

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

APR 24 2013

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2013-0068-PR
)	DEPARTMENT A
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
JOHN VINCENT MACKOVICH,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF NAVAJO COUNTY

Cause No. S0900CR0077005363

Honorable John Lamb, Judge

REVIEW GRANTED; RELIEF DENIED

Brad Carlyon, Navajo County Attorney
By Galen H. Wilkes

Holbrook
Attorneys for Respondent

John Vincent Mackovich

Adelanto, CA
In Propria Persona

MILLER, Judge.

¶1 Petitioner John Mackovich seeks review of the trial court's order denying his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. "We will not disturb a trial court's ruling on a petition for post-conviction relief absent a clear

abuse of discretion.” *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Mackovich has not sustained his burden of establishing such abuse here.

¶2 Pursuant to a plea agreement, Mackovich was convicted of robbery in 1977, when he was sixteen years old. The trial court sentenced him to a term of “not less than five nor more than six years” in prison. In 1978, Mackovich initiated a post-conviction relief proceeding, and, after a hearing, Mackovich apparently requested that the Rule 32 proceeding be “terminated and dismissed.”

¶3 In 2001, twenty years after Mackovich was released from prison, he filed an application asking for “the vacation of [his] conviction and dismissal of the information of indictment.” The trial court denied the application in 2003. In 2006, Mackovich filed a petition for review pursuant to Rule 32.9 from the trial court’s 2003 denial, and Division One of this court treated Mackovich’s application as a petition for post-conviction relief and dismissed his petition for review as untimely.¹ Our supreme court denied a subsequent petition for review of that decision.

¶4 In 2007, Mackovich initiated another Rule 32 proceeding raising, inter alia, numerous claims of error by the trial court, bias and obstruction by the Navajo County Clerk’s office, and ineffective assistance of trial and first Rule 32 counsel. The trial court summarily denied relief. The court also denied Mackovich’s subsequent motion for reconsideration.

¶5 On review, Mackovich essentially repeats the arguments made below and argues the trial court did not indicate in its ruling that it had reviewed his petition or reply and did not adequately set forth the basis for its decision dismissing his petition for post-

¹Mackovich claims to have sent “a timely petition for review on Aug. 2, 2003 by depositing it in the institutional legal mail box addressed to the clerk of the trial court in Navajo county.”

conviction relief. In particular, he objects to the court's apparent reliance on a proposed form of order filed by the state. He also maintains the court "mischaracterized the prior proceedings filed in the trial court [in 1978 and 2001] as Rule 32.1 proceedings."

¶6 First, in its ruling, the trial court identified twenty-four issues raised in Mackovich's petition. It also made specific findings of fact. And Mackovich cites no authority to support the proposition that a court cannot employ a form of judgment provided by a party. *See* Ariz. R. Crim. P. 32.9(c)(1)(iv). We therefore reject his claim that the court did not adequately address his claims or failed to consider his petition.

¶7 We agree with the trial court that because Mackovich's petition is untimely, and because he has not established that any of his claims fall within Rule 32.1(d), (e), (f), (g), or (h), he is not entitled to relief. *See* Ariz. R. Crim. P. 32.4(a). Although he at times asserts his claims are based on newly discovered evidence, he has not shown that his attempts to discover the allegedly material evidence to which he now points, primarily court records, constituted due diligence given his failure to seek relief for more than twenty years. *See* Ariz. R. Crim. P. 32.1(e)(2) (defendant must show "due diligence in securing . . . newly discovered material facts"). Thus, as the court correctly noted, the claims in Mackovich's petition are precluded and subject to dismissal on this basis alone.

¶8 Furthermore, we reject Mackovich's assertions that the trial court should not have found his claims precluded because the proceedings in 1978 and 2001 were not in fact Rule 32 proceedings. On the record before us, the proceeding in 1978 plainly was brought pursuant to Rule 32. After Mackovich's conviction he filed a document entitled "Petition for Post-Conviction Relief" in which he stated he was "eligible for relief" based on "new evidence." The petition stated he had not sought Rule 32 relief previously and that it "includes all the claims and grounds for post-conviction relief known to me."

¶9 Likewise, although Mackovich initiated the 2001 proceeding with an application to set aside his conviction, apparently pursuant to A.R.S. § 13-907, he subsequently sought review of the trial court's decision in that proceeding pursuant to Rule 32.9 and petitioned our supreme court for review under Rule 32. Indeed, the issues raised in his petition to our supreme court in the 2001 proceeding largely mirror those raised in this proceeding. Therefore, because his claims either have been adjudicated finally or could have been raised in previous collateral proceedings, we agree with the court that they are precluded. *See* Ariz. R. Crim. P. 32.2(a)(2), (3). For all these reasons, although we grant the petition for review, we deny relief.

/s/ Michael Miller

MICHAEL MILLER, Judge

CONCURRING:

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

/s/ J. William Brammer, Jr.

J. WILLIAM BRAMMER, JR., Judge*

*A retired judge of the Arizona Court of Appeals authorized and assigned to sit as a judge on the Court of Appeals, Division Two, pursuant to Arizona Supreme Court Order filed December 12, 2012.