to deny the motion on March 7, 2013. This appeal followed.

I.

In his initial brief on appeal, Darby appears to make a single argument -- that the circuit court erred in not providing him with a copy of its May 25, 2012, order giving

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amendments.

[7]The circuit court did not identify in its order which of Darby's two motions to supplement it was purportedly denying.

him 30 days to amend his petition. He argues that the court's failure to provide him with a copy of the order denied him due process because, he says, it denied him a "fair opportunity to amend his Rule 32 petition based on the trial court's opinion and to do so within the 30 days ordered by the trial court to state a claim." (Darby's brief, p. 7.) Darby alleges that had he been served with a copy of the order, he could have amended his claim of newly discovered material facts, and he included in his brief what he claims to be his "amended" claim of newly discovered material facts that he would have submitted to the circuit court had he received the court's May 25, 2012, order.[8]

Initially, we point out that this issue was never presented to the circuit court. As already explained in detail, Darby filed numerous pleadings in the circuit court, both before and after the circuit court's December 27, 2012, summary dismissal of his petition. We have thoroughly reviewed those pleadings that Darby timely filed[9] and we can find no instance in which Darby specifically argued to the circuit court that its failure to provide him with a copy of the court's May 25, 2012, order violated his right to due process. However, Darby argues on appeal that, despite his postjudgment attempts to obtain a copy of the May 25, 2012, order, he did not receive the order -- and, thus, did not know the contents of the order -- until the record on appeal was completed. Under these circumstances, it would have been impossible for Darby to have properly raised his due-process claim in the circuit court. Therefore, we will not prevent Darby from raising this issue for the first time on appeal. See Abdeldayem v. State, 988 So. 2d 608, 610 (Ala. Crim. App. 2007) (where neither petitioner nor his counsel were aware, until after the time for filing a postjudgment motion had passed, that the State had responded to the petition or even that the petition had even been denied, petitioner's argument

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[8]We note that Darby does not argue on appeal that he would have amended any of the other claims in his petition, nor does he pursue any of those other claims on appeal. See Part II of this memorandum.

[9]Those pleadings filed by Darby more than 30 days after the circuit court's December 27, 2012, summary dismissal of his petition were untimely and we do not consider them.

on appeal that he was denied due process when his counsel was not served with copies of any of the circuit court's orders or a copy of the State's response, could be raised for the first time on appeal).

There is no doubt that the failure of a circuit court to serve its orders on a Rule 32 petitioner or his or her counsel, whichever the case may be, is a denial of due process. See Abdeldayem, 988 So. 2d at 610-14; and Presley v. State, 978 So. 2d 63, 66-68 (Ala. Crim. App. 2005). However, even constitutional errors are subject to harmless-error analysis. See Chapman v. California, 386 U.S. 18 (1967). "In order for a constitutional error to be deemed harmless under Chapman, the state must prove beyond a reasonable doubt that the error did not contribute to the" judgment. Davis v. State, 718 So. 2d 1148, 1164 (Ala. Crim. App. 1995), aff'd, 718 So. 2d 1166 (Ala. 1998). In other words, "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." Ex parte Baker, 906 So. 2d 277, 287 (Ala. 2004) (quoting Chapman, 386 U.S. at 24).

Moreover, Rule 45, Ala. R. App. P., provides, in part:

> "No judgment may be reversed or set aside, nor new trial granted in any civil or criminal case on the ground of misdirection of the jury, the giving or refusal of special charges or the improper admission or rejection of evidence, nor for error as to any matter of pleading or procedure, unless in the opinion of the court to which the appeal is taken or application is made, after an examination of the entire cause, it should appear that the error complained of has probably injuriously affected substantial rights of the parties."

"In order for the error to be deemed harmless under Ala. R. App. P. 45, the state must establish that the error did not or probably did not injuriously affect the appellant's substantial rights." Davis, 718 So. 2d at 1164. "The purpose of the harmless error rule is to avoid setting aside a [judgment] for small errors or defects that have little, if any, likelihood of changing the result." Id. This Court has applied the harmless-error rule in Rule 32 proceedings. See

Musgrove v. State, [Ms. CR-07-1528, November 2, 2012] ___ So. 3d ___, ___ (Ala. Crim. App. 2012); Jenkins v. State, 105 So. 3d 1234, 1245 (Ala. Crim. App. 2011), aff'd, 105 So. 3d 1250 (Ala. 2011); Madison v. State, 999 So. 2d 561, 567 (Ala. Crim. App. 2006); Hyde v. State, 950 So. 2d 344, 371 (Ala. Crim. App. 2006); Wilson v. State, 911 So. 2d 40, 46 (Ala. Crim. App. 2005); Moran v. State, 649 So. 2d 1292, 1293 (Ala. Crim. App. 1993); and Young v. State, 600 So. 2d 1073, 1075-76 (Ala. Crim. App. 1992).

