

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

DEWEY LEE MCBRIDE,
Petitioner.

No. 2 CA-CR 2014-0089-PR
Filed September 22, 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NOT FOR PUBLICATION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 Pima County
Nos. CR20081861 and CR20081871
The Honorable Richard D. Nichols, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Barbara LaWall, Pima County Attorney
By Nicolette Kneup, Deputy County Attorney, Tucson
Counsel for Respondent

Natman Schaye
Counsel for Petitioner

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MEMORANDUM DECISION

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

M I L L E R, Presiding Judge:

¶1 Dewey McBride seeks review of a trial court order that denied, in part, his second petition for post-conviction relief. The successive petition claimed the original trial court judge's orders made after she read an ex parte sentencing letter should have been vacated. The affected orders comprised the sentencing and summary denial of the first Rule 32 petition. The successive petition was assigned to another judge, who ruled that McBride stated a sufficient claim to require a resentencing, but the court would not vacate or reconsider the original judge's denial of the first petition. The resentencing has not occurred. We decline relief for the following reasons.

¶2 McBride pled guilty to first-degree burglary, possession of a dangerous drug for sale, and three counts of second-degree burglary. He was sentenced by Judge Eikleberry to a combination of concurrent and consecutive prison terms totaling thirty-seven years. He sought post-conviction relief, contesting the voluntariness of his guilty pleas and arguing his trial counsel had been ineffective. The trial court, Judge Eikleberry, summarily dismissed those claims, and this court denied relief on review. *State v. McBride*, No. 2 CA-CR 2012-0001 (memorandum decision filed May 25, 2012).

¶3 McBride then filed a motion to reconsider the memorandum decision based on his discovery that Judge Eikleberry reviewed a letter from McBride's maternal grandmother (C.T.) regarding sentencing, which the court did not disclose to the parties. The letter is extremely critical of McBride, characterizing him as a "con man" skilled at manipulating the justice system. This court

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summarily denied that motion for reconsideration, and our supreme court denied McBride's petition for review.

¶4 McBride then filed a notice of and petition for post-conviction relief, claiming the letter constituted newly discovered evidence. He argued that the letter called into question Judge Eikleberry's impartiality and, therefore, required that he be resentenced by a different judge. He further argued that, because Judge Eikleberry had dismissed his first Rule 32 petition, a different judge should address the claims raised in that petition.

¶5 The matter was reassigned to Judge Nichols, who initially denied relief, concluding the letter would not have altered McBride's sentences and Judge Eikleberry had not relied on C.T.'s letter in making her sentencing determination. Judge Nichols further concluded McBride was not entitled to reconsideration of the claims raised in his first proceeding, noting that "the Court of Appeals and the Supreme Court . . . have both denied [McBride]'s request for a rehearing on his initial petition based on the discovery of the . . . [l]etter." The court, however, granted McBride's motion for rehearing and ordered that McBride be resentenced. This petition for review followed.

¶6 On review, McBride repeats his contention that he is entitled to have another judge review the merits of the claims raised in his first post-conviction proceeding. He asserts the letter called into question Judge Eikleberry's impartiality and thereby "denied [him] an impartial arbiter to decide his Rule 32 of-right petition." He further asserts that proceedings before a judge "whose impartiality may reasonably be questioned" constitutes structural error which "always requires reversal." *See generally State v. Granados*, 692 Ariz. Adv. Rep. 10, ¶ 12, (Ct. App. Aug. 5, 2014) ("bias or the objective potential for bias based on the judge's 'direct, personal, substantial pecuniary interest' or other strong personal interest in the outcome of the case" can constitute structural error), *quoting Tumey v. Ohio*, 273 U.S. 510, 523 (1927).

¶7 McBride characterizes his claim as one of newly discovered evidence. But the plain language of Rule 32.1(e) permits a claim that "[n]ewly discovered material facts probably exist and

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such facts probably would have changed the verdict or sentence,” not a claim that there might have been a different result in a previous collateral proceeding. Indeed, no basis for relief described in Rule 32.1 expressly permits a collateral attack on an earlier Rule 32 proceeding—each substantive provision specifically addresses a defect in the defendant’s conviction or sentence.¹

¶8 McBride contends he has a due process right to bring his claim under Rule 32, relying generally on *Martinez v. Ryan*, ___, U.S. ___, ___, 132 S. Ct. 1309, 1317 (procedural default does not bar a federal habeas court from hearing a substantial claim of ineffective assistance in the initial-review collateral proceeding if counsel was ineffective). *Martinez*, however, is inapposite because there is no claim of ineffective assistance, and McBride does not otherwise develop this argument; therefore, we do not address it. See *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (failure to develop legal argument waives argument on review).

¶9 For the reasons stated, although we grant review we deny relief.

¹The provisions of Rule 32.1 appear to provide no procedural avenue for a defendant to present a successor claim of judicial bias to challenge the validity of a previous post-conviction proceeding. See Ariz. R. Crim. P 32.1(a), (e)(providing avenue to challenge due process violations, or claims arising from newly discovered evidence, exclusively when marshaled to challenge a conviction, verdict or sentence). McBride has not asserted that he should be allowed to pursue that claim by any other procedural avenue.