IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

JEFFREY DELOACH JR.,
Petitioner.

No. 2 CA-CR 2014-0119-PR
Filed August 29, 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NOT FOR PUBLICATION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 Cochise County
No. CR200900149
The Honorable James L. Conlogue, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Joy Bertrand, Scottsdale
Counsel for Petitioner

MEMORANDUM DECISION

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

E S P I N O S A, Judge:

¶1 Jeffrey DeLoach Jr. petitions this court for review of the trial court's order summarily dismissing his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that ruling unless the court clearly abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We find no such abuse here.

¶2 Following a jury trial, DeLoach was convicted of two counts of aggravated assault and sentenced to consecutive, presumptive prison terms totaling fifteen years. We affirmed his convictions and sentences on appeal. *State v. DeLoach*, No. 2 CA-CR 2010-0008 (memorandum decision filed Sept. 30, 2010). DeLoach then filed a petition for post-conviction relief claiming that expert testimony presented at the trial of another individual in July 2010, seven months after DeLoach's trial, constituted newly discovered evidence pursuant to Rule 32.1(e).

¶3 On review, DeLoach argues the trial court erred by summarily rejecting his claim that the expert's testimony that "Hollywood" is not a criminal street gang is newly discovered evidence that would have changed the verdict or sentence at his trial. In its ruling dismissing DeLoach's petition, the court noted that, because the state had withdrawn its allegation that a criminal street gang was an aggravating factor, "no information related to 'Hollywood' would have had any effect on [DeLoach's] sentence." The court also found that, although DeLoach had testified at trial that "Hollywood" was not a criminal street gang, his "colorful testimony regarding his associates had a much greater impact on the jury than anything that could be said about 'Hollywood.'"

Therefore, the court concluded, new evidence about "Hollywood" would not have impacted DeLoach's verdict or sentence.

¶4 To prevail on a claim of newly discovered evidence, a defendant must "establish that the evidence was discovered after trial although it existed before trial; that it could not have been discovered and produced at trial through reasonable diligence; that it is neither cumulative nor impeaching; that it is material; and that it probably would have changed the verdict" or the sentence. *State v. Saenz*, 197 Ariz. 487, ¶ 7, 4 P.3d 1030, 1032 (App. 2000); *see also* Ariz. R. Crim. P. 32.1(e).

¶5 DeLoach's entire argument explaining why the proffered testimony constituted newly discovered evidence consists of the following assertions: "The evidence is 'new,' in that the availability of the witness has only occurred since the trial," and "This case is distinguishable from others in which Arizona courts have held that the evidence was not 'new' in the R[ule] 32 context, because the defense did not know of the evidence before trial." DeLoach also maintains that the expert testimony from the other trial "could have blunted" evidence presented by the state regarding "Hollywood" in his case. Even assuming this were true, DeLoach nonetheless has not shown how it would qualify as newly discovered evidence.

¶6 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 DeLoach has not done here. Put simply, because DeLoach did not submit any evidence below to establish this required element of a claim of newly discovered evidence, *see* Ariz. R. Crim. P. 32.1(e); *Saenz*, 197 Ariz. 487, ¶ 7, 4 P.3d at 1032, the trial court properly dismissed his petition without conducting an evidentiary hearing.

¶7 Accordingly, although the petition for review is granted, relief is denied.