

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

KENNETH RAMON KENSEY,
Petitioner.

No. 2 CA-CR 2013-0558-PR
Filed April 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NOT FOR PUBLICATION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 Maricopa County

No. CR2009006898001DT

The Honorable John R. Ditsworth, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Kenneth Kensey, Tucson
In Propria Persona

STATE v. KENSEY
Decision of the Court

MEMORANDUM DECISION

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

M I L L E R, Judge:

¶1 Kenneth Kensey petitions this court for review of the trial court's order summarily dismissing his petition for writ of habeas corpus, which the court treated as a petition for post-conviction relief brought pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that ruling unless the court clearly has abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Kensey has not met his burden of demonstrating such abuse here.

¶2 Kensey pled no contest to attempted first-degree murder, aggravated assault, drive-by shooting, misconduct involving weapons, and three counts of aggravated driving under the influence of an intoxicant (DUI). He was sentenced on January 15, 2010, to concurrent prison terms, the longest of which were thirty years. He sought post-conviction relief, and appointed counsel filed a notice stating she had reviewed the record but had been "unable to find any claims for relief to raise in post-conviction relief proceedings." Kensey filed a pro se petition for post-conviction relief raising numerous claims, which the trial court summarily dismissed. Kensey did not seek review of that ruling. He instead filed a second petition for post-conviction relief, which the court also summarily dismissed. Again, Kensey did not seek review in this court.

¶3 On October 24, 2012, Kensey filed a petition for writ of habeas corpus claiming that his due process rights had been violated because he had been "forced to proceed with counsel despite an irreconcilable conflict," that his convictions for aggravated DUI caused him to be improperly convicted and sentenced multiple

STATE v. KENSEY
Decision of the Court

times “for the same offense,” and that his conviction and sentence for first-degree attempted murder is improper because he had acted on the “spur of the moment,” “there is no statute” defining attempted first degree murder, and he should have been charged with endangerment instead of attempted murder. Correctly treating Kensey’s habeas filing as a petition for post-conviction relief pursuant to Rule 32.3, the trial court summarily dismissed it, concluding that it was untimely pursuant to Rule 32.4(a) and that none of Kensey’s claims fell within the exceptions to the timeliness requirement.

¶4 On review, Kensey claims only that, had he been aware the trial court would treat his petition as one for post-conviction relief, he would have “labeled” his filing as “a Rule 32, under Rule 32.1(e)(1) and (2).” He argues he had only recently discovered statutory support for his claims “as well as caselaw pertaining to unlawful sentences.”

¶5 Kensey is correct that a claim of newly discovered material facts pursuant to Rule 32.1(e) may be raised in an untimely proceeding like this one. Ariz. R. Crim. P. 32.4(a). But even had Kensey raised this argument below, it does not warrant relief. A claim of newly discovered material facts does not encompass newly discovered legal theories or authority. *See generally State v. Saenz*, 197 Ariz. 487, ¶ 7, 4 P.3d 1030, 1032 (App. 2000) (to establish claim of newly discovered evidence, defendant must show “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”).

¶6 Kensey does not otherwise suggest the trial court erred in summarily dismissing his petition. Accordingly, although review is granted, relief is denied.