

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

HOPE LYNETTE KING,
Petitioner.

No. 2 CA-CR 2015-0140-PR
Filed June 12, 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NOT FOR PUBLICATION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 Maricopa County

No. CR2001003384

The Honorable Cynthia J. Bailey, Judge

REVIEW GRANTED; RELIEF GRANTED IN PART

COUNSEL

Mark Brnovich, Arizona Attorney General
Jeffrey A. Zick, Chief Counsel, Phoenix
By Tanja K. Kelly, Assistant Attorney General, Tucson
Counsel for Respondent

Osborn Maledon, P.A., Phoenix
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STATE v. KING
Decision of the Court

and

Arizona Justice Project, Tempe
By Katherine A. Puzauskas
Counsel for Petitioner

MEMORANDUM DECISION

Judge Vásquez authored the decision of the Court, in which Judge Miller and Judge Brammer¹ concurred.

VÁSQUEZ, Judge:

¶1 Hope King seeks review of the trial court's order denying her 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. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We grant review and, for the reasons that follow, grant partial relief.

¶2 After a jury trial, King was convicted of eight counts of child abuse stemming from her repeated abuse of her infant daughter. She was sentenced to consecutive prison terms totaling forty years, to be followed by concurrent probation terms, the longest of which is four years. We affirmed her convictions and sentences on appeal. *State v. King*, No. 1 CA-CR 02-0889 (memorandum decision filed Oct. 9, 2003). She sought post-conviction relief, which the trial court denied, and this court denied review. *State v. King*, No. 1 CA-CR 05-0439 PRPC (order filed Jan. 6, 2006).

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.

STATE v. KING
Decision of the Court

¶3 In 2011, King initiated a new post-conviction proceeding, arguing a recent determination that she suffered from postpartum psychosis at the time of her offenses constituted newly discovered evidence pursuant to Rule 32.1(e) relevant to a defense of guilty except insane pursuant to A.R.S. § 13-502. She also asserted, based on that diagnosis, that she was entitled to relief pursuant to Rule 32.1(h) because the evidence would show she did not have the necessary intent to be convicted of the offenses. Finally, King argued she was entitled to raise a “conditional” claim of ineffective assistance of trial and Rule 32 counsel if the court determined her diagnosis was not newly discovered evidence.

¶4 The trial court summarily denied relief. It determined the diagnosis was not newly discovered and, in any event, King had not exercised due diligence because her personal and psychiatric history, as well as that of her family members, was available at trial. The court also concluded that King’s assertions in support of her claim were “completely contradicted” by her statements to police officers and behavioral health professionals. Finally, the court determined the diagnosis evidence would not have changed the verdict, King had not met her burden to obtain relief under Rule 32.1(h), and her claim of ineffective assistance of counsel was precluded. This petition for review followed the court’s denial of King’s motion for rehearing.

¶5 On review, King first asserts she has presented a colorable claim of newly discovered evidence and thus is entitled to an evidentiary hearing. To raise a colorable claim pursuant to Rule 32.1(e), King must demonstrate that: (1) the evidence is, in fact, newly discovered; (2) she exercised due diligence in discovering and presenting the evidence; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material to the issue involved; and (5) the evidence, “if introduced, would probably change the verdict if a new trial were ordered.” *State v. Serna*, 167 Ariz. 373, 374, 807 P.2d 1109, 1110 (1991) (emphasis omitted). In evaluating whether a claim is colorable and whether King is entitled to an evidentiary hearing, we must assume the facts she has alleged are true. *See State v. Watton*, 164 Ariz. 323, 328, 793 P.2d 80, 85 (1990).

STATE v. KING
Decision of the Court

¶6 Evidence is not newly discovered if it could “have been discovered and produced at trial through reasonable diligence.” *State v. Saenz*, 197 Ariz. 487, ¶ 7, 4 P.3d 1030, 1032 (App. 2000). A recent diagnosis of a mental condition that existed at the time of the offense can constitute newly discovered evidence. *See State v. Bilke*, 162 Ariz. 51, 53, 781 P.2d 28, 30 (1989). In *Bilke*, our supreme court determined a defendant’s recent diagnosis of post-traumatic stress disorder (PTSD) constituted newly discovered evidence. *Id.* The court concluded the defendant “easily” had demonstrated he could not have discovered the evidence and produced it at trial, noting the defendant had not been “diagnosed until well after his trial” and PTSD “was not a recognized mental condition at the time of his trial.” *Id.* The court further observed that, although the “defendant may have been aware that his mental condition was not stable, he was not aware that he suffered from PTSD.” *Id.*

¶7 King acknowledges the facts supporting her diagnosis of postpartum psychosis were in existence, at least in part, at the time of her trial. But, under *Bilke*, that does not mean her recent diagnosis is not newly discovered. And, King concedes postpartum psychosis was a known medical condition at the time of her trial. But it does not necessarily follow that trial counsel would have discovered the diagnosis with the exercise of reasonable diligence.