In this case, we find that any error in the circuit court not serving Darby with a copy of its May 25, 2012, order in which it gave Darby 30 days to amend his petition was harmless beyond a reasonable doubt and did not affect Darby's substantial rights. Although Darby may not have received the court's order, Darby managed to file two amendments to his petition -- on November 9, 2012, and November 16, 2012, respectively -- in which he amended his claim of newly discovered material facts, claim (1), as set out above, and his claim challenging the circuit court's denial of his first Rule 32 petition, claim (4), as set out above. Both of those amendments, although not filed within 30 days of the circuit court's order, were nonetheless accepted and considered by the circuit court.

Moreover, it is abundantly clear from the record that it would have been impossible for Darby to amend his claim of newly discovered material facts to avoid summary dismissal of that claim. In Young, supra, this Court held that any error in the State not filing a response to the Rule 32 petition and, thus, not giving the petitioner notice of any applicable preclusions, was harmless. We explained:

> "Under the present circumstances, had Young been given adequate notice of the applicable grounds of preclusion, Young could not have formulated any plausible argument or presented any evidence to overcome the facts supporting application of the limitations period, to dispute the fact that one issue had previously been decided on its merits, or to overcome the legal requirement that Young could attack only the validity of the murder conviction and sentence in the present petition, not the validity of the prior convictions used to enhance

> his sentence. The facts upon which the preclusion grounds are founded -- the date of issuance of certificate of judgment, the date of the filing of the instant petition, and the trial court's finding that Young's prior convictions are adult convictions -- are beyond dispute; we have discerned them from records before us."

600 So. 2d at 1075. Similarly, here, even had Darby received the circuit court's May 25, 2012, order, it would have been impossible for him to have amended his petition to sufficiently allege a claim of newly discovered material facts.

Darby alleged in his petition that a page from the July 26, 2003, issue of The Tuscaloosa News listing the television broadcasts for the night of July 26, 2003, constituted newly discovered material facts. Darby argued that at trial the State established through the testimony of witness S.H. and the victims, J.H. and K.S., that J.H. and K.S. were planning to watch the movie entitled "Scary Movie" on television the night of the crimes, July 26, 2003. Darby also argued that the victims indicated that Darby sodomized them while the movie was on television. Darby asserted, however, that a page from the July 26, 2003, edition of The Tuscaloosa News listing the television broadcasts for the night of July 26, 2003, which he attached to his petition as Exhibit A, established that the movie "Scary Movie" was not broadcast on any cable channel the night of July 26, 2003. Thus, Darby concluded, the victims' testimony regarding what they were watching at the time of the crimes was false. The fact that the victims lied about what they were watching on television at the time of the crimes, Darby argued, coupled with various alleged inconsistencies among the testimonies of S.H., J.H., and K.S., which Darby argued extensively in his petition, established that S.H., J.H., K.S., and the assistant district attorney who prosecuted him knowingly conspired to commit fraud upon the court and the jury and to present perjured testimony in order to wrongfully convict him of crimes he did not commit.

In his petition, Darby further alleged that the broadcast schedule was not known at trial because, he said, neither the district attorney's office nor the public defender's office, which represented him, "with all their resources," found the

television broadcast schedule that had been printed in The Tuscaloosa News on July 26, 2003. (C. 25.) He also argued that because he was incarcerated, he "did not have the mobility or access to the necessary means to locate the evidence." (C. 25.) According to Darby, he did not receive a copy of the page from The Tuscaloosa News until April 3, 2012, when a friend went to the Tuscaloosa Public Library, made a copy of the page, and mailed it to him. Finally, Darby asserted in his postjudgment motion to reconsider that the circuit court had "assured [him] in a court order dated May 4, 2007, ... that [he] had competent, professional counsel and therefore, if the evidence would have been available ... it would have been discovered by Darby's counsel." (C. 106-07.)[10]

In his so-called "amended" claim of newly discovered material facts in his brief on appeal, Darby makes no additional argument and does not allege any additional material facts to support his claim that were not presented to the circuit court in his petition or amendments. Nor could

