

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CR2010-123572-001 DT

07/27/2016

HONORABLE SUSAN M. BRNOVICH

CLERK OF THE COURT  
K. Hartley  
Deputy

STATE OF ARIZONA

LISA MARIE MARTIN

v.

GARY THOMAS KELLEY (001)

GARY THOMAS KELLEY  
#264265 ASPC YUMA CIBOLA  
P O BOX 8909`  
SAN LUIS AZ 85349

COURT ADMIN-CRIMINAL-PCR

**RULE 32 PROCEEDING DISMISSED**

Pending before the Court are Defendant's Notice of Post-Conviction Relief and "Successive Petition Under A.R.Cr.P. 32.1(e) and A.R.Cr.P. 32.2(b) as to Newly Discovered Exculpatory Evidence," both filed on July 11, 2016. The Court deems his submissions a single Notice of Post-Conviction Relief.

This case arises out of Defendant's altercation with two neighbors on May 6, 2010 at about 1 p.m. Defendant fatally shot one of the neighbors, J.V., on the sidewalk in front of the home of neighbors Joe and Gerry Pena, then pointed and cocked the gun at neighbor A.V., but did not shoot. After trial, a jury convicted Defendant of second-degree murder and aggravated assault, rejecting his claim of self-defense. The Court accordingly entered judgment and sentenced him to consecutive terms of imprisonment of 20 flat years and 7.5 years. The Arizona Court of Appeals affirmed on direct appeal, issuing its order and mandate on April 26, 2013. *See State v. Kelley*, 1 CA-CR 11-0496 (App. Oct. 18, 2012) (mem. filed). This is Defendant's second Rule 32 proceeding.

**A. Rule 32.1(a) Claims**

In his current submission, Defendant contends that his convictions and sentences were obtained in violation of his constitutional rights and he is entitled to relief under Arizona Rule of Criminal Procedure 32.1(a). Specifically, Defendant claims that he received ineffective assistance of counsel. (Notice at 2) In a separate document, Defendant states that he "requested investigatory follow-up from both Robert

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Ditsworth at trial and Kathryn Petroff on appeal, but both put him off, and no inquiry, or even aggressive cross-examination occurred to run the notion of Mrs. Pena as witness to ground.” (Successive Petition at 3). Defendant maintains that it was Ms. Pena, not Mr. Pena, who witnessed the shooting.

Defendant cannot raise these Rule 32.1(a) claims because an untimely Notice of Post-Conviction Relief may only assert claims pursuant to Rule 32.1(d), (e), (f), (g), or (h). Ariz. R. Crim. P. 32.4(a); *see generally State v. Petty*, 225 Ariz. 369, 373, ¶ 11, 238 P.3d 637, 641 (App. 2010) (holding ineffective assistance of counsel claims are “cognizable under Rule 32.1(a)”). The Rule 32.1(a) claims Defendant has asserted were required to be raised in a timely Rule 32 proceeding. To the extent Defendant is referring to ineffective assistance of appellate counsel, the Court finds the issue precluded because he asserted it in his prior Rule 32 proceeding. *See* Ariz. R. Crim. P. 32.2(a)(2). To the extent Defendant is referring to trial counsel or raising other new ineffective assistance claims, relief is also precluded. *See* Ariz. R. Crim. P. 32.2(a)(3); *State v. Spreitz*, 202 Ariz. 1, 2, ¶ 4, 39 P.3d 525, 526 (2002) (“Our basic rule is that where ineffective assistance of counsel claims are raised, or could have been raised, *in a Rule 32 post-conviction relief proceeding*, subsequent claims of ineffective assistance will be deemed waived and precluded.”) (emphasis in original).

**B. Rule 32.1(e) Claim**

Alternatively, Defendant contends that he is entitled to relief because newly discovered material facts exist which probably would have changed the convictions or sentences under Arizona Rule of Criminal Procedure 32.1(e). Motions for a new trial based on newly discovered evidence are “disfavored” and “should be granted with great caution.” *State v. Hess*, 231 Ariz. 80, 83, ¶ 11, 290 P.3d 473, 476 (App. 2012). “The relevant inquiry for determining whether the petitioner is entitled to an evidentiary hearing is whether he has alleged facts which, if true, would *probably* have changed the verdict or sentence.” *State v. Amaral*, 239 Ariz. 217, 220, ¶ 11, 368 P.3d 925, 928 (2016) (emphasis in original).