¶8 Christina Hibbert, the clinical psychologist who diagnosed King with postpartum psychosis, noted that, at the time King’s daughter was born, “very few medical and mental health practitioners had been trained in perinatal mood disorders” like postpartum psychosis and, as a result, “there were few who could have given [King] the proper evaluation she deserved.” Hibbert further opined that “the legal, medical and mental health professionals helping Ms. King at the time of her trial did not comprehend perinatal mental illness.”² Taken as true, Hibbert’s

²King was given a psychological evaluation before sentencing and, although the examiner noted King was suffering from, inter alia, depression, obsessive-compulsive disorder, and anxiety disorder, he did not discuss a possible diagnosis of postpartum psychosis or other perinatal mental illness. Although that fact may

STATE v. KING
Decision of the Court

statements support the conclusion that, even in the exercise of reasonable diligence, counsel likely would not have discovered that King was suffering from postpartum psychosis.

¶9 The state nonetheless suggests that, pursuant to *Bilke*, the condition must be unknown to the scientific community at the time of trial to be considered newly discovered. We do not agree that the supreme court in *Bilke* altered the established rule that evidence is newly discovered only if counsel could not have discovered the evidence through reasonable diligence. *See id.* at 53, 781 at 30. Although the court noted PTSD was not a recognized condition at the time of the defendant's trial, we view that reference as having been made in support of the court's conclusion that Bilke could not have discovered the diagnosis in the exercise of reasonable diligence. The state has not identified any textual support in *Bilke* or any other authority suggesting the court intended to create a different rule governing newly discovered medical diagnoses. Nor has the state identified any reason to adopt its argument that we should limit the reasoning in *Bilke* to evidence related to sentencing.

¶10 The trial court also rejected King's claim, in part, because it concluded the diagnosis is inconsistent with her previous statements. For example, when interviewed by police, King stated that she "knew what [she] did was wrong," attempted to characterize some of the infant's injuries as accidental, and stated there was "no excuse for what [she] did." However, Hibbert reviewed the interview transcripts and found many of King's statements to be consistent with the diagnosis, showing "scattered thinking, confusion, and frustration . . . despite apparent moments of clarity or insight."

¶11 Hibbert further opined that postpartum psychosis is "characteristically a 'waxing and waning' disorder, with symptoms increasing and decreasing in intensity and severity." Those

call into question the validity of King's more recent diagnosis, it nonetheless supports a claim that diagnosis might not have been discovered before trial irrespective of counsel's diligence.

STATE v. KING
Decision of the Court

symptoms could include auditory hallucinations, delusions, and behavior such as “disorganized thinking and speech, confusion, mood shifts, irritability, and a lack of insight, judgment, decision-making skills, and self-care.” Hibbert emphasized that persons suffering from postpartum psychosis would have periods of time where they recognized their feelings were unhealthy and may even seek help to deal with those feelings. Thus, that King may at times have appeared to accept responsibility for her actions does not conclusively defeat her claim that Hibbert’s opinion supports a defense pursuant to § 13-502(A).

¶12 And Hibbert observed that, as a result of postpartum psychosis, a person “would not be able to distinguish reality from unreality” or “‘right’ from ‘wrong’” and may feel as though “something else is controlling their actions.” Pursuant to § 13-502(A), “[a] person may be found guilty except insane if at the time of the commission of the criminal act the person was afflicted with a mental disease or defect of such severity that the person did not know the criminal act was wrong.” Hibbert’s opinion that King suffered from postpartum psychosis at the time of her offenses, if valid, supports that defense and would permit the jury to find King guilty except insane. If “doubts exist” whether a defendant is entitled to Rule 32 relief, “a hearing should be held to allow the defendant to raise the relevant issues, to resolve the matter, and to make a record for review.” *Watton*, 164 Ariz. at 328, 793 P.2d at 85, quoting *State v. Schrock*, 149 Ariz. 433, 441, 719 P.2d 1049, 1057 (1986). Thus, accepting Hibbert’s factual assertions as true, as we are required to do, we conclude King has made a colorable claim that her diagnosis of postpartum psychosis constitutes a newly discovered material fact entitling her to relief pursuant to Rule 32.1(e). Accordingly, the trial court must conduct an evidentiary hearing to determine whether King or her counsel in the exercise of reasonable diligence could have discovered at the time of trial the diagnosis of postpartum psychosis and, if not, whether presentation of Hibbert’s testimony would probably change the verdict.³ See

