

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

RICHARD KEITH ROEDDER,
Petitioner.

No. 2 CA-CR 2013-0538-PR
Filed April 9, 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NOT FOR PUBLICATION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 Yuma County

No. S1400CR9218944

The Honorable John N. Nelson, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Richard Keith Roedder, Sioux Falls, South Dakota
In Propria Persona

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MEMORANDUM DECISION

Chief Judge Howard authored the decision of the Court, in which Judge Miller and Judge Brammer¹ concurred.

H O W A R D, Chief Judge:

¶1 Richard Roedder petitions this court for review of the trial court's order summarily dismissing his successive notice of post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P., and the court's denial of his motion for reconsideration² of that ruling. We review a court's denial of post-conviction relief, and its denial of a motion for reconsideration, for an abuse of discretion. *See State v. Sepulveda*, 201 Ariz. 158, ¶ 3, 32 P.3d 1085, 1086 (App. 2001). Roedder has not met his burden of establishing such abuse here.

¶2 Pursuant to a 1994 plea agreement, Roedder was convicted of attempted trafficking in stolen property and attempted sale of a dangerous drug.³ The plea agreement provided, inter alia, for the dismissal of count one (trafficking charge) and count six (drug charge) "as originally charged," and stated that "[t]his

¹The Hon. J. William Brammer, Jr., a retired judge of this court, is called back to active duty and is assigned to serve on this case pursuant to orders of this court and the supreme court.

²Because Rule 32 contains no provision for such a motion, we construe it as a motion for rehearing, which is permitted by Rule 32.9(a), Ariz. R. Crim. P.

³Roedder's 1994 guilty plea occurred after the convictions and sentences arising from his first guilty plea to burglary in the second degree, weapons misconduct, and sale of a dangerous drug were vacated and he was permitted to withdraw from that plea agreement.

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agreement serves to amend the . . . indictment . . . to charge the offense to which the defendant pleads, without the filing of any additional pleading.” The trial court sentenced Roedder to a presumptive, five-year prison term with 618 days of presentence incarceration credit on the drug count, to be followed by a five-year term of intensive probation on the trafficking count.⁴

¶3 Roedder has instituted post-conviction proceedings and been denied relief at least three times between 2002 and 2012.⁵ In several of his prior proceedings, he asserted arguments based on newly discovered evidence, at times without providing any grounds for those arguments; argued that newly discovered material facts concerning the factual basis for the guilty plea in his trafficking conviction rendered his plea invalid; or, in his most recent notice, raised a similar argument regarding the factual basis for his drug conviction. Roedder also has argued several times that his failure to file a timely notice of post-conviction relief was without fault on his part and that he is innocent.

¶4 The trial court summarily dismissed Roedder’s most recent notice, filed in June 2012, stating, “Broken down to the essence of Petitioner’s newest Notice of Petition for Post Conviction Relief, Petitioner has alleged the exact same facts as the basis for newly discovered evidence to wit: there was an insufficient factual basis for the pleas of guilty.” Noting Roedder had not raised any new issues and that the issue raised was pending on review before

⁴In June 1996, Roedder’s probation was revoked and he was sentenced to a presumptive five-year prison term on the trafficking count, to be served concurrently with the sentence on the drug count.

⁵Roedder has filed three notices of post-conviction relief in addition to three motions for reconsideration, two of which the trial court treated as new notices of post-conviction relief; the court essentially has dismissed Roedder’s claims six times in this matter.

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the Arizona Court of Appeals,⁶ the court found his notice precluded and summarily dismissed it.

¶5 On review, Roedder asks that we permit him “to withdraw from his guilty plea, vacate the sentence and conviction [presumably for the drug count and], remand for an evidentiary hearing.”⁷ He contends the trial court erred by summarily dismissing his claim of newly discovered evidence, and argues his guilty plea for the drug count was not knowing, intelligent or voluntary because he was not presented with the indictment at the change-of-plea hearing and thus was unclear as to which drug sale he was admitting guilt. He seems to argue this information is newly discovered because he became aware of it at some undisclosed time after he hired a paralegal service. Roedder also contends, as he has before, that his notice is untimely through no fault of his own.

¶6 Roedder asserts that although this is his “second” post-conviction proceeding, it is the first one in which he has raised claims related to the drug count. Although the record establishes that Roeder has filed more than two post-conviction proceedings, it does appear, based on the record before us, that it is the first time he has raised this specific challenge to the drug count. Pursuant to Rule 32.2(a)(3), a defendant is precluded from relief based on any ground “[t]hat has been waived . . . in any previous collateral proceeding.” Rule 32.2(b), however, expressly exempts from the preclusive effect of Rule 32.2(a) those claims seeking relief based on newly discovered evidence pursuant to Rule 32.1(e).

⁶In a separate petition for review, Roedder challenged, *inter alia*, the trial court’s denial of his claim regarding the factual basis for his guilty plea to the trafficking charge. In a February 26, 2013 order, this court denied review of that petition.

⁷The trial court aptly noted, Roedder “has long since served his prison time in these matters. [Roedder] seeks to set aside these convictions because it appears that these convictions were used to aggravate the sentence(s) . . . which he is now serving in South Dakota.”

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¶7 Here, the trial court concluded Roedder had failed to raise a “new issue,” noting he previously had in fact raised the same issue. Although we do not agree with the court that Roedder previously raised this same claim as it pertains to the drug count, we nonetheless conclude the court correctly found his claim precluded. *See State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984) (appellate court obliged to uphold trial court’s ruling if correct for any reason).

¶8 Without specifically stating when he had discovered the legal bases for his claims and why he could not have raised them sooner, Roedder nonetheless asserts that after hiring a paralegal service, he “became aware of significant facts” that impacted his rights. Rule 32.1(e) creates an exception to the rule of preclusion based only on “newly discovered material facts,” not new legal theories of which a defendant previously was unaware. *See State v. Saenz*, 197 Ariz. 487, ¶ 7, 4 P.3d 1030, 1032 (App. 2000) (describing elements of successful newly discovered evidence claim). And, to be entitled to relief on a claim of newly discovered evidence, a petitioner first must demonstrate the evidence is, in fact, newly discovered, *State v. Serna*, 167 Ariz. 373, 374, 807 P.2d 1109, 1110 (1991), something Roedder has not done here.

¶9 Roedder not only notified the trial court repeatedly over a ten-year span that he intended to raise claims grounded on newly discovered evidence, often without identifying the bases for those claims, but in his most recent notice he did not provide “meritorious reasons . . . indicating why the claim was not stated in the previous petition[s] or in a timely manner.” Ariz. R. Crim. P. 32.2(b). Because Roedder has not explained why his claims constitute newly discovered evidence, and in the absence of any exception to preclusion set forth in Rule 32.2(b), the court correctly found his successive notice of post-conviction relief untimely and, his claim precluded. *See Ariz. R. Crim. P. 32.2(b)*.

¶10 For the reasons stated, we grant review but deny relief.