To be entitled to post-conviction relief based on newly discovered evidence, the defendant must show that the evidence was discovered after trial although existed before trial; the evidence could not have been discovered and produced at trial or on appeal through reasonable diligence; the evidence is neither solely cumulative nor impeaching; the evidence is material; and the evidence probably would have changed the verdict or sentence. *State v. Saenz*, 197 Ariz. 487, 489, ¶ 7, 4 P.3d 1030, 1032 (App. 2000), *see also* Ariz. R. Crim. P. 32.1(e). “Evidence is not newly discovered unless it was unknown to the trial court, the defendant, or counsel at the time of trial and neither the defendant nor counsel could have known about its existence by the exercise of due diligence.” *Saenz*, 197 Ariz. at 490, ¶ 13, 4 P.3d at 1033. When a defendant “knows of the existence and identity of a witness before trial and makes no effort to obtain the witness’ testimony, such testimony will not ordinarily justify a new trial.” *Id.* at 491, ¶ 14, 4 P.3d at 1034.

Defendant states that he has discovered “files buried within the work product of appointed counsel that corroborate my long held perception that another independent eye witness observed the subject events and can provide exculpatory evidence on the issue of self-defense.” (Notice at 3) According to Defendant, Ms. Pena was the “reluctant and recalcitrant” eye witness. (Successive Petition

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at 2) A handwritten list of issues attached to Defendant's memo to appellate counsel disputes Ms. Pena's statement that she was at work talking on the phone when the shooting took place. The document is undated. Ms. Pena stated in her witness interview that she had thought Defendant was a "gentleman" but affirmed that she was at work at the time of the shooting. Defendant's other documents include a portion of Mr. Pena's witness interview, phone records for the Penas, criminal records of Defendant's neighbor, newspaper articles, and a letter received on January 23, 2012.

The defendant does not allege any new facts. Both Defendant and his counsel were aware of Ms. Pena. In fact, Defendant states: "In the fog of the moment, the petitioner recalled seeing Gerry Pena bolt from the house, hop into her vehicle, and speed off." (Successive Petition at 2) Defendant also knew that Ms. Pena arrived home from her work as a hairdresser at 1:00 every day. (*Id.*) The documents upon which Defendant relies were in his counsel's files and were also known to counsel. Indeed, Defendant states that he asked trial counsel to pursue Ms. Pena as a witness. At best, Defendant could offer Ms. Pena's testimony (1) to corroborate his own self-defense claim, which the jury rejected after hearing Defendant testify, and (2) to undermine the credibility of Mr. Pena. If Defendant is correct, then Ms. Pena's credibility would be suspect. Either way, Defendant is not entitled to relief because he has failed to demonstrate reasonable diligence in discovering the evidence. Five years have elapsed since Defendant was sentenced.

Defendant's Rule 32.1(e) claim is more properly characterized as a component of his Rule 32.1(a) ineffective assistance claims. For reasons previously explained, the Court finds that relief under Rule 32.1(a) is barred. *See* Ariz. R. Crim. P. 32.4(a).

**C. Rule 32.1(h) Claim**

Finally, Defendant claims that he is actually innocent and therefore is entitled to relief under Arizona Rule of Criminal Procedure 32.1(h). His submission fails to meet the standard that must be met for him to obtain post-conviction relief pursuant to Rule 32.1(h). The defendant must prove by clear and convincing evidence that, based on the new facts presented, a reasonable fact finder could not find the defendant guilty of the underlying offenses. Defendant's evidence falls short of this standard. It is worth noting that the Arizona Court of Appeals affirmed Defendant's convictions and sentences.

In sum, Defendant fails to state a claim for which Rule 32 can provide relief. The defendant has the burden of alleging substantial claims, providing specific factual support, and adequately explaining why the claims are untimely. Ariz. R. Crim. P. 32.2(b). Defendant has failed to meet that standard. The Court finds that no purpose would be served by further proceedings or appointment of counsel.

IT IS THEREFORE ORDERED dismissing Defendant's Notice of Post-Conviction Relief and "Successive Petition Under A.R.Cr.P. 32.1(e) and A.R.Cr.P. 32.2(b) as to Newly Discovered Exculpatory Evidence," which the Court deems a single Notice of Post-Conviction Relief, pursuant to Arizona Rule of Criminal Procedure 32.2(b).