IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

AJELINA LOUISE ROTH LEWIS,
Petitioner.

No. 2 CA-CR 2019-0287-PR
Filed June 23, 2020

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NOT FOR PUBLICATION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 Cochise County
No. S0200CR201000285
The Honorable Terry Bannon, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Harriette P. Levitt, Tucson
Counsel for Petitioner

MEMORANDUM DECISION

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

E P P I C H, Presiding Judge:

¶1 Ajelina Lewis seeks review of the trial court's order summarily dismissing her petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P.[1] We will not disturb that order unless the court abused its discretion. *See State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). Lewis has not sustained her burden of establishing such abuse here.

¶2 Following a retrial in 2014, Lewis was convicted of second-degree murder and tampering with evidence. The trial court sentenced her to sixteen calendar years' imprisonment for the murder conviction and a consecutive, 1.75-year term for the tampering conviction. We affirmed Lewis's convictions and sentences on appeal. *State v. Lewis*, No. 2 CA-CR 2014-0391 (Ariz. App. May 26, 2016) (mem. decision). In September 2016, Lewis filed a pro se petition for post-conviction relief stating she intended to raise a claim of newly discovered evidence; the court treated her petition as a notice of post-conviction relief.

¶3 In September 2017, appointed counsel filed a Rule 32 petition asserting a claim of actual innocence, presumably a claim under Rule 32.1(h), based on a third-party culpability theory arising from a 2011 murder committed after the 2010 murder in this case. Lewis requested the trial court conduct an evidentiary hearing; order a comparison of the footprints found at both murder scenes; order that the evidence in her case be tested against the DNA of Theodore Ramos, the defendant convicted of

[1] Effective January 1, 2020, our supreme court amended the post-conviction relief rules. Ariz. Sup. Ct. Order R-19-0012 (Aug. 29, 2019). The amendments apply to all cases pending on the effective date unless a court determines that "applying the rule or amendment would be infeasible or work an injustice." *Id*. Because it is feasible and does no injustice, we apply and cite to the current version of the rules.

murder in the 2011 case; and, order DNA testing of the three hair strands found in the hand of the victim in this case after he was murdered.[2]

¶4 The trial court determined that DNA testing was necessary before it could consider Lewis's actual-innocence claim. The court therefore stayed the Rule 32 proceeding and ordered the requested testing, including obtaining buccal swabs from Ramos and Lewis, and ultimately ordering that mitochondrial DNA testing be conducted on the hairs (June 2019 test results). One of the three hairs found in the victim's hand matched Lewis's DNA, but two did not; none of the evidence tested linked Ramos to the murder in this case.

¶5 In July 2019, Lewis filed a supplemental Rule 32 petition asserting that the "DNA test results constitute[d] newly discovered evidence [under Rule 32.1(e)] which, if presented to a jury at the time of the original trial, would most likely have resulted in an acquittal." Lewis argued that the presence of the two hairs that did not match her DNA indicated that "an unknown third party," to wit, a person "other than [her]," had murdered the victim, asserting she had raised a colorable claim entitling her to an evidentiary hearing. Over Lewis's objection, the trial court granted the state's request to conduct additional mitochondrial DNA tests (September 2019 test results), which included buccal swabs from Lewis, the victim, Ramos, and the victim's uncle, with whom the victim had been living at the time of his death.[3] As summarized in the court's ruling below, a comparison of the June and September 2019 test results showed that the DNA from one of the hairs found in the victim's hand matched Lewis's DNA, but the DNA from the other two hairs did not match Lewis, the victim, the victim's uncle or Ramos.

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[2]The hairs were not submitted for testing during either of Lewis's trials.

[3]Although the September 2019 test results do not appear to be part of the record on review, the trial court specifically ordered the state to provide those results to the court and, in fact, summarized them in its ruling below, the accuracy of which the parties do not appear to challenge. And, although Lewis asserts the state "did not request testing of the two hairs which did not match [her] against any of the other individuals who had been living in the residence with [the victim]," we note that, pursuant to the state's request, the hairs were tested against the DNA of the victim's uncle.

