

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Respondent*,

v.

DANIEL R. GUKEISEN, *Petitioner*.

No. 1 CA-CR 15-0557 PRPC
FILED 7-6-2017

Petition for Review from the Superior Court in Maricopa County
No. CR2009-005838-001
The Honorable Sam J. Myers, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Maricopa County Attorney's Office, Phoenix
By Karen Kemper
Counsel for Respondent

The Nolan Law Firm PLLC, Mesa
By Vicki A. R. Lopez, Cari McConeghy Nolan
Counsel for Petitioner

MEMORANDUM DECISION

Presiding Judge Samuel A. Thumma delivered the decision of the Court, in which Judge Lawrence F. Winthrop and Judge James P. Beene joined.

T H U M M A, Judge:

¶1 Petitioner Daniel R. Gukeisen seeks review of the superior court's order denying his petition for post-conviction relief, filed pursuant to Arizona Rule of Criminal Procedure 32.1 (2017).¹ Absent an abuse of discretion or error of law, this court will not disturb a superior court's ruling on a petition for post-conviction relief. *State v. Gutierrez*, 229 Ariz. 573, 577 ¶ 19 (2012). Finding no such error, this court grants review but denies relief.

¶2 A jury found Gukeisen guilty of manslaughter; the court sentenced him to five years in prison and this court affirmed on direct appeal. Gukeisen filed a petition for post-conviction relief that raised claims of newly discovered evidence, ineffective assistance of counsel and sentencing issues. The superior court granted relief on the sentencing issues and the related claims of ineffective assistance but resentenced Gukeisen to the same prison term. The court summarily dismissed the remaining issues.

¶3 In his petition seeking review by this court, Gukeisen argues he has newly discovered evidence and that his trial counsel was ineffective by failing: (1) to object to the court's response to a jury question; (2) to file a motion to suppress; and (3) to move to suppress or otherwise object to blood evidence. Gukeisen presents no issues regarding his sentence.

I. Newly Discovered Evidence.

¶4 Gukeisen argues he has newly discovered evidence of exculpatory photographs. Gukeisen argues his wife took digital photographs of the incident between Gukeisen and the victim as it happened. Gukeisen claims his brother, who took part in the incident, later stole the camera before Gukeisen and/or his wife could download the images and refused to return the camera until after trial. Gukeisen has

¹ Absent material revisions after the relevant dates, statutes and rules cited refer to the current version unless otherwise indicated.

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never produced copies of those photographs and has never provided any meaningful description of what the photographs depict, other than to make general claims that they corroborate unidentified portions of Gukeisen's version of events and that they have "affirmative evidentiary value" and/or impeachment value.

¶5 "Newly-discovered material facts alleged as grounds for post-conviction relief are facts which come to light after the trial and which could not have been discovered and produced at trial through reasonable diligence." *State v. Dogan*, 150 Ariz. 595, 600 (App. 1986). To obtain post-conviction relief based on newly discovered evidence:

- (1) The evidence must appear on its face to have existed at the time of trial but be discovered after trial;
- (2) The petition must allege facts from which the court could conclude the defendant was diligent in discovering the facts and bringing them to court's attention;
- (3) The evidence must not simply be cumulative or impeaching;
- (4) The evidence must be relevant to the case; and
- (5) The 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 (1989).

¶6 Given this standard, Gukeisen has failed to present a colorable claim for relief. First, the photographs are not "newly discovered" because he knew of their existence before trial. Second, Gukeisen offers nothing to suggest he exercised diligence to obtain the photographs. While Gukeisen explains how law enforcement investigators failed to discover the existence of and/or otherwise obtain the camera or the digital photographs, he offers no explanation of what efforts he made to obtain the photographs and does not discuss legal means he could have pursued to obtain the photographs before. Finally, Gukeisen has never produced the photographs and has never provided any meaningful description of what they depict. Therefore, he has also failed to present a colorable claim that the photographs would likely have altered the verdict, that they were not merely cumulative or that they would not serve only to impeach.

