

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

JOSE ARMANDO VIRGEN,
Petitioner.

No. 2 CA-CR 2014-0235-PR and
No. 2 CA-CR 2014-0259-PR (Consolidated)
Filed November 18, 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NOT FOR PUBLICATION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

No. CR20094545001

The Honorable Stephen C. Villarreal, Judge

REVIEW GRANTED; RELIEF DENIED

Jose Armando Virgen, Buckeye
In Propria Persona

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MEMORANDUM DECISION

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

ESPINOSA, Judge:

¶1 Petitioner Juan Virgen seeks review of the trial court’s order dismissing his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. “We will not disturb a trial court’s ruling on a petition for post-conviction relief absent a clear abuse of discretion.” *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We find no such abuse here.

¶2 Pursuant to a 2010 plea agreement, Virgen was convicted of second-degree murder and the trial court imposed a twenty-year prison sentence. Virgen initiated a Rule 32 proceeding in June 2011 and, after appointed counsel notified the court he was “unable to find a meritorious issue of law or fact” to raise in a Rule 32 petition, Virgen filed a pro se petition in March 2014.¹ The court dismissed Virgen’s petition and denied his motion for reconsideration, finding he not only had failed to sustain a claim of newly discovered evidence pursuant to Rule 32.1(e), but he had not provided any basis for his purported claims under Rule 32.1(a), (f), and (h).

¹Although Virgen’s attorney notified the trial court he was unable to find any issues to raise, he did inform the court the sentencing order contained an improper criminal restitution order, which the court vacated.

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¶3 Virgen argues on review,² as he did below, that he had lied to the trial court when he admitted at the change-of-plea hearing that he had stabbed the victim, and also asserts he did not “help co-defendant Saul Virgen to murder” the victim.³ Maintaining he was coerced by Saul to accept responsibility for the stabbing, Virgen contends his guilty plea was not knowing and voluntary and asserts he wants to withdraw his plea and proceed to trial. Virgen claims Saul admitted to a confidential informant in August 2010 that Saul, rather than Virgen, was “the stabber,”⁴ a claim Virgen raised as newly discovered evidence in his petition below.⁵

²Although the pleading before us is entitled “Petition for Review Petition for Special Action,” we treat it as a petition for review.

³Saul, Virgen’s half-brother, also pled guilty to second-degree murder, maintaining he had aided Virgen in the attack. The plea agreements were contingent upon both defendants pleading guilty to second-degree murder.

⁴Notably, Saul’s statement to the informant does not necessarily support Virgen’s assertion that Saul admitted to having stabbed the victim. Rather, Saul told the informant, “On that jale [job] I’m in [prison] for . . . I did that jale.” As previously noted, Saul admitted he had assisted Virgen in the attack.

⁵In December 2010, just after he had pled guilty but before he was sentenced, Virgen filed a “Motion to Correct Factual Basis and Determine Voluntariness of Plea.” In that motion, he asserted that although his factual basis “was to a large degree false,” and although he had helped Saul while Saul had stabbed the victim, rather than the other way around, he nonetheless had entered a knowing and voluntary guilty plea which he did not want to withdraw. During a hearing on the motion, Virgen reaffirmed he did not want to withdraw his guilty plea and, when given the opportunity to correct the factual basis he had provided at the change-of-plea hearing, he declined to do so. The court thus denied Virgen’s motion to correct the factual basis or make a new determination of the voluntariness of his plea.

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¶4 In its ruling dismissing Virgen’s petition, the trial court correctly concluded he had failed to establish a claim of newly discovered evidence. We need not reach the court’s reasoning in so concluding because additional grounds support this result. *State v. Oakley*, 180 Ariz. 34, 36, 881 P.2d 366, 368 (App. 1994). Virgen failed to submit any evidence to show he had “exercised due diligence in securing the newly discovered material facts” between Saul’s August 2010 conversation with the informant and the filing of the Rule 32 petition in July 2014, as Rule 32.1(e)(2) requires. *See State v. Saenz*, 197 Ariz. 487, ¶ 13, 4 P.3d 1030, 1033 (App. 2000) (requirement of newly discovered evidence is that defendant have exercised due diligence in discovering the evidence); *see also State v. Andersen*, 177 Ariz. 381, 387, 868 P.2d 964, 970 (App. 1993) (all elements must be satisfied to establish claim of newly discovered evidence). Nor, as the trial court found, did Virgen provide any basis for his other claims based on Rule 32.1(a), (f), and (h). We conclude the court correctly dismissed Virgen’s petition on the ground he failed to state a colorable claim for relief under Rule 32, and find he has not sustained his burden on review of establishing the court’s ruling was an abuse of discretion.⁶ *See* Ariz. R. Crim. P. 32.6(c).

¶5 Finally, to the extent Virgen raises claims based on ineffective assistance of counsel and *Blakely v. Washington*, 542 U.S. 296 (2004), for the first time in his petition for review, we do not address them. *See* Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review to contain issues “decided by the trial court . . . which the defendant wishes to present to the appellate court for review”); *State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (appellate court

⁶We thus need not address whether a pleading defendant can raise a cognizable claim pursuant to Rule 32.1(h) when that defendant has knowingly and intelligently admitted his or her guilt and waived the right to have his or her guilt determined beyond a reasonable doubt, as Virgen did here. *See State v. Flores*, 218 Ariz. 407, ¶ 6, 188 P.3d 706, 708-09 (App. 2008) (plea agreement waives all non-jurisdictional defects, including deprivations of constitutional rights).

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does not consider issues in petition for review that “have obviously never been presented to the trial court for its consideration”).

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