

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

GARY HAYDEN AUSTIN,
Petitioner.

No. 2 CA-CR 2015-0031-PR
Filed March 9, 2015

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NOT FOR PUBLICATION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)(1); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Mohave County

No. CR11436

The Honorable Steven F. Conn, Judge

REVIEW GRANTED; RELIEF DENIED

Gary Austin, Payson
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 Gary Austin seeks review of the trial court's order denying 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). Austin has not sustained his burden of establishing such abuse here.

¶2 Pursuant to a plea agreement, Austin was convicted of first-degree burglary and armed robbery in 1990, and was sentenced to consecutive ten-year terms of incarceration. In 2013, after his release, Austin filed a "Petition for Post-Conviction Relief and Restoration of Rights." In that petition he cited Rule 32.1(e) and asked that the trial court "remove the dangerous designation" from his armed robbery conviction based on his good behavior and the research relating to juvenile brains discussed in the United States Supreme Court's recent juvenile-sentencing jurisprudence, *see, e.g., Miller v. Alabama*, ___ U.S. ___, 132 S. Ct. 2455 (2012), and restore his rights under A.R.S. § 13-906(A). The trial court denied the petition insofar as it sought post-conviction relief, but ordered Austin's civil rights, with the exception of the right to bear arms, restored.

¶3 On review Austin again cites *Miller* and other Supreme Court cases discussing juvenile brain development, and argues the trial court should have "modif[ied] the sentence" by removing the dangerousness designation on his armed robbery conviction. We agree with the trial court, however, that the relief Austin seeks is simply not available under Rule 32.1(e).

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¶4 An offense is deemed dangerous if it is one “involving the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument or the intentional or knowing infliction of serious physical injury on another person.” A.R.S. § 13-105(13). Nothing in the “newly discovered” material on which Austin relies undermines the determination, which Austin admitted as part of his guilty plea, that the offense he committed fit that definition. Indeed, *Miller* only addresses the constitutionality of mandatory life sentences for juveniles convicted of murder. ___ U.S. ___, 132 S. Ct. 2455. Therefore, the evidence, whether or not newly discovered, would not have changed Austin’s conviction or sentence in the manner he seeks. Even had all the information Austin now cites been known, it would not have altered the fact that his offenses involved the use of a deadly weapon. He therefore has failed to establish a claim for relief under Rule 32.1(e).

¶5 Accordingly, although we grant the petition for review, relief is denied.