II. Ineffective Assistance Of Counsel.

¶7 Gukeisen presents three claims of ineffective assistance of counsel. To state a colorable claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below objectively reasonable standards and that the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

A. The Failure To Object To The Response To A Jury Question.

¶8 Gukeisen argues his trial counsel was ineffective by failing to object to the superior court's response to a jury question. The court instructed the jury on several justification defenses, including self-defense. During deliberations, at Gukeisen's request, the court gave an additional instruction that told the jury in relevant part that there was no evidence that Gukeisen ever "said, acknowledged or admitted" he stabbed the victim, and that it was still legally proper to instruct the jury on self-defense in such circumstances. Shortly thereafter, the jury submitted two written questions: "Did the Defendant or [defense counsel] claim innocen[ce] by self-defense? If so when was this claim made?" With counsels' approval, the court responded in writing "This issue is not relevant to any determination you are to make. You are to rely only on the evidence presented at trial. The arguments or comments of counsel are not evidence and should not be considered as evidence."

¶9 Gukeisen argues his counsel should have objected to the court's response because it caused the jurors to believe they could not consider self-defense because it was not relevant. In support of his claim, Gukeisen provides the affidavit of a person who interviewed several jurors and claims that some of those jurors stated the response confused them and caused them to believe they could not consider self-defense.

¶10 Gukeisen has failed to present a colorable claim of ineffective assistance of counsel on this ground. The failure to object did not fall below objectively reasonable standards. The court's answer was responsive to the question of who made the claim of self-defense and when did that person make the claim. The court properly informed the jury that who made the claim and when were not relevant. Further, the affidavit is not sufficient to present a colorable claim because it contains only hearsay and does not identify any of the jurors who purported to provide the information about jury confusion.

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B. The Failure To File A Motion To Suppress Gukeisen's Statements.

¶11 Gukeisen argues his trial counsel was ineffective in failing to move to suppress statements Gukeisen made to investigators during an interview and a drawing Gukeisen made during that interview. Gukeisen argues counsel should have moved to suppress the evidence because Gukeisen had retained counsel before the interview. He further argues that his counsel arrived at the location of the interview and demanded to see Gukeisen, but investigators did not permit counsel to see Gukeisen until after he invoked his rights.

¶12 Gukeisen has failed to present a colorable claim on this ground. Even in his own affidavit, Gukeisen never claimed his statements were involuntary, that investigators continued the interview after he invoked either his right to remain silent or his right to counsel or that the interview otherwise violated his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). In fact, he concedes the interview stopped as soon as he invoked his rights. The failure to file a motion to suppress under these circumstances did not fall below objectively reasonable standards.

C. The Failure To Move To Suppress Or Object To Blood Evidence.

¶13 Gukeisen argues his trial counsel should have moved to suppress or object to testimony regarding a trail of blood. Gukeisen argues counsel should have objected because there was no evidence the substance the witness observed was blood, let alone human blood.

¶14 Whether to object to evidence is a matter of trial strategy. "Matters of trial strategy and tactics are committed to defense counsel's judgment, and claims of ineffective assistance cannot be predicated thereon." *State v. Beaty*, 158 Ariz. 232, 250 (1988). The testimony and exhibits at issue depict a trail of blood that ends at the spot in the street where the victim collapsed and bled profusely. A witness described what he believed to be, and the photographs appear to show, a large amount of blood in the street surrounded by the debris from the victim's emergency medical treatment. The trail of what appears to be blood runs continuously in decreasing volume from that spot to a sidewalk, down the sidewalk and ends at a planter box where the witness saw what he believed was a single "droplet" of blood. Under these circumstances, the failure to object to the description of the substance as blood because the State failed to conduct any

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tests to determine if the substance was blood and/or human blood did not fall below objectively reasonable standards.

¶15 For these reasons, this court grants review but denies relief.



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