

NOTICE: NOT FOR PUBLICATION.
UNDER ARIZ. R. SUP. CT. 111(c), THIS DECISION DOES NOT CREATE LEGAL PRECEDENT
AND MAY NOT BE CITED EXCEPT AS AUTHORIZED.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Respondent*,

v.

BYRON MURPHY, *Petitioner*.

No. 1 CA-CR 12-0606 PRPC
FILED 12-12-2013

Appeal from the Superior Court in Maricopa County
No. CR2005-006154-001
The Honorable Jo Lynn Gentry-Lewis, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Maricopa County Attorney's Office, Phoenix
By Lisa Marie Martin

Counsel for Respondent

Bryon Murphy, Yuma

Petitioner In Propria Persona

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MEMORANDUM DECISION

Per Curiam: Presiding Judge Maurice Portley, Judge John C. Gemmill, and Judge Kent E. Cattani delivered the following decision.

¶1 In 2006, Petitioner Byron Murphy pled guilty to armed robbery and the trial court sentenced him to fifteen years' imprisonment. Murphy now seeks review of the summary dismissal of his untimely second petition for post-conviction relief. We review the summary dismissal of a petition for post-conviction relief for abuse of discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). We have jurisdiction pursuant to Arizona Rule of Criminal Procedure 32.9(c).

¶2 In his petition for review, Murphy argues he has newly discovered evidence that shows he was set up by an FBI agent who wanted Murphy imprisoned for a long period of time so he could continue his extramarital affair with Murphy's wife. Murphy also argues he has newly discovered evidence showing that his trial counsel and counsel's wife were "social-friends" with the FBI agent and his wife, something counsel failed to disclose. Murphy argues that had he known either of these pieces of information, he would not have pled guilty.

¶3 For a defendant to be entitled to post-conviction relief based on newly discovered evidence,

(1) [T]he evidence must appear on its face to have existed at the time of trial but be discovered after trial;

(2) [T]he 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) [T]he evidence must not simply be cumulative or impeaching;

(4) [T]he evidence must be relevant to the case; [and]

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(5) [T]he 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).

¶4 We deny relief. Regarding the claims involving the FBI agent and Murphy’s wife, Murphy raised these same claims in his “of-right” petition for post-conviction relief in 2007. The only difference in the current petition is that Murphy now provides more details about subsequent legal action taken against the agent and the results of those actions. Any claim a defendant raised in an earlier post-conviction relief proceeding is precluded. Ariz. R. Crim. P. 32.2(a). The new information does not measurably change the claim asserted in his 2007 petition; the legal action subsequently taken against the FBI agent did not change the analysis of whether the FBI agent’s conduct (known at the time of the first post-conviction proceeding) affected Murphy’s decision to enter into a plea agreement; instead it just represents a consequence of the conduct. Accordingly, Murphy is not entitled to relief based on this evidence.

¶5 Regarding the claim that defense counsel failed to disclose he and his wife were “social friends” with the agent and his wife, Murphy’s petition established only that there was inadmissible hearsay suggesting such a relationship. Murphy’s counsel provided an affidavit in which he stated neither he nor his wife had ever met the agent, and counsel had never seen or spoken to the agent’s wife, who was an attorney, outside a courtroom. Thus, there was no competent, admissible evidence supporting Murphy’s claim, and he thus failed to state a colorable claim for relief. Further, even assuming Murphy’s allegation was true, he failed to establish that the information would likely have affected his decision to plead guilty. This alleged relationship is even more tangential than the information of which he was aware regarding his wife’s relationship with the FBI agent, and it is thus highly unlikely the added “information” would have changed any aspect of the potential trial he faced or his decision to plead guilty.

¶6 Because Murphy failed to state any colorable claims for relief, the trial court did not abuse its discretion when it summarily dismissed Murphy’s successive petition for post-conviction relief.

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¶7

We grant review and deny relief.



Ruth A. Willingham · Clerk of the Court
FILED: mjt