

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

FILED BY CLERK

FEB 26 2013

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2012-0461-PR
)	DEPARTMENT B
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
JU' JUAN MARQUETE GIBSON,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20094200001

Honorable James E. Marner, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney

By Jacob R. Lines

Tucson
Attorneys for Respondent

Ju' Juan M. Gibson

San Luis
In Propria Persona

K E L L Y, Judge.

¶1 Following a jury trial, petitioner Ju' Juan Gibson was convicted of two counts each of armed robbery and aggravated assault and one count of aggravated robbery. The trial court sentenced him to concurrent, mitigated and presumptive prison

terms, the longest of which is 7.5 years. We affirmed his convictions and sentences on appeal. *State v. Gibson*, No. 2 CA-CR 2010-0209 (memorandum decision filed Apr. 1, 2011). In 2011, Gibson filed a petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P. We dismissed as untimely his petition for review of the court's summary dismissal of that petition. *State v. Gibson*, No. 2 CA-CR 2012-0068-PR (order filed Apr. 4, 2012). Gibson again sought post-conviction relief,¹ contending trial counsel had been ineffective and asserting a claim of actual innocence. The court dismissed his pro se petition without conducting an evidentiary hearing, and this petition for review followed.

¶2 On review, Gibson appears to contend the trial court erred by finding his claims of ineffective assistance of counsel precluded and by finding he had failed to present a meritorious reason to raise an actual innocence claim in a successive Rule 32 proceeding. He argues trial counsel rendered ineffective assistance in failing to: move to sever his trial from that of his codefendant; request a hearing pursuant to *State v. Dessureault*, 104 Ariz. 380, 453 P.2d 951 (1969); and assert a claim of actual innocence. Gibson also generally asserts he was denied the right to be represented by counsel at trial. He asks that we conduct a “de novo” review of his petition for post-conviction relief and at the very least, order an evidentiary hearing. “We will not disturb a trial court’s ruling

¹Gibson filed a “Writ of Coram Nobis, Writ of Error,” which the trial court correctly treated as a successive petition for post-conviction relief. *See* Ariz. R. Crim. P. 32.3.

on a petition for post-conviction relief absent a clear abuse of discretion.” *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We find no such abuse here.

¶3 Gibson raised claims of ineffective assistance of counsel in his first post-conviction petition. He therefore is precluded from raising such claims now, as the trial court correctly concluded. *See* Ariz. R. Crim. P. 32.2(a)(2), (3) (precluding claims based on any ground “[f]inally adjudicated on the merits . . . in any previous collateral proceeding,” or “[t]hat has been waived . . . in any previous collateral proceeding”); *see also State v. Spreitz*, 202 Ariz. 1, ¶ 4, 39 P.3d 525, 526 (2002) (“Our basic rule is that where ineffective assistance of counsel claims are raised, or could have been raised, in a Rule 32 post-conviction relief proceeding, subsequent claims of ineffective assistance will be deemed waived and precluded.”) (emphasis omitted).

¶4 Additionally, to the extent Gibson’s claim of actual innocence was raised in the context of ineffective assistance of trial counsel, he is precluded from raising that claim in this successive petition. *See* Ariz. R. Crim. P. 32.2(a)(2), (3). And, insofar as his claim of actual innocence was raised as an independent claim pursuant to Rule 32.1(h), nothing in the record establishes “meritorious reasons . . . substantiating the claim and indicating why the claim was not stated in the previous petition,” excusing Gibson from

the preclusive effect of Rule 32. Ariz. R. Crim. P. 32.2(b).² Moreover, on appeal we found substantial evidence supported the jury’s verdicts.

¶5 For all of these reasons, we grant the petition for review but deny relief.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

²Although Rule 32.2(b) contemplates dismissal of a notice of post-conviction relief that fails to state meritorious reasons why the asserted claim was not raised in a previous petition, in the absence of a notice to the writ of Coram Nobis, Writ of Error, the trial court here correctly found “the extensive record . . . as well as Petitioner’s Writ of Coram Nobis, Writ of Error,” did not provide “any meritorious reasons substantiating Petitioner’s claim of actual innocence.”