IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Respondent*,

v.

MICHELLE JANE MCCLUSKEY, *Petitioner*.

No. 1 CA-CR 15-0750 PRPC
FILED 8-10-2017

Petition for Review from the Superior Court in Yavapai County
No. P1300CR950817
The Honorable Jennifer B. Campbell, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Yavapai County Attorney's Office, Prescott
By Steven A. Young
Counsel for Respondent

The Nolan Law Firm PLLC, Mesa
By Cari McConeghy Nolan
Counsel for Petitioner

MEMORANDUM DECISION

Judge Peter B. Swann delivered the decision of the court, in which Presiding Judge Randall M. Howe and Judge Maria Elena Cruz joined.

S W A N N, Judge:

¶1 Michelle Jane McCluskey seeks review of the superior court's dismissal of her underlying successive petition for post-conviction relief. "We will not disturb a trial court's ruling on a petition for post-conviction relief absent a clear abuse of discretion." *State v. Swoopes*, 216 Ariz. 390, 393, ¶ 4 (App. 2007). We have considered the petition for review and find no abuse of discretion. For reasons that follow, we grant review but deny relief.

¶2 In 1997, a jury found McCluskey guilty of first degree murder; armed robbery, a dangerous offense; and theft of a credit card. The court sentenced McCluskey to a term of life imprisonment with no possibility of release until twenty-five years have been served for the first-degree murder conviction; to an aggravated, concurrent sentence of twenty-one years' imprisonment for armed robbery, a dangerous offense; and to an aggravated, consecutive sentence of 2.5 years for theft of a credit card.

¶3 On direct appeal, McCluskey argued that the court abused its discretion by allowing an FBI examiner's expert testimony to the effect that the bullet removed from the victim was analytically indistinguishable from the bullets found in McCluskey's rented storage unit. We held that "even assuming arguendo that [the expert]'s evidence should have been excluded, . . . the remaining evidence — eyewitness testimony, the victim's stolen credit cards, fingerprint evidence, the billing records, defendant's own statements, [her co-defendant]'s statements, the other ballistic evidence — amounted to so overwhelming a case against defendant that the admission of [the expert]'s testimony, if error, was harmless beyond a reasonable doubt." *State v. McCluskey*, 1 CA-CR 97-1013, *11 (Ariz. App. Dec. 24, 1998) (mem. decision).

¶4 Shortly after the order and mandate were filed, McCluskey filed her first petition for post-conviction relief, alleging newly discovered evidence. McCluskey argued that the sentence imposed by the superior court was too harsh in light of the affidavit her co-defendant signed in

which he claimed the statements he made in the pre-sentence report, and all his statements regarding McCluskey's involvement, were false. After learning that McCluskey's co-defendant would not testify, and that he would assert his Fifth Amendment right if he were to take the witness stand, the court struck his affidavit and dismissed the petition pursuant to Ariz. R. Crim. P. ("Rule") 32.6(c).

¶5 In 2014, McCluskey filed another petition for post-conviction relief, raising a claim of illegal sentencing and a new claim of newly discovered evidence. McCluskey's asserted newly discovered material fact was the 2008 notification the state received (and disclosed) from the FBI, informing the state that the Department of Justice conducted a review of past trial testimony relating to bullet lead analysis, which concluded that:

> [T]he examiner properly testified the examination revealed that the evidentiary specimen(s) probably came from the same melt of lead. . . . However, . . . the examiner did not provide sufficient information to the jury to allow them to understand the numbers of bullets made from the melt. Without having evidence concerning the approximate number of bullets produced from a single melt, the jury could have misunderstood the probative value of this evidence.[1]

McCluskey also refers to a FBI press release from 2005 and other reports not provided to the court. She argued the letter was a newly discovered material fact that would have changed the verdict or sentence.

¶6 The court dismissed the petition for post-conviction relief, finding we had reviewed the testimony of the bullet lead analyst and determined that if its admission was in error, it was harmless error. The court concluded that under Rule 32.2(a)(2), McCluskey was precluded from raising the issue in a post-conviction proceeding because it was previously adjudicated on appeal. With regard to McCluskey's unconstitutional sentence claim, the court found the argument was unsupported by law.

¶7 On review, McCluskey claims that the superior court erred when it dismissed her newly discovered evidence claim based on "false" information provided by the FBI examiner, and that the court erred as a matter of law when it found this court's "'harmless error' analysis, done on direct appeal, was sufficient to establish that any error was harmless."

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1 In 2008, post-conviction proceedings on this issue were initiated, but the record does not indicate their ultimate resolution.

McCluskey contends that no jury could possibly have found her guilty absent testimony about the compositional analysis of bullet lead. She further asserts the affidavit provided by her retained ballistics expert in conjunction with the petition for review (which maintains that there is no scientific basis for the analysis the FBI examiner testified to at McCluskey's trial), is newly discovered evidence. A defendant is entitled to an evidentiary hearing regarding a claim of newly discovered evidence if he or she presents a "colorable claim." *State v. Bilke,* 162 Ariz. 51, 52 (1989). McCluskey has not met her burden.

¶8 We already found that even if the expert testimony should have been excluded, such error was harmless beyond a reasonable doubt. *McCluskey*, 1 CA-CR 97-1013, *11. McCluskey's petition is, at most, a proffer of additional grounds for the exclusion of the expert's testimony, which does not affect the other evidence admitted at trial and therefore cannot affect the harmless error analysis. McCluskey contends that the harmless error holding is inapplicable to this petition because the analysis was premised on admission of irrelevant and not "false" evidence by an "expert." We disagree. First, the evidence was not false. Second, harmless error analysis requires the state to prove beyond a reasonable doubt that, absent the error, the verdict would have been the same. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 18 (2005). It is irrelevant why the challenged evidence should have been excluded. Nothing in McCluskey's petition purports to undermine the other, overwhelming evidence against her, and she has therefore failed to show that "the [newly discovered material] evidence probably would have changed the verdict or sentence." Rule 32.1(e)(3).

¶9 Finally, McCluskey again raises the issue of unconstitutional sentencing, but couches it as ineffective assistance of first post-conviction relief counsel. McCluskey's argument is faulty for two reasons. First, her reliance on *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004), is misplaced. Both cases were decided after her conviction was final, and neither has any application or is retroactive. *See State v. Cleere*, 213 Ariz. 54, 57, ¶ 4 n.2 (App. 2006); *State v. Sepulveda*, 201 Ariz. 158, 160–61, ¶ 8 (App. 2001). Next, McCluskey cites the United States Supreme Court decision in *Martinez v. Ryan*, 566 U.S. 1 (2012), and argues it allows her to raise an untimely claim of ineffective assistance of counsel. She is mistaken. *Martinez* held "where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." *Id.* at 17. This simply means McCluskey

can seek habeas corpus relief in federal court based on ineffective assistance of trial counsel if she can first show that she had no or ineffective counsel in her first post-conviction relief proceeding. *Martinez* does not require a state court to consider all untimely claims of ineffective assistance of counsel raised in post-conviction proceedings.

¶10 For the foregoing reasons, we grant review but deny relief.

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