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[10]It appears that Darby was referring to the circuit court's order denying his postjudgment motion to amend his first Rule 32 petition. In his first petition, Darby alleged, among other things, that his trial counsel was ineffective for proceeding to trial without obtaining the results of the forensic testing done on the bed sheets on which the crimes occurred. After a hearing at which Darby was represented by counsel, the circuit court denied Darby's first petition on March 30, 2007. On May 2, 2007, Darby attempted to amend his petition with what he said were six new claims that he had in his possession at the time of the hearing but chose not to file because of an alleged conflict with his Rule 32 counsel. Although the circuit court lost jurisdiction over the Rule 32 proceedings 30 days after its March 30, 2007, denial of Darby's first Rule 32 petition, or on April 30, 2007, it issued an order on May 4, 2007, finding that Rule 32 counsel had represented Darby in a professional and thorough manner. The court also noted in the order that Darby had had a fair trial and had been represented at trial by competent and professional trial counsel. Contrary to Darby's belief, the court's order in no way indicates that his trial counsel could not have discovered the television broadcast schedule in time for Darby's trial.

he. The television broadcast schedule that forms the entire basis of Darby's claim of newly discovered material facts clearly fails to satisfy the requirements in Rule 32.1(e), which provides:

> "Subject to the limitations of Rule 32.2, any defendant who has been convicted of a criminal offense may institute a proceeding in the court of original conviction to secure appropriate relief on the ground that:
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> "....
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> "(e) Newly discovered material facts exist which require that the conviction or sentence be vacated by the court, because:
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> "(1) The facts relied upon were not known by the petitioner or the petitioner's counsel at the time of trial or sentencing or in time to file a posttrial motion pursuant to Rule 24, or in time to be included in any previous collateral proceeding and could not have been discovered by any of those times through the exercise of reasonable diligence;
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> "(2) The facts are not merely cumulative to other facts that were known;
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> "(3) The facts do not merely amount to impeachment evidence;
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> "(4) If the facts had been known at the time of trial or of sentencing, the result probably would have been different; and
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> "(5) The facts establish that the petitioner is innocent of the crime for which the petitioner was convicted or should not have received the sentence that the petitioner received."

It is well settled that all five requirements in Rule 32.1(e) must be satisfied in order to constitute newly discovered evidence. See McCartha v. State, 78 So. 3d 1014 (Ala. Crim. App. 2011).

Despite Darby's arguments to the contrary, the televison broadcast schedule that was printed in The Tuscaloosa News on July 26, 2003, fails to satisfy Rule 32.1(e)(1) because it clearly could have been obtained before Darby's trial through the exercise of reasonable diligence. Moreover, the broadcast schedule fails to satisfy Rule 32.1(e)(3) -- which requires that the newly discovered fact amount to more than merely impeachment evidence -- and Rule 32.1(e)(5) -- which requires that the newly discovered facts "go to the issue of the defendant's actual innocence," i.e., are relevant to the issue of guilt or innocence, "as opposed to a procedural violation not directly bearing on guilt or innocence." Ex parte Ward, 89 So. 3d 720, 727 (Ala. 2011.) What the victims were supposedly watching on television at the time of the crimes is not relevant to whether or not Darby committed the crimes. At most, this evidence would have been relevant to the credibility of the victims, i.e., as impeachment evidence.

The very nature of Darby's claim necessarily establishes that it does not, in fact, constitute newly discovered material facts under Rule 32.1(e) and there is simply no fathomable way that Darby could have amended his claim to make it satisfy the requirements of newly discovered material facts. Therefore, after thoroughly reviewing the record in this case, we conclude that any error in the circuit court not serving Darby with a copy of its May 25, 2012, order, in which the court gave Darby 30 days to amend his petition to properly state a claim, was harmless beyond a reasonable doubt and did not adversely affect Darby's ability to prosecute his fourth Rule 32 petition.

II.

At the end of the argument section in his initial brief, Darby states:

> "In the Trial Court's 'Order Dismissing Rule 32 Petition,' (C. 93), it appears th[at] the Trial Court is basing its ruling solely on, claim one, newly discovered evidence, of the Rule 32 petition. (C. 28-41). Since the Trial Court has never adjudicated any claim other than the newly discovered evidence, (Case No: CC-2003-2648.60; C. 139-141), Darby asserts that claims two thru five,

> (C. 42-53) and amendments, (C. 88-89; C. 94-97), are now presented before This Honorable Court as they appear in the 'Record on Appeal by Trial Clerk,' dated March 12, 2013, based on the fact that the Trial Court failed to furnish a May 25, 2012, court order, (C. 70), without undue delay, corrupting Darby's postconviction relief process, denying him the ability to address the claims in the Trial Court and establish exactly what the Trial Court's opinion is on each claim."

