

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

GREGORY ALAN MCCLANAHAN,
Petitioner.

No. 2 CA-CR 2013-0390-PR
Filed December 9, 2013

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

See Ariz. R. Sup. Ct. 111(c); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Maricopa County
No. CR2007126912001DT
The Honorable David B. Gass, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

William G. Montgomery, Maricopa County Attorney
By Diane Meloche, Phoenix
Counsel for Respondent

Gregory McClanahan, Florence
In Propria Persona

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MEMORANDUM DECISION

Chief Judge Howard authored the decision of the Court, in which Presiding Judge Vásquez and Judge Miller concurred.

H O W A R D, Chief Judge:

¶1 Gregory McClanahan seeks 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 grant review and, for the following reasons, we deny relief.

¶2 After a jury trial, McClanahan was convicted of two counts of kidnapping, one count of sexual assault, two counts of attempted sexual assault, and one count of aggravated assault. The trial court sentenced him to enhanced, aggravated terms of imprisonment, some concurrent and some consecutive, totaling twenty-nine years. We affirmed his convictions and sentences on appeal. *See State v. McClanahan*, No. 1 CA-CR 09-0340 (memorandum decision filed June 29, 2010). McClanahan then filed a notice of post-conviction relief and, after appointed counsel notified the court that he could find no arguable claims pursuant to Rule 32, McClanahan filed a pro se petition in which he alleged ineffective assistance of trial counsel, “newly-discovered material evidence which requires the Court to vacate the Conviction(s) and Sentence(s),” and sentencing error. He also appears to have alleged that the state had engaged in misconduct by knowingly permitting perjured testimony from V.G., one of two victims.

¶3 McClanahan’s claims of trial error centered on his convictions for the kidnapping and sexual assaults committed against V.G. V.G. testified that she had been waiting at a bus stop when McClanahan took her by the arm, said “come with me,” and took her to his car. He then drove her to an alley, pulled her jeans and underwear down, and forced her to engage in oral copulation and anal intercourse. A forensic nurse who performed V.G.’s sexual

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assault examination two to three hours later found bruising on her forearm and an anal laceration, both consistent with V.G.'s account of the assaults. An analysis of material swabbed from V.G.'s hands showed the presence of mixed DNA¹ material, with a major component identified as belonging to McClanahan. At trial, McClanahan testified that he and V.G. had smoked marijuana in his vehicle, that V.G. had agreed to perform oral sex in exchange for other drugs, and that there had been no other sexual contact between the two.

¶4 In his petition below, McClanahan maintained his trial attorney was ineffective because he failed to “verify,” “acknowledge,” or “fully develop” evidence that V.G.'s underwear contained “a complete lack of blood, semen or DNA,”² evidence he maintains was “critical” to his defense. He also alleged the trial court erred in granting the state’s motion in limine to exclude a toxicology report showing that blood drawn during V.G.'s sexual assault examination showed the presence of carboxy-tetrahydrocannabinol (carboxy-THC). McClanahan maintained the report would have established that V.G. perjured herself when she testified that she was not under the influence of alcohol or drugs when the assaults occurred, that the state’s knowing reliance on her perjured testimony was unconstitutional, and that his own attorney was “unconstitutionally” deficient in “fail[ing] to seek expert opinion and services to independently test and elucidate the ill . . . effects of the controlled substances in question to his Jury.” He stated he had “discovered” the state’s motion in limine, which referred to V.G.'s toxicology report, while reviewing the record in November 2011, and, on that basis, characterizes this claim as

¹Deoxyribonucleic acid.

²The criminalist who screened the contents of V.G.'s sexual assault kit for further testing did not submit any clothing for DNA analysis; although she had identified “non-nucleated material on [V.G.'s] underwear and [her] jeans,” she explained “Finding that type of cellular material [on a person’s clothing] . . . is expected, and in this case wouldn’t necessarily be as informative” as material swabbed from V.G.'s person.

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“newly discovered material evidence” under Rule 32.1(e). Finally, he contends the court erred in imposing aggravated prison sentences based on aggravating circumstances that had not been alleged by the state or found by the jury.

¶5 The trial court addressed each of these claims in a signed minute entry and summarily denied relief, and this pro se petition for review followed. We review the summary dismissal of Rule 32 claims for an abuse of discretion. *See State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006). We find none here.

