IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

JOHN DEAN BABCOCK,
Petitioner.

No. 2 CA-CR 2015-0307-PR
Filed November 30, 2015

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NOT FOR PUBLICATION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 Pima County
No. CR20060145
The Honorable Howard Fell, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

John Dean Babcock, Buckeye
In Propria Persona

MEMORANDUM DECISION

Presiding Judge Miller authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Espinosa concurred.

M I L L E R, Presiding Judge:

¶1 John Babcock seeks review of the trial court's order denying his petition for 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). Babcock has not met his burden of demonstrating such abuse here.

¶2 In 2007, Babcock pled guilty to manslaughter and was sentenced to a twenty-year prison term. Babcock filed a notice of post-conviction relief but did not file a petition, and that proceeding was subsequently dismissed. He initiated another proceeding in 2010; that proceeding was dismissed after Babcock again did not file a petition.

¶3 In 2014, Babcock filed a notice of and petition for post-conviction relief arguing recently obtained medical information was newly discovered evidence relevant to his sentence, specifically his 2012 diagnosis of post-traumatic stress syndrome and a recent determination that his hepatitis C infection was "now in the final (terminal) stage four and he has less than 20 months to live." He further claimed that, had his trial counsel obtained a psychological evaluation for him, his PTSD would have been discovered before sentencing. The trial court summarily denied relief. It concluded it would have imposed the same sentence even if evidence that Babcock suffered from PTSD had been presented at the time of sentencing, that "[f]urther argument" by counsel at sentencing regarding his hepatitis C infection would not have changed his sentence, and that the lack of adequate treatment for hepatitis C

while incarcerated did not permit the court to modify his sentence.[1] This petition for review followed.

¶4 On review, Babcock argues he is entitled to an evidentiary hearing on his claims in order to "complete the record" concerning his PTSD diagnosis and hepatitis C prognosis, and that he is entitled to present "all his mitigating factors at the time of sentencing." Babcock is correct that recently discovered medical diagnoses can constitute newly discovered evidence pursuant to Rule 32.1(e). *State v. Bilke*, 162 Ariz. 51, 53, 781 P.2d 28, 30 (1989). To state a colorable claim for such relief, however, Babcock was required to show that the evidence existed at the time of sentencing but could not have been discovered in the exercise of reasonable diligence. *See id.* at 52, 781 P.2d at 29 ("evidence must appear on its face to have existed at the time of trial but be discovered after trial"); *State v. Saenz*, 197 Ariz. 487, ¶ 7, 4 P.3d 1030, 1032 (App. 2000) (evidence not newly discovered unless "it could not have been discovered and produced at trial through reasonable diligence").

¶5 Babcock has not shown that his PTSD diagnosis could not have been discovered before trial with reasonable diligence. Indeed, he asserted counsel should have discovered and presented that diagnosis. A claim of ineffective assistance made pursuant to Rule 32.1(a) cannot be raised in an untimely proceeding like this one. Ariz. R. Crim. P. 32.4(a). Babcock's claim is, essentially, that he has recently discovered evidence that his attorney should have discovered before sentencing. Even assuming this claim is cognizable under Rule 32.1(e), however, it nonetheless fails. As we noted above, to establish a claim of newly discovered evidence a defendant must establish the evidence could not have been obtained before trial in the exercise of reasonable diligence. *See Saenz*, 197 Ariz. 487, ¶ 7, 4 P.3d at 1032. Assuming, without deciding, that Babcock could meet this requirement by showing he could not have,

---

[1]Although the trial court's conclusion would strongly suggest Babcock cannot show any new evidence would have altered his sentence, *see* Ariz. R. Crim. P. 32.1(e), in our discretion we choose to address the merits of Babcock's newly discovered evidence claim.

in the exercise of diligence, obtained the information before trial—as distinguished from counsel's purported lack of diligence—he has not done so.[2]

¶6 Babcock's claim based on his worsening condition due to hepatitis C similarly does not warrant relief under Rule 32. The trial court observed that evidence of Babock's hepatitis C diagnosis was presented at sentencing. To the extent Babcock suggests he did not understand the seriousness of that diagnosis, he offers no basis to conclude he could not have discovered more information about the condition in the exercise of reasonable diligence. *See Saenz*, 197 Ariz. 487, ¶ 13, 4 P.3d at 1033. Moreover, to the extent Babcock asserts that the decline in his health is independent of the initial diagnosis, this information cannot constitute newly discovered evidence because it did not exist at the time of sentencing. *See Bilke*, 162 Ariz. at 52, 781 P.2d at 29 ("evidence must appear on its face to have existed at the time of trial, but be discovered after trial").

¶7 We grant review but deny relief.

---

[2] In *Saenz*, this court stated that evidence is only newly discovered if it was "unknown to the trial court, the defendant, or counsel at the time of trial and neither the defendant nor counsel could have known about its existence by the exercise of due diligence." 197 Ariz. 487, ¶ 13, 4 P.3d at 1033. On its face, this language would appear to render meritless any claim of newly discovered evidence based on information counsel knew or could have discovered even if it would have been impossible for defendant to have personally discovered the evidence. That precise question, however, was not before us in *Saenz*. We instead addressed the opposite situation where a defendant kept information from counsel. *See id.* ¶¶ 13-14.