

NOTICE: NOT FOR PUBLICATION.
UNDER ARIZ. R. SUP. CT. 111(c), THIS DECISION DOES NOT CREATE LEGAL PRECEDENT
AND MAY NOT BE CITED EXCEPT AS AUTHORIZED.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Respondent*,

v.

ANTHONY LOZANO-SOLIS, *Petitioner*.

No. 1 CA-CR 12-0003 PRPC
FILED 12-12-2013

Petition for Review from the Superior Court in Maricopa County
No. CR 2004-015263-001
The Honorable Crane McClennen, Judge

**REVIEW GRANTED; RELIEF GRANTED; VACATED AND
REMANDED**

COUNSEL

Maricopa County Attorney's Office, Phoenix
By Gerald R. Grant

Counsel for Respondent

Anthony Lozano-Solis, Florence

Petitioner In Propria Persona

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MEMORANDUM DECISION

Judge Margaret H. Downie delivered the decision of the Court, in which Presiding Judge Lawrence F. Winthrop joined. Judge Jon W. Thompson dissented.

D O W N I E, Judge:

¶1 Petitioner Anthony Lozano-Solis seeks review of the trial court's order summarily dismissing his notice of post-conviction relief. See Ariz. R. Crim. P. 32.1. Although we will not reverse a trial court's ruling in a Rule 32 proceeding "absent a clear abuse of discretion," *State v. Swoopes*, 216 Ariz. 390, 393, ¶ 4, 166 P.3d 945, 948 (App. 2007), we find such here and grant Lozano-Solis relief.

¶2 The State charged Lozano-Solis with aggravated assault and second-degree escape. Upon trial to a jury, Lozano-Solis was found guilty as charged on both counts. The trial court sentenced Lozano-Solis to consecutive prison terms totaling 17 years. We affirmed the convictions and sentences on appeal. *State v. Lozano-Solis*, 1 CA-CR 05-0676 (Ariz. App. Feb. 6, 2007) (mem. decision).

¶3 On March 5, 2007, Lozano-Solis commenced his first Rule 32 proceeding and subsequently filed a petition for post-conviction relief in which he raised claims of ineffective assistance of counsel. The trial court summarily dismissed the petition based on a finding that Lozano-Solis failed to present a colorable claim for relief. This court denied review of Lozano-Solis's petition for review.

¶4 On June 25, 2009, Lozano-Solis commenced a second Rule 32 proceeding by filing a notice of post-conviction relief in which he indicated he intended to raise another claim of ineffective assistance of counsel. The trial court summarily dismissed this notice based on preclusion because Lozano-Solis could have raised the claim in the first Rule 32 proceeding. Lozano-Solis did not seek review of the trial court's ruling.

¶5 On March 25, 2010, Lozano-Solis filed the notice of post-conviction relief presently before the court, raising a claim of actual innocence. Specifically, he alleged that he learned "last week or the week

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prior” that the victim of the aggravated assault charge had recanted his trial testimony, and he further requested appointment of counsel to represent him with respect to his claim of actual innocence. Included in the notice was a request for appointment of counsel to assist him in presenting the claim.

¶6 The trial court directed the State to file a response “limited to whether Defendant is entitled to successive filing.” The State filed a response in which it argued that the trial court should dismiss the notice because Lozano-Solis provided nothing to substantiate his allegation and because recanting testimony is “unreliable.” Lozano-Solis thereafter submitted a reply, attaching what he claimed was a copy of a letter from the victim in which the victim indicated that he testified to what the prosecutor wanted because of a threat to jail his parents. He also filed two motions requesting that the trial court allow him to correspond with the victim, who is also an inmate in the Arizona Department of Corrections, and to obtain an affidavit from the victim. Without addressing the request for appointment of counsel or the two *pro se* motions, the trial court summarily dismissed the notice of post-conviction relief based on a finding “that the State’s arguments are well-take[n].”

¶7 We hold that the trial court abused its discretion in summarily dismissing the Rule 32 proceeding at the notice stage. The trial court is authorized to summarily dismiss a Rule 32 proceeding at the notice stage based on preclusion. Ariz. R. Crim. P. 32.2(a), 32.6(c). A claim is precluded when it “has been waived at trial, on appeal or in any previous collateral proceeding.” Ariz. R. Crim. P. 32.2(a)(3). A petitioner like Lozano-Solis, who files a successive notice of post-conviction relief, may only assert claims that fall within Rule 32.1(d), (e), (f), (g), or (h), and must state in the notice “meritorious reasons . . . substantiating the claim and indicating why the claim was not stated in the previous petition or in a timely manner.” Ariz. R. Crim. P. 32.2(b); *see also State v. Petty*, 225 Ariz. 369, 372-73, ¶ 10, 238 P.3d 637, 640-41 (App. 2010) (explaining petitioners seeking to raise non-precluded claim in untimely or successive petition may do so if able to state meritorious reasons for failing to assert claim in timely manner or in previous proceeding). In the instant case, the notice filed by Lozano-Solis asserted a claim of actual innocence under Rule 32.1(h), explained that it was predicated on recantation by the victim, and stated that the reason why the claim was not raised in his previous petitions was because he had just recently learned of the recantation. Thus, the notice complies with the requirements of Rule 32.2(b) for presenting a non-precluded claim in a successive petition.

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¶8 The arguments advanced by the State regarding the lack of proof for the claim of actual innocence and the unreliability of recanted testimony go to the merits of the claim and are properly raised in response to the petition for post-conviction relief, not the initial notice commencing the proceeding. *See* Ariz. R. Crim. P. 32.5 (enumerating contents of petition for post-conviction relief and requiring that petitioner detail facts of claim and submit “[a]ffidavits, records, or other evidence currently available to the defendant supporting the allegations” in the petition). Because the notice filed by Lozano-Solis set forth the substance of the specific exception of the non-precluded claim sought to be raised and provided “meritorious reasons” for not raising the claim in previous proceedings, the trial court abused its discretion in summarily dismissing the proceedings at the notice stage and depriving Lozano-Solis of the opportunity to file a petition for post-conviction relief establishing the existence of a claim of actual innocence under Rule 32.1(h). *See State v. Cowles*, 207 Ariz. 8, 9, ¶ 3, 82 P.3d 369, 370 (App. 2004) (“Generally, a court abuses its discretion where the record fails to provide substantial support for its decision or the court commits an error of law in reaching the decision.”)

¶9 Accordingly, we grant the petition for review. We further vacate the order summarily dismissing the notice of post-conviction relief and remand to the trial court for further proceedings consistent with this decision.

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T H O M P S O N, Judge, dissenting:

¶10 The petition is precluded unless it presents a corroborated claim of actual innocence. Ariz. R. Crim. Proc. 32.1(h).

¶11 At trial, a jury unanimously found that petitioner had, using a gun, assaulted the victim. The state's evidence showed that officers responded to the scene and took a statement from the victim, who immediately identified his assailant when petitioner returned to the scene. We affirmed on direct appeal. Petitioner now asserts that the person who testified at the trial was pressured by law enforcement to appear and was not the reporting victim.

¶12 Were this true, it would establish irregularities in the trial proceedings. It would not establish that petitioner did not assault the reporting victim. Because the petition does not present a corroborated claim of actual innocence, it is precluded.



Ruth A. Willingham · Clerk of the Court
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