¶6 On review, McClanahan again argues the merits of the claims he raised below. But McClanahan fails to address the trial court’s findings that issues “regarding the toxicology report [and] the appropriateness of the trial court’s sentencing decisions . . . [were] issue[s] for appeal, not for a petition for post-conviction relief.” For the sake of clarity, we restate the court’s ruling in the context of Rule 32: By failing to assert the issues on direct appeal, McClanahan has waived his claims that (1) the court erred in excluding evidence of the toxicology report, (2) the state engaged in misconduct with respect to the toxicology report or its relationship to V.G.’s testimony, and (3) the court erred in imposing aggravated sentences. McClanahan is therefore precluded from raising these claims in this post-conviction proceeding. *See Ariz. R. Crim. P. 32.2(a)(3)* (“A defendant shall be precluded from relief under this rule based upon any ground . . . [t]hat has been waived at trial, on appeal, or in any previous collateral proceeding.”).

¶7 Like the trial court, we find no merit to McClanahan’s assertion that his post-trial “discovery” of the state’s pretrial motion regarding the toxicology report renders that report a “newly discovered material fact[,]” pursuant to Rule 32.1(e), that permits an exception to the rule of preclusion. *See Ariz. R. Crim. P. 32.2(b)* (“Rule 32.2(a) shall not apply to claims for relief based on Rules 32.1(d), (e), (f), (g) and (h).”). For the purposes of Rule 32.1(e), evidence is “newly discovered” only if it is “unknown to the trial court, the defendant, or counsel at the time of trial and neither the defendant nor counsel could have known about its existence by the exercise of due diligence.” *State v. Saenz*, 197 Ariz. 487, ¶¶ 13-14, 4

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P.3d 1030, 1033-34 (App. 2000). Because defense counsel and the court were both aware of the toxicology report before trial, it is not newly discovered evidence. The court did not abuse its discretion in denying relief on these precluded claims.

¶8 The only non-precluded claim asserted by McClanahan was his claim of ineffective assistance of trial counsel, because that claim could not have been raised in his direct appeal. *See State v. Spreitz*, 202 Ariz. 1, ¶ 9, 39 P.3d 525, 527 (2002). On review, McClanahan maintains the trial court's explanation in denying this claim "is insufficient" "[i]n the absence of a full and fair Evidentiary Hearing . . . to explore Counsel's mishandling of DNA related material." We disagree.

¶9 In its ruling, the court found "the absence of DNA [on V.G.'s underwear], even if true, would not be clearly exculpatory given the other evidence" against McClanahan, and concluded "counsel's performance was not deficient and the alleged error did not prejudice [McClanahan]'s defense." In a letter McClanahan filed in support of his petition below, his trial attorney responded to McClanahan's argument that V.G.'s underwear "contained exculpatory evidence because they did not contain his DNA." Counsel explained,

Simply put, Mr. McClanahan wanted an expert to testify that if he had touched objects and body parts . . . his DNA must be present and discoverable. . . . I tried to explain to Mr. McClanahan that he was wrong and that his theory was not supported by science.

Counsel further stated he had not obtained a DNA specialist to examine the underwear because it did not "appear[] to be necessary given the facts and evidence of the case." Counsel cross-examined the criminalist who had examined V.G.'s underwear and decided it did not warrant further testing, and he argued to the jury that the only DNA evidence found had been consistent with McClanahan's

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account of the incident. But the jury nonetheless convicted McClanahan of the sexual assaults.

¶10 McClanahan has also failed to state a colorable claim that his trial counsel rendered ineffective assistance with respect to the toxicology report. According to the state’s motion, carboxy-THC is a “pharmacologically inactive metabolite . . . that . . . does not affect the functioning of either the brain or the nervous system,” and “[n]o active drugs or metabolites of any drugs were found in [V.G.]’s blood.” McClanahan fails to identify any evidence that any expert would have (1) disputed the state’s characterization of carboxy-THC or (2) rendered an opinion that the level of carboxy-THC found in V.G.’s blood established—or even suggested—that she had been under the influence of marijuana at the time of the assault. *See, e.g., Spires v. Raymond Westbrook Logging*, 997 So. 2d 175, 179 (La. Ct. App. 2008) (finding presence of carboxy-THC “is not an indicator of intoxication”; “this is the nonpsychoactive metabolite of THC that can be found in the system days after marijuana is smoked”). Nor does McClanahan address his attorney’s response to the motion or indicate why that response could be considered inadequate. We find no abuse of discretion in the trial court’s implicit determination that McClanahan had failed to state a colorable claim of ineffective assistance of counsel, and therefore that no evidentiary hearing was required. *See State v. Krum*, 183 Ariz. 288, 292, 903 P.2d 596, 600 (1995) (“To obtain an evidentiary hearing, a petitioner must make a colorable showing that the allegations, if true, would have changed the verdict.”)

¶11 McClanahan has failed to establish the trial court abused its discretion in denying his petition for post-conviction relief. Accordingly, we also deny relief.