

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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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

GARY THOMAS KELLEY, *Petitioner*.

No. 1 CA-CR 16-0537 PRPC
FILED 1-9-2018

Petition for Review from the Superior Court in Maricopa County
No. CR2010-123572-001
The Honorable Susan M. Brnovich, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

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

Gary Thomas Kelley, San Luis
Petitioner

MEMORANDUM DECISION

Judge Peter B. Swann delivered the decision of the court, in which Presiding Judge Randall M. Howe and Judge Maria Elena Cruz joined.

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S W A N N, Judge:

¶1 Gary Thomas Kelley petitions this court for review from the dismissal of his petition for post-conviction relief. For reasons that follow, we grant review but deny relief.

¶2 A jury convicted Kelley of second degree murder and aggravated assault, and the superior court imposed a 20-year flat prison term for the murder and a consecutive 7.5-year prison term for the aggravated assault. We affirmed the convictions and sentences on direct appeal. *State v. Kelley*, 1 CA-CR 11-0496, 2012 WL 5029264 (Ariz. App. Oct. 18, 2012) (mem. decision). Kelley timely petitioned for post-conviction relief, alleging ineffective assistance of trial and appellate counsel. The superior court summarily dismissed the petition, and Kelley did not seek review. Kelley then filed a successive notice and petition for review, alleging ineffective assistance of counsel, newly discovered evidence, and actual innocence. The superior court dismissed the petition. Kelley now petitions for review by this court.

¶3 Kelley's petition for review attempts to incorporate previous filings and attachments, in violation of Ariz. R. Crim. P. ("Rule") 32.9(c)(1)(iv). We do not consider matters not submitted for review. Rule 32.9(c)(1) ("Failure to raise any issue that could be raised in the petition or cross-petition for review shall constitute waiver of appellate review of that issue."). The petition itself appears to request review based solely on a claim of newly discovered material facts under Rule 32.1(e). Specifically, Kelley asserts that in files "previously unseen" he has found evidence that a witness's wife was present at the time of the relevant events and would have provided exculpatory testimony.

¶4 For a defendant to obtain post-conviction relief based upon newly discovered evidence, "(1) the evidence must appear on its face to have existed at the time of trial but be discovered after trial; (2) the motion 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).

¶5 We agree with the superior court that the evidence Kelley refers to is not newly discovered. The wife's purported presence was within Kelley's personal knowledge at the time of the trial (at which he

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testified). Further, the record reveals that Kelley knew of the alleged evidence before filing his first petition for post-conviction relief. Moreover, Kelley does not provide information to establish due diligence. And, perhaps most significantly, he provides no evidence that the wife would actually exonerate him. To the contrary, the transcript of the wife's interview that Kelley attached to his successive petition for post-conviction relief shows that the wife denied being at the scene or at home at the time of the crimes. Kelley has provided no affidavit from the wife to show any recantation or statements contradicting her interview. That is fatal to his claim. *State v. Borbon*, 146 Ariz. 392, 399 (1985).

¶6 Accordingly, we grant review but deny relief.



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