

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

FREDERICK KING JR.,
Petitioner.

No. 2 CA-CR 2015-0483-PR
Filed February 17, 2016

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Maricopa County
No. CR2002098228
The Honorable Roland J. Steinle, Judge

REVIEW GRANTED; RELIEF DENIED

Frederick King Jr., Buckeye
In Propria Persona

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MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Howard and Judge Staring concurred.

ESPINOSA, Judge:

¶1 Frederick King Jr. seeks review of the trial court's denial of his petition for writ of habeas corpus, which the court treated as a successive and untimely notice of post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that order unless the court clearly abused its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). King has not met his burden of demonstrating such abuse here.

¶2 After a jury trial, King was convicted of first-degree murder, attempted armed robbery, and two counts of attempted second-degree murder. He was sentenced to life imprisonment without the possibility of release for twenty-five years for the first-degree murder conviction, and a combination of concurrent and consecutive prison terms for his remaining convictions. We affirmed his convictions and sentences on appeal. *State v. King*, No. 1 CA-CR 03-0755 (decision order filed Nov. 25, 2005; memorandum decision filed Feb. 1, 2005).

¶3 Before this proceeding, King sought and was denied post-conviction relief in 2005 and 2012. He did not timely seek review of those denials. In January 2014, King filed a petition for a writ of habeas corpus asserting his trial counsel had been ineffective by not requesting a jury instruction for attempted theft as a lesser-included offense of attempted armed robbery, and additionally claimed the trial court had erred in failing to give that instruction sua sponte. King characterized his claims as grounded in newly discovered evidence pursuant to Rule 32.1(e), namely that he had only recently learned of controlling authority which "did not exist at the time" of his trial. Citing Rule 32.3, the trial court treated King's

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petition as a notice of post-conviction relief and summarily denied it. This petition for review followed.

¶4 On review, King first asserts the trial court erred in summarily rejecting his claims, arguing that Rule 1.2, Ariz. R. Crim. P., allows a court to disregard what he characterizes as the “technicality of state rules.” But Rule 1.2 requires only that we “construe [the rules] to secure simplicity in procedure, fairness in administration, the elimination of unnecessary delay and expense, and to protect the fundamental rights of the individual while preserving the public welfare.” Nothing in that rule permits us to disregard the clear language of our Rules of Criminal Procedure. And, pursuant to those rules, King’s claims of ineffective assistance of counsel and instruction error cannot be raised in this untimely proceeding. *See* Ariz. R. Crim. P. 32.1, 32.4(a).

¶5 King insists his claims may properly be raised because they are grounded in newly discovered evidence. Although a claim of newly discovered evidence under Rule 32.1(e) may be raised in an untimely proceeding, Ariz. R. Crim. P. 32.4(a), King has identified no such evidence. He suggested in his petition below that the new evidence he had discovered was our supreme court’s ruling in *State v. Wall*, 212 Ariz. 1, 126 P.3d 148 (2006). But a claim of newly discovered material facts does not encompass newly discovered legal theories or authority. *See generally State v. Saenz*, 197 Ariz. 487, ¶ 7, 4 P.3d 1030, 1032 (App. 2000) (to establish claim of newly discovered evidence, defendant must show “that the evidence was discovered after trial although it existed before trial; that it could not have been discovered and produced at trial through reasonable diligence; that it is neither cumulative nor impeaching; that it is material; and that it probably would have changed the verdict”).

¶6 Insofar as King argues he only recently discovered his trial counsel had a responsibility to request a lesser-included instruction, even were we to agree this constituted newly discovered evidence, he did not raise this argument in his petition below, and we therefore do not address it further. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (court of appeals does not address issues raised for first time in petition for review); *see also*

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Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review shall contain “issues which were decided by the trial court and which the defendant wishes to present to the appellate court for review”). For the same reason, we do not address King’s new argument that *Wall* constitutes a significant change in the law pursuant to Rule 32.1(g).

¶7 Although we grant review, relief is denied.