

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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL  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

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STATE OF ARIZONA, *Respondent*,

*v.*

ANDRE LAMAR MURPHY, *Petitioner*.

No. 1 CA-CR 16-0409 PRPC  
FILED 10-10-2017

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Petition for Review from the Superior Court in Maricopa County  
No. CR 2002-011380  
The Honorable Roland J. Steinle, III, Judge, Retired

**REVIEW GRANTED; RELIEF DENIED**

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COUNSEL

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

Cheri L. McCracken Attorney at Law, Phoenix  
By Cheri L. McCracken  
*Counsel for Petitioner*

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**MEMORANDUM DECISION**

Judge Jennifer B. Campbell delivered the decision of the Court, in which Presiding Judge Diane M. Johnsen and Judge Michael J. Brown joined.

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**C A M P B E L L**, Judge:

¶1 Andre Lamar Murphy petitions this court for review from the summary dismissal of his petition for post-conviction relief. We have considered the petition for review and grant review but deny relief.

¶2 Murphy pled guilty to conspiracy to commit armed robbery. He was sentenced to five years in prison in 2003. In 2016, Murphy filed a petition for post-conviction relief seeking to set aside his conviction based upon “newly discovered material facts.” Ariz. R. Crim. P. 32.1(e). The superior court summarily denied his petition.

¶3 Murphy filed a motion for reconsideration, attaching additional documentation he avowed should have been attached to his petition for post-conviction relief and was not “through no fault of [Murphy’s].” He attached police reports, a plea agreement by an FBI case agent from 2009, federal dockets, an FBI press release about the agent improperly influencing criminal prosecutions, Murphy’s plea agreement, and a portion of his pre-sentence report. The superior court denied the motion for reconsideration.

¶4 Murphy filed a petition for review with this court. The major issue in Murphy’s petition is newly discovered evidence related to the misconduct of an FBI case agent. He also adds claims of ineffective assistance of counsel, no factual basis for the plea and actual innocence.<sup>1</sup> Murphy entered a plea of guilty, thereby waiving all non-jurisdictional defenses and defects. *State v. Moreno*, 134 Ariz. 199, 200 (App. 1982).

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<sup>1</sup> Murphy did not raise these issues in his petition for post-conviction relief therefore the superior court did not specifically address those issues. They are therefore not properly before this court. Ariz. R. Crim. P. 32.9(c)(1); *State v. Ramirez*, 126 Ariz. 464, 468 (App. 1980).

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¶5 He bases his request for relief under Rule 32.1 on an affair between the FBI case agent and a co-defendant's wife. The relationship between the FBI agent and the witness occurred in "late 2002." The events giving rise to Murphy's arrest and subsequent prosecution occurred in June of 2002. Murphy claims he is entitled to relief under Rule 32.1(e), even though his claim is untimely, because he did not discover this information until June 2013.

¶6 To obtain post-conviction relief based upon newly discovered evidence, a defendant must demonstrate the following: 1) the evidence must appear on its face to have existed at the time of trial but be discovered after trial; 2) the petition must allege facts from which the court could conclude the defendant was diligent in discovering the facts and bringing them to the court's attention; 3) the evidence must not simply be cumulative or impeaching; 4) the evidence must be relevant to the case; and 5) the evidence must be such that it would likely have altered the verdict, finding, or sentence if known at the time of trial. *State v. Bilke*, 162 Ariz. 52, 52-53 (1989).

¶7 While the "newly discovered evidence" likely existed at the time he entered into a plea agreement, Murphy did not diligently discover the facts nor was he diligent in bringing the information to the court's attention. The guilty plea of the FBI agent was a matter of public record in 2009. By his own admission, Murphy was aware of the situation as early as June 2013. The three-year delay in filing for relief does not constitute the required due diligence. Thus, the superior court did not abuse its discretion in summarily denying relief on that basis. *State v. Wilson*, 179 Ariz. 17, 20 (App. 1993).

¶8 Murphy also fails to show the evidence would provide anything more than mere impeachment, or that it would likely have altered his decision to plead guilty. The inappropriate relationship by the FBI officer took place after the investigation of his case was complete. As evidenced by Murphy's own exhibits, an extensive investigation took place. There was more than one case agent and more than one agency involved in that investigation. Accordingly, at best, the information might be useful for impeachment, but would not go directly to the facts of his case. Ariz. R. Evid. 607 ("Any party, including the party that called the witness, may attack the witness's credibility.").

¶9 Other than his assertion that he would have pled not guilty, and his denial of participation in the pre-sentence report, Murphy does not provide any facts to support his contention that the alleged failure to

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disclose the relationship would have changed the outcome of the plea, or of a trial if he chose to proceed to trial. *See State v. Wilson*, 179 Ariz. 17, 20 (App. 1993). Murphy has not met his burden of proof, to show by a preponderance of the evidence, that he is entitled to relief.

¶10 Accordingly, we grant review but deny relief.



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