

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

JUN 20 2013

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2013-0022-PR
)	DEPARTMENT A
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
JAMES EDRY CARBONETTO,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause Nos. CR20101257001, CR20101989001, CR20102684001, and
CR20102897001

Honorable Jane L. Eikleberry, Judge

REVIEW GRANTED; RELIEF DENIED

Law Office of Emily Danies
By Emily Danies

Tucson
Attorney for Petitioner

MILLER, Judge.

¶1 James Carbonetto petitions this court for review of the trial court’s summary dismissal of his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that ruling unless the court clearly has abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We grant review but deny relief.

¶2 After previously rejecting a plea agreement offered by the state, Carbonetto pled guilty as charged in four cause numbers to three counts of third-degree burglary, two counts of possession of burglary tools, two counts of theft of a means of transportation, and one count each of theft by control, possession of a dangerous drug, and possession of drug paraphernalia. He additionally admitted having ten previous felony convictions. The trial court sentenced him to a combination of concurrent, consecutive, presumptive, and partially mitigated prison terms totaling twenty-eight years’ imprisonment.

¶3 Carbonetto filed a notice of post-conviction relief, and appointed counsel filed a notice of review stating she had reviewed the record and found “no colorable claims” to raise in post-conviction relief. Carbonetto then retained counsel, who filed a petition for post-conviction relief arguing that trial counsel had been ineffective in failing to “hav[e] a psychological evaluation done” or to “order[] medical records” relevant to Carbonetto’s mental health and that a recent psychological evaluation of Carbonetto constituted newly discovered evidence pursuant to Rule 32.1(e).

¶4 Carbonetto claimed in his petition that he had “exhibited behavior” that should have prompted trial counsel to “question[] his . . . state of mind in rejecting the plea,” specifically that Carbonetto had sent a letter to counsel “indicating he wanted to be

punished severely and did not care what sentence he received.” He argued that, had trial counsel obtained a psychological evaluation and had the trial court “been apprised of the depth and complexity of [his] mental health issues,” the court would have sentenced him to “mitigated concurrent terms for all charges” or reinstated the plea offered by the state, “which required concurrent [prison] terms [of] 10-20 years.”

¶5 The trial court summarily dismissed Carbonetto’s petition. It determined Carbonetto “ha[d] not overcome the strong presumption that his trial counsel’s performance was competent.” It further observed that it was made aware before sentencing of Carbonetto’s background and mental health issues. It concluded that “[a] psychological evaluation and medical records would have added very little to the information provided” and would not have changed the sentences imposed. The court also found that, even in light of the information contained in the psychological evaluation, Carbonetto’s “decisions were knowingly, voluntarily and intelligently made.”

¶6 On review, Carbonetto reurges his claims of ineffective assistance of counsel and newly discovered evidence. We address each in turn. Generally, “[t]o 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.” *State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006). That is, he must show that “if the allegations are true, [they] might have changed the outcome.” *State v. Runnigeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993). “Proof of ineffectiveness must be a demonstrable reality rather than a matter of speculation.” *State v. Meeker*, 143 Ariz. 256, 264, 693 P.2d 911, 919 (1984).

¶7 Carbonetto asserts counsel should have obtained a psychological evaluation. It is not entirely clear, however, what Carbonetto argues counsel should have done with that evaluation. To the extent he suggests counsel would have been able to rely on the evaluation to seek reinstatement of the state’s initial plea offer, he cites no supporting authority¹ and does not develop this argument in any meaningful way; accordingly, we do not address the issue further. *See* Ariz. R. Crim. P. 32.9(c)(1)(iv) (petition for review shall contain “reasons why the petition should be granted”); *cf.* *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (claims waived for insufficient argument on appeal). And, in any event, he cites no authority and identifies no evidence suggesting that an attorney falls below prevailing professional norms by failing to obtain a psychological evaluation in these circumstances. *See State v. Donald*, 198 Ariz. 406, ¶ 21, 10 P.3d 1193, 1201 (App. 2000) (to warrant evidentiary hearing, Rule 32 claim “must consist of more than conclusory assertions”).

¶8 To the extent that Carbonetto argues that his “state of mind” was a mental illness that prevented him from understanding the plea agreement, the record does not support the claim. *See generally State v. Djerf*, 191 Ariz. 583, ¶¶ 25-28, 959 P.2d 1274, 1283 (1998) (defendant’s “depressive reactions” observed in psychological evaluation insufficient to establish reasonable grounds for competency hearing). The psychological evaluation notes the psychological factors influencing Carbonetto’s decision without any

¹Carbonetto stated in his petition for post-conviction relief, without citation or explanation, that the trial court could reinstate the state’s plea offer pursuant to *State v. Donald*, 198 Ariz. 406, 10 P.3d 1193 (App. 2000). But he does not squarely raise this claim on review, much less adequately develop or support it.

suggestion that he was not competent to stand trial. Moreover, there is no affidavit from Carbonetto showing facts within his personal knowledge on this issue. *See* Ariz. R. Crim. P. 32.5.²

¶9 Carbonetto further asserts trial counsel could have “use[d the evaluation] at sentencing.” But he identifies no error in the trial court’s conclusion that his sentences would have been the same even had a psychological evaluation been presented. Thus, Carbonetto has not shown resulting prejudice. *See Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d at 68; *Runningeagle*, 176 Ariz. at 63, 859 P.2d at 173. The court did not err in concluding this claim of ineffective assistance of counsel was not colorable.

¶10 The trial court also correctly rejected Carbonetto’s claim of newly discovered evidence. First, we question whether the psychological evaluation qualifies as newly discovered evidence. “In order to be entitled to post-conviction relief on the ground of newly discovered evidence under Rule 32.1(e), a defendant must establish that the evidence was discovered after trial although it existed before trial[and] that it could not have been discovered and produced at trial through reasonable diligence” *State v. Saenz*, 197 Ariz. 487, ¶ 7, 4 P.3d 1030, 1032 (App. 2000). Carbonetto has not argued that the psychological evaluation could not have been obtained before his guilty plea or before sentencing—indeed, his claim of ineffective assistance of counsel depends on his assertion that counsel should have done so. And, even if we assume the psychological evaluation constitutes newly discovered evidence under Rule 32.1(e), the court expressly

²Rule 32.5 was amended effective January 1, 2013. Ariz. Sup. Ct. Order No. R-12-0009 (Aug. 30, 2012). We refer to the version of the rule in effect at the time Carbonetto filed his petition.

found it would not have changed the result at sentencing. *See id.* (defendant not entitled to relief unless newly discovered evidence “probably would have changed the [result]”).

¶11 For the reasons stated, although review is granted, relief is denied.

/s/ Michael Miller

MICHAEL MILLER, Judge

CONCURRING:

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

/s/ Peter J. Eckerstrom

PETER J. ECKERSTROM, Presiding Judge