

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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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.

CHENE MANLEY, *Petitioner*.

No. 1 CA-CR 15-0741 PRPC
FILED 10-26-2017

Petition for Review from the Superior Court in Maricopa County
No. CR1996-012553
The Honorable Jose S. Padilla, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Maricopa County Attorney's Office, Phoenix
By Diane Meloche
Counsel for Respondent

The Ferragut Law Firm PC, Phoenix
By Ulises A. Ferragut, Jr.
Counsel for Petitioner

MEMORANDUM DECISION

Chief Judge Samuel A. Thumma delivered the decision of the court in which Presiding Judge Peter B. Swann and Judge Maria Elena Cruz joined.

T H U M M A, Chief Judge:

¶1 Petitioner Chene Manley seeks review of the superior court's order denying her 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). Because Manley has shown no such error, this court grants review but denies relief.

¶2 In March 1999, a jury found Manley guilty of first degree murder, a Class 1 felony and a dangerous offense; second degree burglary, a Class 3 felony; Kidnapping, a Class 2 felony; and theft, a Class 4 felony, each committed in November 1996. The superior court imposed concurrent prison sentences, the longest being natural life for the murder conviction. On direct appeal, this court affirmed the convictions and sentences.

¶3 In March 2001, days after the mandate on her direct appeal issued, Manley timely filed a notice of post-conviction relief. The superior court then appointed counsel for Manley and, after searching the record, counsel found no tenable issue to submit to the court. Manley was then allowed to proceed as a self-represented litigant and given a deadline to file her own petition. When she failed to file a petition by the deadline, the superior court summarily dismissed her notice of post-conviction relief. In 2004, this court denied Manley's petition for review.

¶4 In 2015, Manley filed another notice of post-conviction relief, raising claims of newly discovered evidence and a significant change in the law, and requested that counsel be appointed. *See* Ariz. R. Crim. P. 32.1(e), (g). The court denied Manley's request for court-appointed counsel,

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

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summarily dismissed the notice and Manley's timely petition for review with this court followed.

¶5 Manley's newly discovered evidence claim was based on her congenital neurological condition, Chiari Malformation, that was diagnosed in 2014. According to her 2015 notice of post-conviction relief, Manley suffered from the condition's symptoms, including "emotional and impulse-control problems," at the time she committed the offenses and at trial. "[P]resent[ing] the court with evidence for the first time does not mean that such evidence is 'newly discovered.'" *State v. Mata*, 185 Ariz. 319, 333 (1996). "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) (emphasis added). A petitioner's medical condition diagnosed after a conviction may qualify as newly discovered evidence for Rule 32 purposes if the condition existed at the time of the offense but was not diagnosable because the condition was not medically recognized at the time of trial. *State v. Bilke*, 162 Ariz. 51, 53-54 (1989).

¶6 Although Manley asserted in her notice that she suffered from the medical condition at the time of the offenses, she did not allege that the condition was not discoverable earlier. Stated differently, Manley failed to assert that Chiari Malformation was not a recognized medical condition at the time of her 1999 trial and sentencing. Instead, Manley claimed she "could not bring this matter to the attention of the Court before [she filed the 2015 notice] because Petitioner was wholly unaware of her condition, as were all members of her family, until the condition was diagnosed by the medical services provided by the Arizona Department of Corrections." Moreover, in the 2015 notice, Manley admits that she "is not . . . at this point[] able to provide the Court with all the facts and research how and why her Chiari Malformation constitutes newly discovered material facts under the law." This admission further evidences the failure of the 2015 notice to satisfy the requirement that, despite due diligence, Manley was unable to procure a diagnosis of Chiari Malformation before she was tried and sentenced. *See State v. Turner*, 92 Ariz. 214, 221 (1962) (noting, in considering a newly-discovered evidence argument on a motion for new trial, that the defendant "must show by affidavit or testimony in court, that due diligence was used to ascertain and produce the evidence in time for use at his trial. He must account for his failure to produce the evidence by stating explicitly the details of his efforts to ascertain and procure it."). Consequently, the superior court properly dismissed Manley's newly discovered evidence claim. *See Ariz. R. Crim. P. 32.2(b)* ("If the specific

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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.”).

¶7 The superior court also properly dismissed Manley’s claim that a significant change in the law probably would have affected her sentences. Manley summarily asserted that her medical condition “necessary[ly] implicat[es] . . . the prohibition on cruel and unusual punishment,” citing *Miller v. Alabama*, 567 U.S. 460 (2012) and *Graham v. Florida*, 560 U.S. 48 (2010). Manley provided no analysis of those cases or application of them in support of her claim for relief. Moreover, both *Miller* and *Graham* addressed constitutional limits on sentencing juvenile offenders. *Alabama*, 567 U.S. at 479; *Graham*, 560 U.S. at 75. Manley was 18 years old at the time of the offenses; accordingly, because she was not a juvenile, *Miller* and *Graham* are inapposite.

¶8 Manley’s petition for review argues she “is entitled to present the Superior Court with arguments supporting post conviction relief on the basis of truly significant new developments in medical research on the wide ranging effects of the condition she had from birth.” The superior court proceedings that are the subject of this review provided Manley with just such an opportunity. Moreover, Manley did not argue in superior court that advances in medical research constituted newly discovered evidence and a petition for review may not present issues not first presented to the trial court. *State v. Bortz*, 169 Ariz. 575, 577-78 (App. 1991); Ariz. R. Crim. P. 32.9(c)(1)(ii). Finally, although claiming a right to court-appointed counsel for her 2015 notice, Manley does not provide any authority supporting that claim. *See* Ariz. R. Crim. P. 32.9(c)(1)(ii) & (iv).

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



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