

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

FRANK SILVA ROQUE,
Petitioner.

No. 2 CA-CR 2014-0300-PR
Filed September 22, 2014

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NOT FOR PUBLICATION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); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Maricopa County

No. CR2001095385

The Honorable Mark F. Aceto, Judge

REVIEW GRANTED; RELIEF DENIED

Frank S. Roque, Buckeye
In Propria Persona

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MEMORANDUM DECISION

Judge Howard authored the decision of the Court, in which Judge Vásquez and Judge Brammer¹ concurred.

H O W A R D, Judge:

¶1 Frank Roque petitions for review of the trial court’s summary dismissal of his successive, untimely petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. We grant review, but we deny relief.

¶2 After a jury trial, Roque was convicted of first-degree murder, attempted first-degree murder, endangerment, and three counts of drive-by shooting, all committed in September 2001. He was sentenced to death for the murder; the trial court imposed a combination of concurrent and consecutive prison terms for the other offenses. After independent review, our supreme court reduced Roque’s death sentence to natural life imprisonment. *State v. Roque*, 213 Ariz. 193, ¶ 171, 141 P.3d 368, 406 (2006). Roque previously has sought post-conviction relief without success.

¶3 In September 2012, Roque filed a notice of post-conviction relief in which he alleged that a computerized tomography scan (CT scan) of his brain had revealed the presence of “vague white matter” and that this finding constituted a newly discovered material fact relevant to his insanity defense that probably would have changed the verdicts at trial. *See* Ariz. R. Crim. P. 32.1(e). The trial court summarily dismissed the notice as deficient, citing Rule 32.2(b), which provides that when a non-precluded claim is raised in a successive or untimely post-conviction relief proceeding, “the notice of post-conviction relief must set forth

¹The Hon. J. William Brammer, Jr., a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and the supreme court.

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the substance of the specific exception [to preclusion] and the reasons for not raising the claim in the previous petition or in a timely manner.” The rule further provides that “[i]f 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).

¶4 The following month, Roque filed another notice of post-conviction relief raising the same claim, adding that the CT scan had been performed in October 2006 and asserting the condition had “clearly existed before trial.” He argued he had diligently pursued such evidence but counsel had ignored his requests to submit to a CT scan during his trial and appeal. In its order dismissing Roque’s second Rule 32 notice on this claim, the trial court explained the specific requirements for making a claim under Rule 32.1(e) and, again citing Rule 32.2(b), observed that Roque had failed to explain his six-year delay in asserting the claim or his failure to include it in his December 2007 petition for post-conviction relief.

¶5 Roque then filed a motion to reconsider the dismissal, asserting he had not learned of the radiologist’s 2006 report until the end of 2008. He seemed to suggest he (1) had been unable to raise the claim between 2008 and 2010 due to his pending litigation in federal court and (2) had been unable to raise the claim since October 2010, when the federal litigation had concluded, due to ill health. The trial court denied the motion to reconsider, concluding the notice had been properly dismissed as deficient. Citing *State v. Bilke*, 162 Ariz. 51, 52-53, 781 P.2d 28, 29-30 (1989), the court explained a defendant who asserts a claim pursuant to Rule 32.1(e) “must allege facts from which the Court could conclude that [he] was diligent in discovering and bringing to the Court’s attention the alleged[] newly discovered evidence.”

¶6 Roque repeats his arguments in his petition for review, maintaining he “acted with due diligence in finding the new evidence.” With respect to his delay in bringing the claim after learning of the radiology report in 2008, he asserts, without citation

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to authority, that “it is against federal law to have a state court appeal pending while attacking state convictions in federal court.”

¶7 We review a summary denial of post-conviction relief for an abuse of discretion, *State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006), and we find none here. The court clearly identified Roque’s claims and resolved them correctly based on thorough, well-reasoned analysis; we need not repeat that analysis here. See *State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993).

¶8 Accordingly, we grant review but deny relief.