

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz.R.Sup.Ct. 111(c); ARCAP 28(c);
Ariz.R.Crim.P. 31.24



DIVISION ONE
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**IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE**

STATE OF ARIZONA,)
) Court of Appeals
) Division One
 Respondent,) No. 1 CA-CR 09-0411 PRPC
)
 v.) Mohave County
) Superior Court
 CHARLIE ALAN WENSEL,) No. CR-2008-0643
)
 Petitioner.) DEPARTMENT C
)
) D E C I S I O N
) O R D E R
)
 _____)

Petitioner Charlie Alan Wensel petitions this court for review from the dismissal of his petition for post-conviction relief. Presiding Judge Patrick Irvine and Judges Michael J. Brown and Donn Kessler have considered the petition for review and, for the reasons stated, grant review and relief in part and deny review in part.

Wensel pled guilty to failure to comply with sex offender registration requirements. He was sentenced to a presumptive term of 2.5 years' imprisonment, to be served consecutively to two other prison sentences imposed in two other matters. Wensel has not yet begun serving his sentence in this case.

Wensel was charged pursuant to Arizona Revised Statutes ("A.R.S.") sections 13-3821 (2010), -3822 (2010), and -3824 (2010).¹

Arizona Revised Statutes § 13-3821 provides in relevant part that if a person has been convicted of an offense in another jurisdiction and that offense would constitute one of several Arizona sex offenses if committed in Arizona, that person must register with the sheriff of any county in Arizona in which they enter and remain for ten days or more. A.R.S. § 13-3821(A)(5). Section 13-3821 further provides a person who is required to register by another jurisdiction must also register in Arizona regardless of whether the offense in the other jurisdiction would constitute an Arizona sex offense. *Id.* The failure to register is a class 4 felony. A.R.S. § 13-3824(A).

The record contains virtually no information on the State's theory of why Wensel was required to register as a sex offender in Arizona pursuant to A.R.S. § 13-3821. The presentence report represents the registration requirement was based on Wensel's 1996 convictions for sexual battery and false imprisonment in California. The record does not reveal whether the State believed Wensel was required to register in Arizona because it

¹ We cite the current version of the applicable statutes because no revisions material to this decision have since occurred.

believed the elements of one or more of the California offenses also constituted one of the Arizona offenses listed in A.R.S. § 13-3821, if it believed a California court had ordered Wensel to register, or if the State had some other theory. The presentence report states simply that as a result of Wensel's convictions for sexual battery and false imprisonment in California, he "was ordered to register as a sex offender in Arizona" without further explanation regarding why, by whom or under what authority.

Wensel did not file a timely "of-right" petition for post-conviction relief. He did, however, file an untimely petition for post-conviction relief in which he raised an issue pursuant to Arizona Rule of Criminal Procedure 32.1(h), commonly referred to as "actual innocence." See Ariz.R.Crim.P. 32.1(h) (a defendant is entitled to relief if the facts underlying the claim would be sufficient to establish that no reasonable factfinder would have found the defendant guilty of the offense beyond a reasonable doubt).² Wensel argued he was not required to

² Preclusion does not apply to claims raised pursuant to Rule 32.1(h) *if* meritorious reasons for why the issue was not raised in a timely fashion are given. Ariz.R.Crim.P. 32.2(b). Because the trial court addressed the merits of this issue, we do not address whether Wensel provided meritorious reasons for the delayed filing. Further, because we grant review and relief pursuant to Rule 32.1(h), we need not and do not address the

register as a sex offender in California and that neither of the California offenses would constitute one of the Arizona offenses identified in A.R.S. § 13-3821(A). Therefore, Wensel argued, he could not be guilty of failure to comply with sex offender registration requirements because he was not required to register as a sex offender pursuant to A.R.S. § 13-3821. Wensel further argued he knew he was not required to register as a sex offender in California, but pled guilty only because an official in the Arizona Department of Corrections ("DOC") told him he had to register as a sex offender in Arizona. This was ostensibly because one or more of Wensel's California convictions constituted one of the Arizona offenses listed in A.R.S. § 13-3821. See *State v. Kuntz*, 209 Ariz. 276, 280, ¶ 13, 100 P.3d 26, 30 (App. 2004) (a determination of whether a foreign conviction would constitute one of the Arizona offenses identified in A.R.S. § 13-3821 requires comparison of the elements of the foreign offense with those of the corresponding Arizona offense). Wensel argues it was only after he was sentenced that he learned the DOC official was incorrect.

The trial court summarily dismissed the petition for post-conviction relief. Regarding the claim of "actual innocence,"

other grounds for relief raised in the petition for post-conviction relief or the petition for review.

the court held Wensel was not entitled to relief because he pled guilty and never disputed he had to register; he provided a sufficient factual basis for the plea; the factual basis to support a plea does not require proof beyond a reasonable doubt (see *State v. Salinas*, 181 Ariz. 104, 106, 887 P.2d 985, 987 (1994)); and Wensel had failed to show that no reasonable court would have accepted his guilty plea under these circumstances. The court later denied Wensel's motion for reconsideration. Wensel now seeks review.

Under Rule 32, a defendant is entitled to an evidentiary hearing if he presents a colorable claim. *State v. D'Ambrosio*, 156 Ariz. 71, 73, 750 P.2d 14, 16 (1988). A colorable claim is one that, if the allegations are true, might have changed the outcome. *State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993). There is nothing in the record before us to indicate Wensel was required to register as a sex offender pursuant to A.R.S. § 13-3821. There are no records from California to indicate he was required to register there.³ Further, our review of the applicable statutes shows sexual battery and false imprisonment as defined under California law

³ We note the May 8, 1996 sentencing order from California states "Further conditions are set forth in a probation order[.]" It is unknown if the "further conditions" may have included registration because the record does not contain a copy of the probation order.

in 1996 could have been committed in a manner such that they would not constitute any of the Arizona offenses identified in A.R.S. § 13-3821. The State has never contested otherwise. In fact, in its response to Wensel's motion to supplement the post-conviction relief record, the State noted the "elements test" discussed in *Kuntz* was "not necessary" and "purposeless" in the context of this case. Wensel has, therefore, presented a colorable claim that he was not required to register as a sex offender pursuant to A.R.S. § 13-3821(A) and that no reasonable fact-finder would have found him guilty beyond a reasonable doubt of failure to comply with sex offender registration requirements under those circumstances. See Ariz.R.Crim.P. 32.1(h).

We express no opinion regarding whether Wensel was required to register. We hold only that Wensel presented a colorable claim and was, therefore, entitled to an evidentiary hearing. We grant review and relief on the grounds presented pursuant to Rule 32.1(h) and remand for proceedings consistent with this decision order. We deny review of all other claims.

/s/

PATRICK IRVINE, Presiding Judge