

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

SHAWN MICHAEL GRIZZLE,
Petitioner.

No. 2 CA-CR 2013-0459-PR
Filed January 28, 2014

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NOT FOR PUBLICATION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. CR2010122373001DT

The Honorable Sally Schneider Duncan, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

William G. Montgomery, Maricopa County Attorney
By Shaheen P. Torgoley, Deputy County Attorney, Phoenix
Counsel for Respondent

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Bruce F. Peterson, Maricopa County Legal Advocate
By Consuelo M. Ohanesian, Deputy Legal Advocate, Phoenix
Counsel for Petitioner

MEMORANDUM DECISION

Judge Eckerstrom authored the decision of the Court, in which Judge Espinosa and Judge Miller concurred.

ECKERSTROM, Judge:

¶1 Petitioner Shawn Grizzle 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 but, for the following reasons, we deny relief.

¶2 Grizzle was originally charged in May 2010 with theft of means of transportation, unlawful flight from a law enforcement vehicle, two counts of kidnapping, and two counts of endangerment, with the kidnapping and endangerment counts alleged as dangerous offenses. The state also alleged Grizzle had two or more historical prior felony convictions and had committed the crimes while on release for another felony, as well as aggravating circumstances relevant to sentencing.

¶3 Pursuant to a plea agreement, Grizzle was convicted of theft of means of transportation and two counts of endangerment, having one historical prior felony conviction. The state dismissed the other counts, as well as allegations of dangerousness, commission of the crimes while on release, and all but one of the prior felony convictions. The parties agreed the terms for all three counts, as well as any term imposed after revocation of Grizzle's probation in another case, would be concurrent. They also agreed the court would impose prison terms of at least 6.5 years for the theft and 1.75 years for the endangerment counts, the presumptive terms for those convictions. The court accepted the agreement and, on

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September 21, 2010, sentenced Grizzle to the presumptive terms on all counts, the minimum sentences permitted by the agreement.

¶4 In June 2011, Grizzle filed a notice of post-conviction relief and a pro se petition in which he alleged he had “just found out [he has] Hep[atitis] C and lots of psych[ological] issues.” He stated he was now on mental health medications, but had not been when he was charged, and added, “Then I got to [the Arizona Department of Corrections (ADOC)] and found out I have hep[atitis] C and am in Stage 2 and am not get[t]ing treated.” Appointed counsel then filed a petition alleging that Grizzle’s diagnosis with Hepatitis C gave rise to a claim that, pursuant to Rule 32.1(e), “[n]ewly discovered material facts probably exist and such facts probably would have changed the . . . sentence.”¹ Attached to his petition were pages from his ADOC medical chart for September 24, 2010, near the time he was admitted to prison, that included the following assessment notation: “#4. Hx of Hep C – 2003.”² The trial court summarily denied relief and dismissed the petition, stating only that it had found no colorable claims for relief. This petition for review followed.

¶5 On review, Grizzle sets forth the same arguments he raised below, asserts that his petition stated a colorable claim, and asks that we “vacate his sentence, and direct the lower court [to] resentence [him] in light of the information about the condition of his health.” We review the summary dismissal of Rule 32 claims for an abuse of discretion. *State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006). We find none here.

¶6 Evidence that a defendant had, at the time of sentencing, an undiagnosed medical condition relevant to the

¹The trial court cited Grizzle’s “mental health information” as a mitigating circumstance at sentencing; thus, this does not appear to be information that was “newly discovered . . . after the trial.” Ariz. R. Crim. P. 32.1(e)(1).

²The attached pages also included a form titled “Hepatitis C Treatment Checklist” dated April 25, 2011.

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sentence imposed may qualify as newly discovered material facts entitling a defendant to relief pursuant to Rule 32.1(e). *State v. Bilke*, 162 Ariz. 51, 53, 781 P.2d 28, 30 (1989); *State v. Cooper*, 166 Ariz. 126, 130, 800 P.2d 992, 996 (App. 1990). To state a colorable claim for such relief, a petitioner must meet the following five requirements:

- (1) the evidence must appear on its face to have existed at the time of trial but be discovered after trial;
- (2) the motion must allege facts from which the court could conclude the defendant was diligent in discovering the facts and bringing them to the court's attention;
- (3) the evidence must not simply be cumulative or impeaching;
- (4) the evidence must be relevant to the case;
- (5) the evidence must be such that it would likely have altered the verdict, finding, or sentence if known at the time of trial.

Bilke, 162 Ariz. at 52-53, 781 P.2d at 29-30; *see also* Ariz. R. Crim. P. 32.1(e) (newly discovered material facts exist if discovered after trial, defendant exercised due diligence, and facts "are not merely cumulative or used solely for impeachment"). More generally, to determine whether a petitioner has stated a colorable claim pursuant to Rule 32.1(e), a court inquires whether the evidence presented "plausibly show[s]" the facts alleged and, if so, whether those facts "probably would" entitle the petitioner to relief. *State v. Krum*, 183 Ariz. 288, 292-93, 903 P.2d 596, 600-01 (1995).

¶7 In this case, the same judge who had sentenced Grizzle also considered his petition for post-conviction relief. The trial court may have found it implausible that Grizzle had been unaware of his diagnosis with Hepatitis C at sentencing, when his ADOC medical chart appears to indicate that he had a history of that diagnosis dating back to 2003. Or the court may have concluded that the facts Grizzle alleged were insufficient to show he had been "diligent in discovering the facts and bringing them to the court's attention." *Bilke*, 162 Ariz. at 52-53, 781 P.2d at 29-30. Finally, the court may

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have determined that it likely would have imposed the same sentence had Grizzle's diagnosis been known at sentencing.³ None of these determinations would constitute an abuse of discretion under the facts presented, and any one of them would support the court's finding that Grizzle failed to state a colorable claim for post-conviction relief.

¶8 Accordingly, although review is granted, relief is denied because Grizzle has not demonstrated that the trial court erred in dismissing his petition.

³Grizzle appears to have recognized that whether evidence of his diagnosis "probably would have changed the . . . sentence," Ariz. R. Crim. P. 32.1(e), was a determination within the trial court's sole discretion. In his petition below, he asked the court "to review his petition and accompanying exhibit to determine whether, had the plea agreement not stipulated to a specific sentence range, the court would have taken into account the state of [his] physical health in determining his sentence and imposed less than the presumptive sentence it did impose. If the information . . . would support a mitigated sentence, [Grizzle] asks that this court set aside his plea agreement."