

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

EFRAIN ISMAEL CONDE,
Petitioner.

No. 2 CA-CR 2017-0326-PR
Filed January 5, 2018

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NOT FOR PUBLICATION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. 31.19(e).

Petition for Review from the Superior Court in Maricopa County
No. CR1988005881
The Honorable James P. Beene, Judge

REVIEW GRANTED; RELIEF DENIED

Efrain Conde, Buckeye
In Propria Persona

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MEMORANDUM DECISION

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

B R E A R C L I F F E, Judge:

¶1 Efrain Conde seeks review of the trial court’s order summarily dismissing his successive and untimely notice of and petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that order unless the court abused its discretion. *See State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). Conde has not shown such abuse here.

¶2 After a jury trial, Conde was convicted of first-degree murder, first-degree burglary, five counts of armed robbery, eight counts of aggravated assault, and attempted armed robbery. For murder, the trial court sentenced him to life in prison without the possibility of release on any basis for twenty-five years, and to consecutive prison terms for the remaining crimes totaling 255 years. We affirmed his convictions and sentences on appeal. *State v. Conde*, 174 Ariz. 30, 37 (App. 1992). His convictions stem from a 1988 bank robbery. *Id.* at 31. During the robbery he and an accomplice shot and killed an off-duty police officer working as a security guard. *Id.* Conde and his accomplice stole a car for their getaway from a bank customer, and then, after a thirty-minute car chase during which they stole two other cars at gunpoint, Conde was wounded and arrested. *Id.*

¶3 Before this proceeding, Conde has twice unsuccessfully sought post-conviction relief. In the second proceeding in July 2016, Conde filed a notice of post-conviction relief only claiming, without further showing, that he “now possesses new evidence of material facts that proves beyond any reasonable doubt that he was wrongly convicted.” The trial court summarily dismissed the notice, noting that Conde did not “allege any new facts.”

¶4 Shortly thereafter, to start this proceeding, Conde filed a notice of and petition for post-conviction relief, along with a “Motion for Evidentiary Hearing.” He claimed to have recently obtained “new evidence” that a detective involved in his case had “falsified information in

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multiple . . . cases.” He raised multiple claims of error, including trial error, arguing that the new evidence “brings into question ALL the evidence used in the trial,” “would have produced a none-guilty [sic] verdict,” and “confirms [he] was unconstitutionally deprived of assistance of counsel.” He included with his petition a brief magazine article dated November 2014 noting that, in *Milke v. Ryan*, 711 F.3d 998 (9th Cir. 2013), the court had vacated a defendant’s death sentence because the state had “withheld information” about several cases in which the same detective involved in his case had “lied under oath or committed other misconduct.” Conde also raised claims about his sentences and argued that the parole board had violated his due process rights by denying him parole “without [his] presence.”

¶5 The trial court, stating it would treat Conde’s filings as a “single Notice of Post-Conviction Relief,” summarily dismissed the proceeding. It found the bulk of Conde’s claims precluded because he did not raise them on appeal or in his first Rule 32 proceeding. The court also noted Conde could not raise a claim as to a recent parole board hearing under Rule 32. As to his claims of newly discovered evidence, the court concluded that Conde had not “show[n] why the instances of misconduct in other cases were material here, or[,] if they were, why the evidence was not merely cumulative or impeaching.” This petition for review followed.

¶6 On review, Conde asserts that the evidence he provided “met the tests for newly discovered material evidence,” the evidence “supported claims that could not have been previously presented,” and that claims of newly discovered evidence “may include reinvigoration of claims categorized under Rule 32.1(a).” To prevail on a claim of newly discovered evidence, Conde must show that the newly discovered material facts were discovered after the trial, he was diligent in securing them, and they “probably would have changed the verdict.” *State v. Amaral*, 239 Ariz. 217, ¶ 9 (2016); *see* Ariz. R. Crim P. 32.1(e). Also, he “must establish that the evidence . . . could not have been discovered and produced at trial through reasonable diligence.” *State v. Saenz*, 197 Ariz. 487, ¶ 7 (App. 2000). The facts must not be “merely cumulative or used solely for impeachment, unless the impeachment evidence substantially undermines testimony which was of critical significance at trial such that the evidence probably would have changed the verdict or sentence.” Ariz. R. Crim. P. 32.1(e).

