

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

HEATHER ELIZABETH POLZIN,
Petitioner.

No. 2 CA-CR 2017-0212-PR
Filed October 20, 2017

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NOT FOR PUBLICATION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 Cochise County
No. CR200900726
The Honorable Wallace R. Hoggatt, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Peter A. Kelly, Palominas
Counsel for Petitioner

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MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Staring and Judge Howard¹ concurred.

ESPINOSA, Judge:

¶1 Heather Polzin seeks review of the trial court's orders summarily denying her successive and untimely petition for post-conviction relief and motion for rehearing filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb the court's orders unless the court clearly abused its discretion. *See State v. Roseberry*, 237 Ariz. 507, ¶ 7, 353 P.3d 847, 848 (2015). Polzin has not met her burden of demonstrating such abuse here.

¶2 Polzin pled guilty in 2010 to attempted possession of a dangerous drug for sale and was sentenced to an 8.75-year prison term. She sought post-conviction relief, raising various claims, including that her trial counsel had failed to challenge a search warrant pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978). As part of that claim, Polzin asserted she had discovered undisclosed evidence of misconduct by a police officer involved in her case, Michael Mitchell. The trial court summarily denied relief, and Polzin sought review in this court. While that petition for review was pending, Polzin's Rule 32 counsel was required to withdraw and substitute counsel was appointed. That counsel did not file an amended petition for review. This court granted review but denied relief. *State v. Polzin*, No. 2 CA-CR 2012-0245-PR (Ariz. App. Oct. 17, 2012) (mem. decision).

¶3 In January 2017, Polzin filed a petition for post-conviction relief arguing evidence of Mitchell's misconduct

¹The Hon. Joseph W. Howard, 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.

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constituted newly discovered evidence and, had she been aware of his misconduct, she would not have accepted the state's plea offer. The trial court summarily dismissed the petition, concluding among other things that Polzin had raised issues related to Mitchell's misconduct in her first Rule 32 proceeding and did not "act diligently" in raising her most-recent claim. The court denied Polzin's subsequent motion for rehearing, and this petition for review followed.

¶4 On review, Polzin repeats her claim of newly discovered evidence and asserts the trial court erred in concluding she had not been diligent in raising the claim. A claim of newly discovered evidence can be raised in an untimely proceeding like this one. Ariz. R. Crim. P. 32.1(e), 32.2(b). However, to do so, a petitioner must explain "the reasons for not raising the claim in the previous petition or in a timely manner," Ariz. R. Crim. P. 32.2(b), and must "exercise[] due diligence in securing the newly discovered material facts," Ariz. R. Crim. P. 32.1(e)(2).

¶5 Polzin does not contest the trial court's conclusion that she was aware of Mitchell's alleged misconduct during her previous Rule 32 proceeding. As she did below, Polzin blames her failure to raise this claim sooner on substitute counsel in her previous Rule 32 proceeding. But, even if we agreed that a defendant can demonstrate the diligence required by Rule 32.1(e) and Rule 32.2(b) by claiming her previous counsel was inadequate, she has offered no explanation for her failure to raise these issues in the four years between that proceeding and her most recent petition for post-conviction relief.² Moreover, although Polzin asserts her substitute counsel was ineffective, that claim cannot be raised in an untimely proceeding like this one. *See* Ariz. R. Crim. P. 32.1(a) cmt., 32.4(a).

²Polzin asserted below that it would be "unrealistic and unjust to expect" her to raise the claim while incarcerated. We find no authority, however, supporting the notion that an incarcerated defendant is not required to diligently pursue claims for post-conviction relief.

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¶6 Although we grant review, relief is denied.