³We express no opinion whether King should be entitled to relief following the evidentiary hearing. That determination necessarily requires the trial court to evaluate Hibbert’s credibility

STATE v. KING
Decision of the Court

Serna, 167 Ariz. at 374, 807 P.2d at 1110; *see also* Ariz. R. Crim. P. 32.6(c), 32.8(a).

¶13 King also contends the trial court erred in rejecting her claim pursuant to Rule 32.1(h). To obtain relief under Rule 32.1(h), a defendant must “demonstrate[] by clear and convincing evidence that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would have found defendant guilty of the underlying offense beyond a reasonable doubt.” King asserts “that evidence concerning her” postpartum psychosis “would have severely compromised the State’s ability to prove *means rea* beyond a reasonable doubt” for her counts of intentional child abuse.

¶14 King acknowledges, however, that Arizona does not permit expert testimony as part of a “diminished mental capacity” defense. *See State v. Mott*, 187 Ariz. 536, 544, 931 P.2d 1046, 1054 (1997). But she asserts that evidence of her mental disorder is admissible nonetheless as “observation” evidence pursuant to *Clark v. Arizona*, 548 U.S. 735 (2006). The Supreme Court in *Clark* upheld Arizona’s restriction on defenses grounded in limited mental capacity, but nonetheless stated that so-called “observation evidence,” including “testimony of an expert witness about a defendant’s ‘tendency to think in a certain way and his behavioral characteristics’” could be admitted “to show a defendant did not have the requisite mental state to commit the charged offense.” *State v. Wright*, 214 Ariz. 540, ¶¶ 10-11, 155 P.3d 1064, 1067-68 (App. 2007), *quoting Clark*, 548 U.S. at 757.

¶15 But we need not decide whether, or to what extent, evidence concerning King’s postpartum psychosis would be

and to determine the weight to be given to her opinions in light of any evidence the state offers and the defendant’s burden to prove a defense under § 13-502 by clear and convincing evidence. *See* § 13-502(C); *State v. Hess*, 231 Ariz. 80, ¶ 11, 290 P.3d 473, 476 (App. 2012) (in evaluating Rule 32.1(e) claim, trial court may consider witness credibility and evidence “the state undoubtedly would offer at a new trial in response to the defendant’s new evidence”).

STATE v. KING
Decision of the Court

admissible as observation evidence because its presentation would do no more than create a conflict in the evidence. As we noted above, King made several statements suggesting she had acted intentionally and was aware of her actions and their consequences. Nothing would require the jury to find Hibbert's contrary testimony credible and to reject King's admissions. Thus, King cannot meet the burden of demonstrating "that no reasonable fact-finder would have found [her] guilty of the underlying offense beyond a reasonable doubt." Ariz. R. Crim. P. 32.1(h).

¶16 Finally, King asserts the trial court erred in rejecting her claim of ineffective assistance of post-conviction counsel, citing *Martinez v. Ryan*, ___ U.S. ___, 132 S. Ct. 1309 (2013), for the proposition "that Arizona defendants have a right to the effective assistance of counsel in their first petition for post-conviction relief." In *Martinez*, the Supreme Court determined that, as a matter of equity, a non-pleading defendant may be able to obtain federal habeas review of a claim that is procedurally barred if he can show ineffective assistance of his first post-conviction counsel. ___ U.S. at ___, 132 S. Ct. at 1319-20. As we explained in *State v. Escareno-Meraz*, 232 Ariz. 586, ¶¶ 4-6, 307 P.3d 1013, 1014 (App. 2013).

¶17 For the reasons stated, we grant review and partial relief. We remand the case to the trial court for an evidentiary hearing on King's claim of newly discovered evidence. We otherwise deny relief.