

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

MICHAEL DEVAUGHN JOHNSON,
Petitioner.

No. 2 CA-CR 2016-0066-PR
Filed April 11, 2016

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NOT FOR PUBLICATION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. CR2011114400003DT
The Honorable Pamela D. Svoboda, Judge

REVIEW GRANTED; RELIEF DENIED

Michael Johnson, Phoenix
In Propria Persona

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MEMORANDUM DECISION

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

ECKERSTROM, Chief Judge:

¶1 Michael Johnson 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 review a trial court’s summary denial of post-conviction relief for an abuse of discretion, *see State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006), and we find none here.

¶2 Johnson was convicted after a jury trial of possession of dangerous drugs for sale, possession of narcotic drugs for sale, and possession of marijuana. He was sentenced to concurrent prison terms, the longest of which were 15.75 years. This court affirmed his convictions and sentences on appeal. *State v. Johnson*, No. 1 CA-CR 13-0584 (memorandum decision filed Jan. 13, 2015). The trial court dismissed Johnson’s first notice of post-conviction relief, filed on January 7, 2014, and this court denied relief after review of that decision. *State v. Johnson*, No. 2 CA-CR 2015-0410-PR (memorandum decision filed Dec. 2, 2015). On April 21, 2014, Johnson filed a successive notice of post-conviction relief and, a week later, he filed his petition.

¶3 In that petition, he alleged the existence of a “newly discovered witness” who would testify that Johnson had not been present when a police officer observed signs of drug trafficking at an apartment on March 21, 2011. Based on that officer’s observations, police executed a search warrant, found a cache of dangerous drugs, and arrested Johnson and others who were in the apartment when they arrived. *See* Ariz. R. Crim. P. 32.1(e) (providing ground for relief when “[n]ewly discovered material facts probably exist and such facts probably would have changed the verdict or sentence”).

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Similar arguments, with respect to different witnesses, had been raised in connection with Johnson's motion to vacate the judgment, which the trial court denied on April 3, 2014. Details of those claims are addressed, to the extent required, in our decision on Johnson's first Rule 32 proceeding. *See Johnson*, No. 2 CA-CR 2015-0410-PR, ¶¶ 2-3. We need not repeat them here.

¶4 The trial court dismissed Johnson's April 2014 petition, finding he had "fail[ed] to provide sufficient facts, affidavits, records, or other evidence to support why these facts could not have been produced at the trial phase through reasonable diligence." *See* Ariz. R. Crim. P. 32.6(c) (trial court shall dismiss petition if no non-precluded claim "presents a material issue of fact or law which would entitle the defendant to relief"); *see also State v. Saenz*, 197 Ariz. 487, ¶ 7, 4 P.3d 1030, 1032 (App. 2000) (claim under Rule 32.1(e) requires showing that "newly discovered evidence . . . could not have been discovered and produced at trial through reasonable diligence"). This petition for review followed.

¶5 On review, Johnson argues he "explained in his Rule 32 notice and petition that he learned of [this new witness] on April 10th 2014[,] after his [sixty] days expired," apparently referring to the deadline for filing a petition for post-conviction relief in his first Rule 32 proceeding, initiated by his January 2014 notice. *See* Ariz. R. Crim. P. 32.4(c)(2). He also argues that he has met "all the requirements for [a] new trial," noting the new witness's affidavit, dated April 10, 2014, filed as an exhibit to his April petition.

¶6 As noted in our earlier memorandum decision, Johnson never filed a Rule 32 petition in his first proceeding. *Johnson*, No. 2 CA-CR 2015-0410-PR, ¶ 4. But by the end of January 2014, three weeks after he filed his first Rule 32 notice, he signed an "addendum" to his motion to vacate the judgment and attached what purported to be a written statement from a newly identified witness, T.T., stating T.T. "and [his] girlfriend drove" to the apartment in question on March 21, 2011, to look for T.T.'s cousin, and Johnson had not been there. In her affidavit, M.P., the "newly discovered witness" identified in Johnson's April 2014 petition,

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describes T.T. as her “ex-boyfriend,” and she provides an account similar to the statement from T.T. that Johnson had filed in January.

¶7 Rule 32.2(b) provides that when a claim under Rule 32.1(e) “is to be raised in a successive or untimely post-conviction relief proceeding, the notice of post-conviction relief must set forth the substance of the specific exception and the reasons for not raising the claim in the previous petition or in a timely manner.” Further, “[i]f the specific exception and meritorious reasons do not appear substantiating the claim and indicating why the claim was not stated in the previous petition or in a timely manner, the notice shall be summarily dismissed.” Ariz. R. Crim. P. 32.2(b). Although Johnson maintains he did not learn about M.P. until April 10, 2014, when she signed her affidavit, he clearly knew of her existence in January 2014, when T.T. stated he and his girlfriend had gone to the apartment on March 21, 2011.

¶8 The trial court referred in its order to Johnson’s failure to provide evidence that these facts could not have been discovered through reasonable diligence before trial. But Rule 32.1(e) also requires a defendant to “demonstrate that he or she ‘exercised due diligence in securing the newly discovered material facts.’ That is, the defendant must show he or she ‘was diligent in pursuing’ a remedy under Rule 32.” *State v. Hess*, 231 Ariz. 80, ¶ 7, 290 P.3d 473, 475 (App. 2012), quoting *State v. Bilke*, 162 Ariz. 51, 53, 781 P.2d 28, 30 (1989). We cannot say the court abused its discretion in dismissing Johnson’s successive notice and petition, as he failed to file a petition in his first Rule 32 proceeding, despite apparently having notice then of facts in support of a claim under Rule 32.1(e). See *Bilke*, 162 Ariz. at 52-53, 781 P.2d at 29-30 (claim under Rule 32.1(e) requires showing of diligence, both in “discovering the facts and [in] bringing them to the court’s attention”); see also Ariz. R. Crim. P. 32.2(b); *State v. Lopez*, 234 Ariz. 513, ¶ 10, 323 P.3d 1164, 1166 (App. 2014) (appellate court will uphold Rule 32 ruling if correct for any reason).

¶9 For the foregoing reasons, although we grant review, we deny relief.