¶7 Assuming, without deciding, that Conde has otherwise met these requirements, he has not shown that the evidence would have changed the verdict had it been used at trial. The evidence would no doubt

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have been useful in impeaching the detective's testimony, but Conde has not shown that he probably would have been acquitted had the jury disregarded the detective's testimony. And Conde, who was unrepresented at trial, defended himself against the charges by arguing that the detective and others had framed him for the crimes, in part by taking his gun, firing it, and then, apparently, placing fired bullets and shell casings at the crime scenes and then firing the gun into the already-dead victim's skull. None of the misconduct described in *Milke* is similar.¹ 711 F.3d at 1020-21.

¶8 Nor do we agree with Conde's assertion that the evidence allows him to raise claims under Rule 32 that cannot be raised in an untimely proceeding like this one. Conde was only permitted to raise claims under Rule 32.1(d) through (h). Ariz. R. Crim. P. 32.4(a)(2)(A), (D). He is wrong that claims otherwise precluded – such as his claims of police misconduct and other alleged trial errors – are “reinvigorated” by the claim of newly discovered evidence. That argument is inconsistent with the plain language of Rule 32.1(e), which does not refer to newly discovered material facts as to other post-conviction claims – it refers only to those facts bearing on the defendant's “verdict or sentence.” See *State ex rel. Thomas v. Newell*, 221 Ariz. 112, ¶ 7 (App. 2009) (rule's plain language is best indicator of meaning). And, in any event, evidence of the detective's conduct in other cases does not support Conde's various claims, which depend on his unproven assertion that the state falsified evidence against him.

¶9 Conde also seems to argue that he may amend his original petition based on the newly discovered evidence. Rule 32.6(c) permits amendment “only for good cause.” Citing case law that does not control this court, Conde argues that the rule allows a petition to be amended even after a trial court has ruled on it. Even were we to agree with this interpretation, Conde did not move to amend his original petition and, as we have explained, the newly discovered evidence does not support his other claims in any event. Additionally, we need not address his argument that he cannot be said to have waived the claims under Rule 32.2(a)(3) because he did not have all the “material facts” relevant to those claims.

¹The court in *Milke* provided a list of cases in which the detective had committed misconduct. 711 F.3d at 1020-21. That conduct, some of which occurred before Conde's trial, consisted of the detective lying under oath as well as Fifth Amendment violations in the interrogation of suspects, including interrogation of a suspect suffering a skull fracture who “did not know his own name, the year or the name of the president.” *Id.*

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Whether a claim has been waived or not is immaterial, only the timeliness of raising the claim is relevant. *See* Ariz. R. Crim. P. 32.4(a)(2)(A); *see also State v. Lopez*, 234 Ariz. 513, ¶¶ 7-8 (App. 2014).

¶10 Conde also seems to claim that, because the trial court treated his filings as a notice of post-conviction relief, summary dismissal was inappropriate. He claims that, because he had complied with Rule 32.2(b), he is entitled to “appointment of counsel” and “full post conviction relief briefing.” Pursuant to Rule 32.2(b), a defendant seeking to raise a claim pursuant to Rule 32.1(d) through (h) in an untimely proceeding must include with the notice of post-conviction relief “the specific exception to preclusion and . . . the reasons for not raising the claim in a previous notice or petition, or for not raising the claim in a timely manner.” Even if we accept Conde’s suggestion that his filings, taken together, would meet the requirements of Rule 32.2(b), he is not entitled to relief. Conde filed a petition for post-conviction relief with his notice. As we have explained, that petition does not state a colorable claim. The court was thus required by Rule 32.6(d)(1) to summarily dismiss it, and we may affirm the court’s ruling for any reason supported by the record. *See State v. Banda*, 232 Ariz. 582, n.2 (App. 2013). And Conde was not entitled to counsel. *See* Ariz. R. Crim. P. 32.4(b)(2) (non-pleading defendant entitled to counsel only in timely or first post-conviction proceeding).

¶11 We grant review but deny relief.