IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

MICHAEL LYNN COOK,
Petitioner.

No. 2 CA-CR 2015-0370-PR
Filed November 12, 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NOT FOR PUBLICATION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 Maricopa County
Nos. CR2006008794001DT; CR2006005346001DT
The Honorable Colleen L. French, Judge

REVIEW GRANTED; RELIEF DENIED

Michael Lynn Cook, Florence
In Propria Persona

MEMORANDUM DECISION

Presiding Judge Vásquez authored the decision of the Court, in which Judge Howard and Judge Kelly[1] concurred.

VÁ S Q U E Z, Presiding Judge:

¶1 Michael Cook seeks review of the trial court's order denying his successive and untimely 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. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Cook has not met his burden of demonstrating such abuse here.

¶2 After a jury trial, Cook was convicted of attempted second-degree murder, drive-by shooting, weapons misconduct, and five counts of aggravated assault. He was sentenced to concurrent and consecutive prison terms totaling forty years. We affirmed his convictions and sentences on appeal. *State v. Cook*, No. 1 CA-CR 07-1038 (memorandum decision filed June 25, 2009). Cook then sought and was denied post-conviction relief, and we denied review of Cook's subsequent petition for review.

¶3 While Cook's first petition for review was pending in this court, he filed a notice of post-conviction relief raising a claim of newly discovered evidence. Before trial, the state had moved to admit statements made to a police officer by Cook's siblings, then aged eight and six, that they had seen Cook shoot the victim. The state asserted Cook's mother had refused to allow the children to be interviewed and had failed to appear with the children for depositions despite having been served with a subpoena. It further noted Cook had called his mother from jail and told her to ignore

[1]The Hon. Virginia C. Kelly, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and our supreme court.

the subpoena. Thus, the state argued, Cook had "forfeited his confrontation rights to these witnesses." After a hearing at which recordings of Cook's conversations with his mother were played, the trial court granted the state's motion and, at trial, a police detective testified about the children's statements incriminating Cook.

¶4 Cook attached to his second notice affidavits from his younger siblings stating they had "never said anything to the police about Michael L. Cook" and an affidavit from his mother stating she had not been told by Cook "not to come to court." He also included a letter from an attorney who had represented Cook before trial stating he had sent "the tape of interviews taken of [Cook]'s mother and her children that were there at the scene" and "they completely refute the statements allegedly made to police."

¶5 Because Cook had requested the interview tapes for use in preparing his Rule 32 petition and was not permitted to have those recordings while incarcerated, the trial court appointed counsel. Counsel filed a notice of completion stating he had determined Cook's claims "are unsubstantiated" and, thus, "[c]ounsel will not be filing a Petition for Post Conviction Relief." Counsel explained that Cook had discovered interviews done by an attorney who had represented Cook previously and that the attorney believed those interviews would have been helpful to the defense because they contradicted statements the children had made to police. Appointed counsel stated the attorney had given recordings of those interviews to trial counsel, but that the recordings "cannot be located." Counsel opined, however, that the interviews could not have changed the outcome at trial because the victim had identified Cook as the person who shot him.

¶6 Cook filed a pro se petition for post-conviction relief asserting, based on the affidavits and letter, that his trial counsel had been ineffective in failing to call his siblings as witnesses and that the state had denied his right to a fair trial by failing to subpoena them. He further claimed he "did not request the witness[es] not to testify." The trial court summarily denied relief, stating "it simply does not matter now what [the children's] testimon[y] might have been" because Cook had caused them to be unavailable for trial.

The court further concluded the letter and other communications from previous counsel "constitute hearsay and impeachment evidence not justifying post-conviction relief." This petition for review followed.

¶7 On review, Cook claims he was denied effective assistance of counsel because trial counsel "allow[ed] perjured testimony to go uncorrected" and failed to call his siblings as witnesses. He also claims appellate and Rule 32 counsel were ineffective in failing to raise various issues. Claims of ineffective assistance of trial counsel cannot be raised in a successive, untimely proceeding like this one. Ariz. R. Crim. P. 32.1(a); 32.4(a). Cook did not raise his claims related to appellate and Rule 32 counsel in the trial court, and we therefore do not address them. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (court of appeals does not address issues raised for first time in petition for review). And, insofar as Cook suggests these arguments are based on newly discovered evidence, Rule 32.1(e) does not permit a claim of newly discovered ineffective assistance of counsel. It permits only claims based on material facts that "probably would have changed the verdict or sentence." Ariz. R. Crim. P. 32.1(e).

¶8 Cook next asserts that the state failed to subpoena the witnesses and violated his constitutional rights by presenting perjured testimony and that the trial court erred in finding he had waived his right to confront those witnesses. Cook's claims of constitutional error cannot be raised in this untimely proceeding. Ariz. R. Crim. P. 32.1(a); 32.4(a). Nor has he developed any argument that his mother's affidavit could constitute newly discovered evidence that he did not forfeit his right to confront witnesses.

¶9 Although Cook did not expressly raise in his petition a claim of newly discovered evidence pursuant to Rule 32.1(e), the trial court addressed that question. We agree with the court that any such claim warrants summary dismissal. "Evidence is not newly discovered unless 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." *State v. Saenz*, 197 Ariz. 487, ¶ 13, 4 P.3d 1030, 1033 (App. 2000). Cook additionally must demonstrate he "exercised due diligence in securing the newly discovered material facts." Ariz. R. Crim. P. 32.1(e)(2). Because it appears Cook's trial counsel was aware of the recordings, a claim based on Rule 32.1(e) necessarily fails. *See Saenz*, 197 Ariz. 487, ¶ 13, 4 P.3d at 1033. And, even if we disregard counsel's knowledge, Cook has not explained how he uncovered the evidence and thus has not shown he exercised diligence in bringing it to the court's attention.

¶10 Cook also takes issue with the trial court's denial of his motion to strike what he describes as the state's "second" response to his petition for post-conviction relief. No error occurred. Cook's convictions are under Maricopa County cause number CR2006-008794-001. However, he has filed documents under that cause number as well as under CR2006-005346-001, which was dismissed without prejudice in 2006. As the court correctly pointed out, the state was merely filing responses in both cause numbers to match Cook's filings.

¶11 Cook further complains the trial court erred in denying his motion for alternate counsel for his evidentiary hearing and to subpoena various witnesses. A trial court must reject a petition for post-conviction relief without conducting an evidentiary hearing if a defendant has failed to raise any non-precluded claim presenting "a material issue of fact or law which would entitle the defendant to relief." Ariz. R. Crim. P. 32.6(c). Cook has not made a cognizable claim for relief, and thus the court correctly dismissed his petition without an evidentiary hearing.

¶12 Although we grant review, we deny relief.