¶6 The trial court summarily dismissed Lewis's Rule 32 petition, finding "[t]he mitochondrial DNA test results of the hairs fail to establish a colorable claim of newly discovered material facts that would have changed [Lewis's] verdict," and further concluding, "[i]f anything, the presence of [Lewis's] hair in [the victim's] hand, combined with the abundance of evidence presented at her jury trial, potentially may have weighed against her." The court also determined Lewis had not exercised due diligence in bringing the evidence to the court's attention, and that the evidence likely would not have altered the verdict or sentence at trial. This petition for review followed.

¶7 On review, Lewis argues the trial court abused its discretion by dismissing her petition without conducting an evidentiary hearing on her claim of newly discovered evidence.[4] She contends the court erroneously found she had failed to exercise due diligence to bring the purported newly discovered evidence to the court's attention, asserting she could not have raised such a claim while her appeal was pending, and maintains the state's "machinations" further delayed the DNA testing.[5] She also argues the court erroneously found the newly discovered evidence would probably not have altered the jury's verdict.

¶8 To establish a claim of newly discovered material facts under Rule 32.1(e), a defendant must show "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 sentence. *State v. Saenz*, 197 Ariz. 487, ¶ 7 (App. 2000). To be entitled to an evidentiary hearing, Lewis must have made a "colorable claim"—that is, she must have "alleged facts which, if true, would probably have changed" the outcome of her case. *State v. Amaral*, 239 Ariz. 217, ¶¶ 10-12 (2016) (emphasis omitted).

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[4]On review, we consider both the initial and supplemental petitions for post-conviction relief that were before the trial court.

[5]To the extent Lewis also obliquely suggests the trial court erred by finding she had the ability to request DNA testing as early as her first trial in 2011, we do not consider this unsupported assertion. *State v. Stefanovich*, 232 Ariz. 154, ¶ 16 (App. 2013) (insufficient argument waives claim on review).

¶9 The trial court clearly identified Lewis's claims and correctly resolved them on their merits. Because that analysis is thorough and well-reasoned, we adopt it. *See State v. Whipple*, 177 Ariz. 272, 274 (App. 1993) (when trial court has correctly ruled on issues raised "in a fashion that will allow any court in the future to understand the resolution[, n]o useful purpose would be served by this court rehashing the trial court's correct ruling in a written decision").

¶10 We additionally note that, to the extent Lewis argues she was unable to pursue a claim of newly discovered evidence while her appeal was pending, maintaining the trial court lacked jurisdiction to consider such a claim during that time, we disagree. The right to file a notice of post-conviction relief is not "suspended" while an appeal is pending. *State v. Jones*, 182 Ariz. 432, 433-34 (App. 1995); *see also* Ariz. R. Crim. P. 31.3(c) (limits for filing new matter without permission of appellate court do not apply to filing of petition for post-conviction relief not otherwise precluded under Rule 32.2).

¶11 We also note that in her petition and reply below, Lewis essentially failed to address, much less "explain the reasons . . . for not raising the claim in a timely manner," as Rule 32.2(b) requires. *See also Saenz*, 197 Ariz. 487, ¶ 13 (requirement of newly discovered evidence is that defendant have exercised due diligence in discovering the evidence); *State v. Hess*, 231 Ariz. 80, ¶ 8 (App. 2012) (petitioner's lack of diligence in requesting DNA testing warranted denial of Rule 32 petition, where form of DNA testing requested was available ten years before petition leading to claim of newly discovered evidence). By asserting on review that she would have explained at the evidentiary hearing the reasons for any delay in bringing this evidence to the trial court's attention, Lewis has not established a colorable claim meriting an evidentiary hearing on her claim of newly discovered evidence in the first instance. Finally, even assuming, without deciding, that Lewis showed that she had exercised due diligence in presenting this claim, she has failed to raise a colorable claim for relief because she cannot show the evidence presented probably would have changed the outcome. *See Saenz*, 197 Ariz. 487, ¶ 7.

¶12 We grant review but deny relief.