IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

DONOVAN KEITH NEWMAN,
Petitioner.

No. 2 CA-CR 2017-0258-PR
Filed December 6, 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NOT FOR PUBLICATION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 Pima County
No. CR20152130001
The Honorable Greg Sakall, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Robert A. Kerry, Tucson
Counsel for Petitioner

MEMORANDUM DECISION

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

S T A R I N G, Presiding Judge:

¶1 Donovan Newman petitions this court for review of the trial court's order summarily denying his successive petition for post-conviction relief and his motion for rehearing, filed pursuant to Rule 32, Ariz. R. Crim. P. We grant review, but we deny relief.

¶2 Pursuant to a plea agreement in December 2015, Newman was convicted of aggravated domestic violence and kidnapping, also a domestic violence offense. The trial court sentenced him to concurrent, slightly aggravated prison terms, the longer of which is seven years. Newman filed his first petition for post-conviction relief in July 2016, asserting the court had not properly considered his criminal history at sentencing and that trial counsel had been ineffective. The court summarily dismissed his petition in September 2016. Newman filed the underlying petition in April 2017, in which he alleged the existence of newly discovered evidence that he is seriously mentally ill (SMI). *See* Ariz. R. Crim. P. 32.1(e). He maintained that although he was aware of his SMI diagnosis at sentencing, because that diagnosis was not contained in the medical records trial counsel and his first Rule 32 attorney had requested, they had failed to present this information to the court. He also asserted that when his first Rule 32 attorney ultimately went "the extra mile," she was able to obtain documentation of his SMI diagnosis, a factor he contended would have resulted in a reduced sentence pursuant to A.R.S. § 13-701(E)(2) and (E)(6).

¶3 The trial court summarily denied Newman's petition, concluding that evidence of his SMI diagnosis was not newly discovered, noting that, before he was sentenced, he "had" a letter dated August 26, 2015, confirming his SMI diagnosis. *See State v. Saenz*, 197 Ariz. 487, ¶ 7 (App. 2000) (to prevail on claim of newly discovered evidence, defendant must "establish that the evidence was discovered after trial although it existed before trial; that it could not have been discovered and produced at trial through reasonable diligence; that it is neither cumulative nor impeaching; that it is material; and that it probably would have changed

the verdict" or the sentence). The court also determined the condition was, in any event, cumulative to his "diagnoses of [Post-Traumatic Stress Disorder], anxiety, and bipolar disorder," which the court had considered at sentencing. *See id.* The court thus determined that, even had it known about Newman's SMI diagnosis at sentencing, it would not have imposed a different sentence. *See id.*

¶4 In its ruling denying Newman's motion for rehearing, the trial court clarified that even if Newman did not have a copy of the August 26 letter in his possession when he was sentenced, it would not have ruled differently. Specifically, the court pointed to a document establishing that Newman had participated in an "Informal Appeal Conference" on August 25, 2015, at which it was determined he met the criteria for SMI, further confirming that Newman knew about his SMI diagnosis "long before his sentencing." The court also reaffirmed its initial ruling that Newman had "failed to show that he exercised due diligence in securing the newly discovered fact, that it is material, and that it would have probably resulted in a reduced sentence," and it reasserted that the diagnosis was cumulative to evidence already before the court. This petition for review followed.

¶5 On review, Newman asserts, as he did below, that trial counsel incorrectly informed the trial court at sentencing that Newman "never has made it all the way through a mental health screening and diagnosis." He further maintains that although he "had informed his trial counsel . . . of his SMI diagnosis," counsel "did not present it at sentencing because it had not been part of the mental health records in the file." He similarly contends that, because the SMI diagnosis was not in his medical records when Rule 32 counsel filed his first Rule 32 petition, she did not bring it to the court's attention. We review a summary denial of post-conviction relief for an abuse of discretion. *State v. Bennett*, 213 Ariz. 562, ¶ 17 (2006). We find no such abuse here.

¶6 As Newman acknowledges, "[t]he fact that [he] knew he had been diagnosed SMI [before he was sentenced] is not disputed." Thus, because Newman undisputedly knew about his diagnosis at sentencing and when his first Rule 32 petition was filed, it cannot be considered "newly discovered." *State v. Bilke*, 162 Ariz. 51, 52 (1989) (for purpose of Rule 32.1(e), newly discovered evidence "must appear on its face to have existed at time of trial but be discovered after trial"). And even assuming, without finding, that Newman's attorneys did not "know" about his SMI diagnosis because it did not appear in his medical records, it nonetheless was not

newly discovered evidence.[1] "'Evidence known to the defendant is not newly discovered, even if it is not known to his counsel.'" *Saenz*, 197 Ariz. 487, ¶ 13, *quoting Commonwealth v. Osomo*, 568 N.E.2d 627, 631 (Mass. App. Ct. 1991).[2] In light of our determination that at least one of the required elements of newly discovered evidence was not established, we decline to address Newman's additional arguments that his SMI diagnosis satisfied the other elements of newly discovered evidence. *See State v. Andersen*, 177 Ariz. 381, 387 (App. 1993) (all elements must be satisfied to establish claim of newly discovered evidence).

¶7 To the extent the trial court found the SMI diagnosis was not newly discovered because Newman knew about it at sentencing, it did not abuse its discretion in denying his successive petition for post-conviction relief. Accordingly, although we grant review, we deny relief.

[1]On review, Newman asserts, "Who was his counsel to believe, a client who was admittedly SMI or the medical records?"

[2]Nothing prevented Newman himself from telling the trial judge about his SMI diagnosis at the time of sentencing.