(Darby's brief, p. 20.)

To the extent that this is an argument that the circuit court failed to rule on all of the claims in Darby's petition and the two amendments that were accepted by the circuit court, it is meritless. Merely because the circuit court did not specifically mention in its order each of the claims Darby raised in his petition and two amendments does not mean the circuit court did not rule on those claims. The court's order, as quoted above, is clearly a final judgment summarily disposing of all of Darby's claims in his petition and his two amendments filed on November 9, 2012, and November 16, 2012.

To the extent that this is an argument that the circuit court should have made specific findings regarding each of his claims, because the circuit court summarily dismissed Darby's petition pursuant to Rule 32.7(d), it was not required to make specific findings of fact. See, e.g, Fincher v. State, 724 So. 2d 87, 89 (Ala. Crim. App. 1998) ("Rule 32.7 does not require the trial court to make specific findings of fact upon a summary dismissal.").

Finally, to the extent Darby here is attempting to reassert claims (2) through (5), as set out above, as well as the claims raised in his November 16, 2012, amendment and his December 7, 2012, amendment, he has failed to comply with Rule 28(a)(10), Ala. R. App. P., which requires that an argument contain "the contentions of the appellant/petitioner with respect to the issues presented, and the reasons therefor, with citations to the cases, statutes, other authorities, and parts of the record relied on." Darby cites no authority and makes no argument regarding why he believes the circuit court erred in dismissing claims (2) through (5), as set out above,

as well as the claims raised in his November 16, 2012, amendment and his December 7, 2012, amendment. Indeed, Darby does not even identify within this argument what those claims were. Because Darby has failed to sufficiently argue in his initial brief on appeal any claim raised in his petition other than his claim of newly discovered material facts, all of the remaining claims Darby raised in the circuit court are deemed to be waived and will not be considered by this Court. See C.B.D. v. State, 90 So. 3d 227, 239 (Ala. Crim. App. 2011) ("Failure to comply with Rule 28(a)(10) has been deemed a waiver of the issue presented.").

III.

In his reply brief on appeal, Darby raises the following four issues:

> (1) "Darby's Rule 32 petition submitted to the circuit court May 16, 2012, is null as of June 24, 2012" (Darby's reply brief, p. 2);
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> (2) "The circuit court abused its discretion when the court failed to furnish Darby a copy of the court's May 25, 2012, order" (Darby's reply brief, p. 2);
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> (3) "Newly discovered evidence, a [television] guide, exposed three State witnesses intentionally, knowingly, and willingly committing multiple crimes in order to deceive the jury into convicting Darby" (Darby's reply brief, p. 5); and
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> (4) "Darby has re-introduced his newly discovered evidence claim on the grounds that the court's factual determination is not based on the evidence of the case (case no: CC-2003-2648.60)." (Darby's brief, p. 6.)

Issue (2) was properly raised in Darby's initial brief on appeal and rejected by this Court in Part I of this memorandum. As part of that issue, we likewise necessarily rejected Issue (3). Issue (4), which appears to correspond to claim (4) in Darby's petition, as set forth previously, was not properly raised in Darby's initial brief on appeal, see

Part II of this memorandum, and, thus, it has essentially been raised for the first time in Darby's reply brief. However, "issues raised for the first time in a reply brief are not properly subject to appellate review." Ex parte Powell, 796 So. 2d 434, 436 (Ala. 2001). Finally, Issue (1), although mentioned in passing in the conclusion of Darby's initial brief, was not specifically argued by Darby in his initial brief and, thus, is also not properly before this Court.

IV.

Rule 32.7(d), Ala. R. Crim. P., authorizes the circuit court to summarily dismiss a petitioner's Rule 32 petition

> "[i]f the court determines that the petition is not sufficiently specific, or is precluded, or fails to state a claim, or that no material issue of fact or law exists which would entitle the petitioner to relief under this rule and that no purpose would be served by any further proceedings ..."

See also Hannon v. State, 861 So. 2d 426, 427 (Ala. Crim. App. 2003); Cogman v. State, 852 So. 2d 191, 193 (Ala. Crim. App. 2002); Tatum v. State, 607 So. 2d 383, 384 (Ala. Crim. App. 1992). Because Darby failed to satisfy the requirements of Rule 32.1(e) and he does not pursue any other claim from his petition on appeal, we conclude that summary disposition of Darby's Rule 32 petition was appropriate.

Based on the foregoing, the judgment of the circuit court is affirmed.

AFFIRMED.

Welch and Joiner, JJ., concur.