

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

CARMAN NICHOLAS KING,
Petitioner.

No. 2 CA-CR 2014-0163-PR
Filed July 28, 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NOT FOR PUBLICATION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 Pinal County

No. S1100CR200801512

The Honorable Robert C. Brown, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

COUNSEL

M. Lando Voyles, Pinal County Attorney
By Rosemary Gordon Pánuco, Appellate Bureau Chief, Florence
Counsel for Respondent

Carman Nicholas King, Buckeye
In Propria Persona

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MEMORANDUM DECISION

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Miller and Judge Brammer¹ concurred.

ECKERSTROM, Chief Judge:

¶1 Petitioner Carman King 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). King has not sustained his burden of establishing such abuse here.

¶2 Pursuant to a plea agreement, King was convicted of theft of a means of transportation. In March 2009, the trial court suspended the imposition of sentence and placed King on a three-year term of probation, to begin upon his release from a prison term being served for a separate offense. In June 2012, the state filed a petition to revoke King's probation. King admitted to having violated two of the terms of his probation as alleged in an amended petition, and the court revoked his probation, imposing a 3.5-year prison sentence.

¶3 After his probation was revoked, King initiated a proceeding for post-conviction relief, and appointed counsel filed a notice stating she had "reviewed the transcripts and trial file" and could "find no colorable claims pursuant to Rule 32." The trial court granted King additional time to file a pro se, supplemental petition,

¹The Hon. J. William Brammer, Jr., a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and the supreme court.

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and when King failed to file anything, the court dismissed the proceeding on September 27, 2013.

¶4 On December 6, 2013, King initiated a second proceeding for post-conviction relief. In his petition, he stated as grounds for relief newly discovered evidence, that his initial Rule 32 counsel had been ineffective, and “prosecutorial misconduct—perjury by the state, ineffective assistance of counsel, confrontation[] rights against the witness denied.” In a subsequent “motion for reconsideration” and a reply, King expanded on his claim of newly discovered evidence, explaining he had discovered evidence that a third party had been stopped driving the vehicle he had been convicted of stealing two days after the date on which he confessed to having taken and abandoned the vehicle. He also stated he had discovered the information on September 12, 2013 “by public access to court information” and “a records request . . . from the City of Apache Junction Municipal Court” in October 2013. The trial court summarily denied relief in March 2014.

¶5 In his petition for review, King challenges the trial court’s March 2014 ruling. He again argues newly discovered evidence about a third party having been stopped driving the car entitled him to relief because he would not have pled guilty had he been aware of the information. He also again asserts various claims of prosecutorial misconduct, ineffective assistance of counsel, and claims that there was no factual basis for his plea. Because King’s second proceeding for post-conviction relief was untimely, he could only raise claims pursuant to Rule 32.1(d), (e), (f), (g), or (h). *See* Ariz. R. Crim. P. 32.4(a). Thus, King’s claim of newly discovered evidence is the only claim that could be raised properly in the untimely second proceeding,² and the court properly denied relief on the others.

²King also asserted in his petition for post-conviction relief, without supporting argument, that the court lacked jurisdiction to enter his conviction. Because he did not adequately present such a claim to the trial court, we do not address it on review. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980); *see also* Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review shall contain “[t]he

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¶6 The trial court also correctly concluded that the evidence King relies upon in support of his claim of newly discovered evidence did not entitle him to relief. A defendant presents a colorable claim of newly discovered evidence pursuant to Rule 32.1(e) under the following standard:

(1) the evidence must appear on its face to have existed at the time of trial but be discovered after trial; (2) the motion must allege facts from which the court could conclude the defendant was diligent in discovering the facts and bringing them to the court's attention; (3) the evidence must not simply be cumulative or impeaching; (4) the evidence must be relevant to the case; (5) the evidence must be such that it would likely have altered the verdict, finding, or sentence if known at the time of trial.

State v. Bilke, 162 Ariz. 51, 52-53, 781 P.2d 28, 29-30 (1989).

¶7 In this case, as the trial court concluded, King "entered his plea stating that he abandoned the vehicle." We agree with the court that "[w]hat may have happened after that point has nothing to do with [King's] case." We cannot say the court abused its discretion in determining evidence that a third party was found with the car after King, by his own admission, had abandoned it likely would not have altered King's conviction or sentence. Nor can we say King has established he was diligent in discovering this evidence, which was available in public records.

¶8 Therefore, although we grant the petition for review, we deny relief.

issues which were decided by the trial court and which the defendant wishes to present" for review).