

NOTICE: NOT FOR PUBLICATION.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

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STATE OF ARIZONA, *Respondent*

*v.*

ANTHONY VOLPE, *Petitioner.*

No. 1 CA-CR 12-0520-PRPC  
FILED 12-5-2013

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Appeal from the Superior Court in Maricopa County  
No. CR2009-144768-002  
The Honorable Lisa M. Roberts, Judge

**REVIEW GRANTED; RELIEF DENIED**

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COUNSEL

Maricopa County Attorney's Office, Phoenix  
By Diane Meloche

*Counsel for Respondent*

Anthony Volpe, Buckeye

*In Propria Persona Petitioner*

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**MEMORANDUM DECISION**

Judge John C. Gemmill delivered the decision of the Court, in which Presiding Judge Maurice Portley and Judge Kent E. Cattani joined.

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**G E M M I L L**, Judge:

¶1 Petitioner Anthony Volpe pled guilty to burglary in the first degree, dangerous, and the trial court sentenced him to fifteen years' imprisonment. Volpe filed a pro se of-right petition for post-conviction relief after his counsel could find no colorable claims for relief. The trial court summarily dismissed the petition and Volpe now seeks review. We review the summary dismissal of a petition for post-conviction relief for abuse of discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). We have jurisdiction pursuant to Arizona Rule of Criminal Procedure 32.9(c).

¶2 Volpe argues his trial counsel was ineffective when he failed to obtain documents that showed Volpe had a contractual right to be on the premises where the victim's apartment was located and, therefore, did not enter the victim's apartment "unlawfully," a necessary element of residential burglary. See Arizona Revised Statutes ("A.R.S") section 13-1507(A). Volpe further argues he has newly discovered evidence that establishes he had a right to be on the premises.

¶3 To state a colorable claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below objectively reasonable standards and that the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To show prejudice, a defendant must show that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

¶4 Regarding newly discovered evidence, there are five factors a defendant must establish to obtain post-conviction relief based on newly discovered material evidence:

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- (1) The evidence must appear on its face to have existed at the time of trial but be discovered after trial;
- (2) The motion must allege facts from which the court could conclude the defendant was diligent in discovering the facts and bringing them to court's attention;
- (3) The evidence must not simply be cumulative or impeaching;
- (4) The evidence must be relevant to the case;
- (5) The evidence must be such that it would likely have altered the verdict, finding, or sentence if known at the time of trial.

*State v. Bilke*, 162 Ariz. 51, 52-53, 781 P.2d 28, 29-30 (1989).

¶5 We deny relief. The newly discovered evidence that Volpe argues proves he had a right to be on the premises and, in turn, proves his counsel's ineffectiveness includes a rental application form that is mostly blank, does not identify the property to be rented, does not identify any terms of a rental agreement, and is signed by no one other than Volpe. This document proves nothing. The other two documents consist of a receipt from "P.J. Hussey and Associates" made out to Volpe for "rent" paid and an electric bill in Volpe's name, both of which identify 6049 W. Laurie Lane, Apartment 5, Glendale, Arizona. The record, however, shows that Volpe and his codefendant committed the charged offenses in the victim's apartment, which the indictment identifies as apartment number 1 of the complex. But, the new evidence cited by Volpe concerns a different apartment number from the victim's, and Volpe offers no explanation for the discrepancy. At most, these documents show Volpe may have had an apartment in the same complex as the victim at some point in time before the incident. Therefore, Volpe has failed to present colorable claims for relief based on either newly discovered evidence or his counsel's failure to obtain these documents.

¶6 Volpe also argues his counsel was ineffective when he failed to file a motion to permit Volpe to withdraw from the plea. The trial court considered Volpe's oral, pro se motion to withdraw and denied the

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motion after hearing Volpe's argument. Therefore, Volpe suffered no prejudice from any inaction of counsel and he offers no evidence that counsel would have been any more successful.

¶7 Volpe also argues his plea was "coerced" because his counsel told him he would not get fifteen years' imprisonment. The plea agreement provided that the trial court could sentence Volpe to up to fifteen years' imprisonment. At the change of plea hearing, the court explained to Volpe more than once that he could be sentenced to up to fifteen years' imprisonment. Volpe acknowledged he understood this, even when his counsel stated to the court and Volpe that he believed it was possible Volpe could get a shorter sentence within the agreed upon range. Volpe has failed to present a colorable claim that he was coerced into accepting the plea offer.

¶8 Finally, Volpe argues the State did not timely disclose the transcript of an inculpatory telephone call Volpe made from jail. Volpe waived this issue when he pled guilty. A plea agreement waives all non-jurisdictional defenses, errors, and defects which occurred prior to the plea. *State v. Moreno*, 134 Ariz. 199, 200, 655 P.2d 23, 24 (App. 1982). The waiver of non-jurisdictional defects includes deprivations of constitutional rights. *Tollett v. Henderson*, 411 U.S. 258, 267 (1973).

¶9 While Volpe's petition for review and reply present numerous other issues, Volpe did not raise those issues in the petition for post-conviction relief he filed below. A petition for review may not present issues and arguments not first presented to the trial court. *State v. Bortz*, 169 Ariz. 575, 577, 821 P.2d 236, 238 (App. 1991); Ariz. R. Crim. P. 32.9(c)(1)(ii). Further, this court will not consider arguments or issues first raised in a reply. See *State v. Watson*, 198 Ariz. 48, 51, ¶ 4, 6 P.3d 752, 755 (App. 2000).

¶10 We grant review but, for the reasons explained herein, deny relief.



Ruth A. Willingham · Clerk of the Court  
FILED: mjt