IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Respondent*,

v.

LORI SUE KOECKES, *Petitioner*.

No. 1 CA-CR 15-0463 PRPC
FILED 6-15-2017

Petition for Review from the Superior Court in Yavapai County
No. V1300CR201280153
The Honorable Tina R. Ainley, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Yavapai County Attorney's Office, Prescott
By Sheila Sullivan Polk
Counsel for Respondent

C. Kenneth Ray, II PC, Prescott
By C. Kenneth Ray, II
Counsel for Petitioner

MEMORANDUM DECISION

Presiding Judge Kent E. Cattani delivered the decision of the Court, in which Judge Jon W. Thompson and Judge Paul J. McMurdie joined.

C A T T A N I, Judge:

¶1 Lori Sue Koeckes petitions for review from the superior court's dismissal of her petition for post-conviction relief. For reasons that follow, we grant review but deny relief.

¶2 In the underlying criminal case, Koeckes was charged with (a) four counts of aggravated driving under the influence ("DUI") with a minor in the vehicle (blood alcohol concentration ("BAC") over 0.08 and 0.20 within two hours of driving), (b) two counts of aggravated DUI (impaired to the slightest degree) with a minor in the vehicle, (c) two counts of vehicular endangerment, and (d) one count of criminal damage. Koeckes had a bench trial after waiving her jury trial right.

¶3 The charges arose from a single incident in March 2012. That day, Koeckes drove with her two children, T.K. and N.K., both under age 15, to a veterinary office and back home. T.K. testified that she had not seen Koeckes drink anything before leaving home, and that Koeckes's driving on the way to the office was normal. An employee at the office testified that she had observed no signs that Koeckes had been drinking.

¶4 T.K. testified that Koeckes was "weaving all over" and swerved to the right several times on the drive home, she had "watery and red" eyes and "kind of a sour smell to her breath," and she was "kind of slurr[ing] her words." Koeckes's boyfriend, B.B., testified that Koeckes was slurring her speech and not making sense during a phone call at approximately 4:30 p.m.

¶5 At approximately 5:00 p.m., Koeckes crashed the car into B.B.'s garage. She had trouble finding the gear shift to put the car in reverse, and after T.K. helped her, she backed up but then drove forward and hit the garage again. Approximately two and a half hours later, an officer administered two breath tests, which showed a BAC of 0.27. Blood drawn almost six hours after driving showed a BAC of 0.20.

¶6 At trial, a criminalist performed a retrograde extrapolation to estimate Koeckes's BAC at the time of driving. Koeckes testified, however, that she had not consumed any alcohol before hitting the garage, but that she had "chugged some rum" (about 10 drinks) *after* the accident because she was worried that B.B. would be angry about the damage to his car and garage.

¶7 The superior court acquitted Koeckes of the BAC-based counts of aggravated DUI, reasoning in part that it could not rule out alcohol consumption after the accident affecting the BAC numbers presented at trial. The court found Koeckes guilty of the remaining offenses, however, concluding that T.K.'s and B.B.'s descriptions of Koeckes's behavior before the accident provided sufficient circumstantial evidence that Koeckes was impaired by alcohol while driving. The court suspended imposition of sentence and placed Koeckes on four years' supervised probation. Koeckes appealed, and this court affirmed. *State v. Koeckes*, 1 CA-CR 13-0689, 2014 WL 3608711 (Ariz. App. July 7, 2014) (mem. decision).

¶8 Koeckes subsequently filed a petition for post-conviction relief asserting claims based on newly discovered evidence, ineffective assistance of trial counsel, and actual innocence. *See* Ariz. R. Crim. P. 32.1(a), (e), (h). Her proffered evidence consisted of an affidavit from an expert who opined that the criminalist who testified at trial regarding Koeckes's BAC had insufficient "information . . . to allow an accurate calculation of a retrograde," and additionally pointed out that there was no direct evidence Koeckes consumed alcohol before the accident. Koeckes argued that this new evidence likely would have changed the result—and in fact demonstrated that she was not impaired by alcohol at the time of driving and thus was factually innocent—and that the failure to present such evidence at trial constituted ineffective assistance of trial counsel. The superior court denied the petition, and Koeckes petitioned this court for review.

¶9 We deny relief because the expert opinion obtained after trial would not have changed the verdicts. That opinion contested the viability of the State's retrograde analysis to attempt to call into question the State's calculation of Koeckes's BAC when driving. But Koeckes was acquitted of the aggravated DUI charges that depended on BAC; the DUI offenses of which she was convicted did not require proof of elevated BAC, but rather that Koeckes was driving while "impaired to the slightest degree." *Compare*

Ariz. Rev. Stat. ("A.R.S.") § 28-1381(A)(1), *with* A.R.S. § 28-1381(A)(2).[1] And other circumstantial evidence supported the court's conclusion that Koeckes was impaired to the slightest degree at the time of driving.

¶10 Accordingly, because the expert evidence would not have changed the verdicts, Koeckes's claims of newly discovered evidence and ineffective assistance of counsel fail. *See Strickland v. Washington*, 466 U.S. 668, 691–96 (1984); *State v. Bilke*, 162 Ariz. 51, 52–53 (1989). So too her claim of actual innocence under Arizona Rule of Criminal Procedure 32.1(h). Although we disagree with the superior court's ruling that the claim was precluded, *see* Ariz. R. Crim. P. 32.2(b), the claim nevertheless does not provide a basis for relief given Koeckes's failure to establish her innocence by clear and convincing evidence.

¶11 We grant review, but deny relief.

AMY M. WOOD • Clerk of the Court
FILED: AA

[1] Absent material revisions after the relevant date, we cite a statute's current version.