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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. TIFFANY LACHELLE SUTTON, Petitioner.	2 CA-CR 2012-0111-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF MARICOPA COUNTY

Cause No. CR2007110370001SE

Honorable David K. Udall, Judge

REVIEW GRANTED; RELIEF DENIED

William G. Montgomery, Maricopa County Attorney
By Lisa Marie Martin
Phoenix
Attorneys for Respondent

Tiffany Sutton
Goodyear
In Propria Persona

V Á S Q U E Z, Presiding Judge.

¶1 Petitioner Tiffany Sutton seeks review of the trial court's order dismissing her successive notice for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that ruling unless the court clearly has abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 Sutton pled guilty in 2007 to aggravated assault, a dangerous offense, and was sentenced to an aggravated, ten-year prison term. She filed a notice of post-conviction relief, and the trial court appointed counsel, but the court later dismissed that proceeding at Sutton's request. She filed additional notices in October 2009, November 2010, and March 2011,[1] raising, at various times, claims of newly discovered material facts pursuant to Rule 32.1(e), based on her family's efforts to have her involuntarily committed for mental health treatment and an audio recording of the victim's police interview. She also had alleged that her counsel had been ineffective. In these notices, she claimed she had not previously brought her claims because her appointed Rule 32 counsel had advised her to dismiss her petition or risk "receiv[ing] more [prison] time," and she had not been informed of her right to seek relief in propria persona or been given instructions on how to present her claims. The court dismissed each notice, and Sutton did not seek review.

¶3 In May 2011, Sutton filed her fifth notice of post-conviction relief, again asserting an audio recording of the victim's police interview was "newly discovered material evidence" and claiming that recording was inconsistent with the "police narrative/incid[]ent report" of the victim's interview. She additionally claimed that, due to 2009 amendments to the sentencing code, her sentence was in excess of the maximum allowed by the statutes listed in her plea agreement. She maintained she had not previously brought these claims because she had only become aware of "possible discrepancies" due to an October 2010 letter from her trial counsel and had only obtained her "case materials" from counsel in November 2010. The trial court dismissed the

[1]Sutton characterized the March 2011 filing as a petition for post-conviction relief, but the trial court construed it as a successive notice.

notice, concluding Sutton had not adequately complied with Rule 32.2(b) by explaining "the substance of the specific reasons for not raising the claim in a timely manner" and had not sufficiently supported her claims of newly discovered evidence or of a significant change in the law.[2]

¶4 On review, Sutton does not meaningfully address the trial court's conclusions beyond repeating her claims that she did not have access to her case materials until November 2010. We find no abuse of discretion.

¶5 Sutton appeared to claim in her notice that, pursuant to Rule 32.1(e), the audio recording of the victim's police interview contains "[n]ewly discovered material facts" relevant to her sentence.[3] Although a claim of newly discovered evidence is not necessarily subject to preclusion pursuant to Rule 32.2(a),[4] Rule 32.2(b) requires a defendant's notice bringing a claim excepted from preclusion to "set forth the substance

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[2]The trial court also observed that Sutton had failed to comply with Rule 32.5 because she did not provide "facts, affidavits, records, or other evidence to support her claims." To the extent the court relied on Rule 32.5 to conclude Sutton's notice was subject to dismissal, we disapprove of its analysis. That rule sets forth the requirements for a Rule 32 petition, not an initial notice. *See* Ariz. R. Crim. P. 32.5.

[3]To the extent Sutton suggests the recording is relevant to her guilt, she pled guilty to the offense and does not assert the factual basis for that plea was deficient. We therefore do not address that claim further. *See State v. Martinez*, 102 Ariz. 215, 216, 427 P.2d 533, 534 (1967) ("[A]fter a plea of guilty, a defendant may not thereafter question the legal sufficiency of the evidence against h[er]."); *but cf. State v. Johnson*, 142 Ariz. 223, 224, 689 P.2d 166, 167 (1984) ("[A] criminal defendant who pleads guilty and admits the existence of a prior conviction can . . . attack the sufficiency of the evidence used to prove its factual basis."). Nor do we address Sutton's suggestion that her trial counsel was ineffective in failing to review "the actual evidence or contact the victim" because, even if such a claim is not precluded, Sutton expressly abandoned any claim of ineffective assistance of counsel in her notice of post-conviction relief.

[4]We assume, without deciding, that this claim is not precluded despite Sutton having raised it, albeit without detail or explanation, in her March 2011 notice of post-conviction relief.

of the specific exception and the reasons for not raising the claim in the previous petition or in a timely manner." Ariz. R. Crim. P. 32.2(a) and (b). "If the specific exception and meritorious reasons do not appear substantiating the claim and indicating why the claim was not stated in the previous petition or in a timely manner, the notice shall be summarily dismissed." Ariz. R. Crim. P. 32.2(b).

¶6 Here, Sutton did not provide a basis for her claim that the audio recording is newly discovered pursuant to Rule 32.1(e). To seek relief on this ground, the evidence must have existed at the time of trial but be discovered only after trial; thus, evidence is "newly discovered" only if it is "unknown to the trial court, the defendant, or counsel at the time of trial and neither the defendant nor counsel could have known about its existence by the exercise of due diligence." *State v. Saenz*, 197 Ariz. 487, ¶¶ 13-14, 4 P.3d 1030, 1033-34 (App. 2000). Although Sutton asserted she was unaware of the recording's existence until she received her case materials from her trial counsel in 2010, the record is clear that counsel knew of and indeed possessed the recording. Not only was the recording apparently in the case materials counsel had sent Sutton, but counsel referred to it in a sentencing memorandum filed prior to Sutton's sentencing. And, in any event, beyond generally asserting below that she did not understand the procedural requirements, Sutton has not attempted to explain why she did not raise this claim adequately in her March 2011 notice of post-conviction relief.

¶7 Sutton also failed to state a claim that amendments to the sentencing statutes constitute a significant change in the law entitling her to relief. *See* Ariz. R. Crim. P. 32.1(g) (post-conviction relief available if "significant change in the law" applicable to "defendant's case would probably overturn the defendant's conviction or sentence"). Again, she did not explain in her notice why she had not previously raised

this claim. Moreover, even assuming that applying the amended sentencing statutes would alter Sutton's sentence, those amendments were not intended to make substantive changes to the existing law and were not expressly made retroactive. 2008 Ariz. Sess. Laws, ch. 301, §§ 119, 120; A.R.S. § 1-244 ("No statute is retroactive unless expressly declared therein."). Thus, those amendments do not constitute a significant change in the law as contemplated by Rule 32.1(g).

¶8 For the reasons stated, although review is granted, relief is denied.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge