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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 12/02/10
RUTH WILLINGHAM,
ACTING CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 10-0130
)
Appellee,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
)
ATHAR ALMAS,) (Not for Publication -
) Rule 111, Rules of the
Appellant.) Arizona Supreme Court)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-179796-001DT

The Honorable Janet E. Barton, Judge

AFFIRMED

Terry Goddard, Attorney General Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
Attorneys for Appellee

Maricopa County Public Defender's Office Phoenix
By Joel M. Glynn, Deputy Public Defender
Attorneys for Appellant

G E M M I L L, Judge

¶1 Almas appeals the Superior Court's denial of her
Motion to Vacate Judgment. Almas' counsel filed a brief in

compliance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), stating that he has searched the record and found no arguable question of law and requesting that this court examine the record for reversible error. Almas was afforded the opportunity to file a supplemental brief *in propria persona* but did not do so. See *State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999). For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 "We view the facts and all reasonable inferences therefrom in the light most favorable to sustaining the convictions." *State v. Powers*, 200 Ariz. 123, 124, ¶ 2, 23 P.3d 668, 669 (App. 2001).

¶3 Almas was charged with one count of aggravated assault, a class three dangerous felony.

¶4 According to the evidence presented at trial by the State, the victim, J.S., was eating breakfast at Tumbleweed, a homeless shelter, when Almas asked him to charge her cell phone. J.S. plugged the phone in and went outside to talk to a friend. When Almas returned, she could not find her phone. Almas was "furious" and accused J.S. of stealing her phone. Almas' friend Tiny also questioned J.S. about the phone. The three of them argued for approximately twenty to thirty minutes.

¶5 J.S. then walked outside and felt a sharp pain in his

back. He turned around and saw Almas holding a knife, asking, "Where's my phone?" J.S. testified that Almas then forced him to get on a bus with her to go to another homeless shelter. While on the bus, J.S. saw Almas put the knife in her backpack. J.S. then decided to take the backpack. The two struggled over possession of the backpack, but J.S. eventually gained control over it. J.S. then got off the bus and ran to the State Capitol Building where he explained what had happened to the security guard. Unbeknownst to J.S., Almas followed him into the building, grabbed her backpack, and ran out.

¶16 Shortly afterward, the Capitol Police Department and the Phoenix Fire Department arrived and saw a six-inch cut on J.S.' back. One of the officers saw Almas in the area and J.S. positively identified her as his attacker.

¶17 Almas offered conflicting testimony in her defense at trial. She testified that she loaned her phone to J.S. at nine o'clock in the morning because he wanted to use it to take a picture. She stated that at seven o'clock the next morning she met J.S. in the library, but he did not have her phone so she contacted the police. The police searched J.S., but could not find her phone. Almas and J.S. went with the police back to Tumbleweed to search for her phone, but it was not found there.

¶18 After the police left, Almas took the bus alone to another homeless shelter. She got off that bus and met up with

two of her friends, T.P. and K.G. The three of them then boarded another bus. Almas stated that after they got off the bus T.P. and K.G. walked a different way to get food. Almas said that J.S. was not on the bus with them.

¶19 Almas also testified that shortly after T.P. and K.G. left, someone came up behind her and took her backpack. She ran after the suspect and followed him into the Capitol building where she realized it was J.S. Almas maintained that she did not stab J.S.

¶10 A three-day jury trial began on August 26, 2009. The jury found Almas guilty of the charged offense. Judge Barton sentenced Almas to a mitigated five-year prison term and credited her with fifty-three days of pre-sentence incarceration time. Almas filed an appeal. In a memorandum decision filed June 3, 2010, this court affirmed the conviction and sentence of the trial court. *State v. Almas*, 1 CA-CR 09-0859 (Ariz. App. June 3, 2010) (mem. decision).

¶11 Meanwhile, after sentencing, Almas filed a Motion to Vacate Judgment, citing newly discovered evidence. In an affidavit from K.G., K.G. stated that Almas called her to say that her phone was stolen and that she was at Tumbleweed with J.S. K.G. also stated that on the day in question, October 28, 2008, she boarded the DASH bus at central station with T.P and Almas, coming from the ASU library. She did not see J.S. on the

bus. K.G. stated that she got off the bus with T.P. one stop before Almas, and the two of them walked toward the CASS shelter. K.G. was never contacted by either State or defense counsel, and only spoke with defense counsel on September 21, 2009 after being contacted by Almas' friend Pierre.

¶12 Judge Barton denied the motion and Almas filed a timely appeal.

DISCUSSION

¶13 Having considered defense counsel's brief and examined the record for reversible error, see *Leon*, 104 Ariz. at 300, 451 P.2d at 881, we find none. "Whether to grant a new trial is a decision within the sound discretion of the trial judge, and we will not reverse that decision unless the appellant can affirmatively show that the trial judge abused his discretion." *State v. Mann*, 117 Ariz. 517, 520, 573 P.2d 917, 920 (App. 1977) (citing *State v. Scott*, 113 Ariz. 423, 426, 555 P.2d 1117, 1120 (1976)). We find no abuse of discretion by Judge Barton in denying the motion.

¶14 According to Arizona Rule of Criminal Procedure 24.2(a)(2), a defendant is entitled to relief on the basis of newly discovered material facts. Newly discovered material facts exist if, (1) the newly discovered material facts probably would have changed the verdict or sentence, (2) the newly discovered material facts were discovered after the trial, (3)

the defendant exercised due diligence in securing the newly discovered material facts, and (4) the newly discovered material facts are not merely cumulative or used solely for impeachment, unless the impeachment evidence substantially undermines critical testimony and probably would have changed the verdict. Ariz. R. Crim. P. 32.1(e). Almas failed to prove these elements by a preponderance of the evidence. See *State v. Saenz*, 197 Ariz. 487, 489, ¶ 7, 4 P.3d 1030, 1032 (App. 2000) (the defendant has the burden of proving the allegations by a preponderance of the evidence for all post-conviction relief claims).

¶15 The newly discovered evidence at issue in this case is the testimony of K.G. Almas states that she had no means of finding K.G before trial because she did not know her last name or where she lived, and therefore, she was unable to locate K.G. However, K.G.'s affidavit states that on the day in question Almas called K.G. to tell her that her phone had been stolen. Approximately three weeks after the trial, Almas' friend Pierre was able to locate K.G. Based on the foregoing, we find that the trial court did not abuse its discretion in finding that Defendant did not exercise due diligence in securing K.G.'s testimony. "[W]here 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 (citations omitted). Therefore, we affirm the denial of Almas' Motion to Vacate Judgment.¹

¶16 Pursuant to *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984), counsel's obligations in this appeal have ended. Counsel need do no more than inform Almas of the disposition of the appeal and her future options, unless counsel's review reveals an issue appropriate for submission to the Arizona Supreme Court by petition for review. Almas has thirty days from the date of this decision in which to proceed, if she desires, with a *pro se* motion for reconsideration or petition for review.

CONCLUSION

¶17 The denial of Almas' Motion to Vacate Judgment is affirmed.

_____/s/_____
JOHN C. GEMMILL, Presiding Judge

CONCURRING:

_____/s/_____
PATRICIA K. NORRIS, Judge

_____/s/_____
MAURICE PORTLEY, Judge

¹ Because we are affirming the trial court's ruling regarding lack of diligence in obtaining the newly discovered evidence, we need not address the trial court's rulings on the other elements required to vacate judgment.