

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

OCT 30 2013

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	2 CA-CR 2013-0311-PR
	)	DEPARTMENT B
Respondent,	)	
	)	<u>MEMORANDUM DECISION</u>
v.	)	Not for Publication
	)	Rule 111, Rules of
VINCENT E. RODRIGUEZ,	)	the Supreme Court
	)	
Petitioner.	)	
_____	)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF MARICOPA COUNTY

Cause Nos. CR2003013217001DT and CR2006012527001DT

Honorable Edward Bassett, Judge

REVIEW GRANTED; RELIEF DENIED

William G. Montgomery, Maricopa County Attorney  
By Diane Meloche

Phoenix  
Attorneys for Respondent

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K E L L Y, Presiding Judge.

¶1 Vincent Rodriguez petitions this court for review of the trial court's order dismissing his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P., based on Rodriguez's failure to comply with Rule 32.5. We will not disturb the

court's ruling unless the court clearly has abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Rodriguez has not met his burden of demonstrating such abuse here.

¶2 In CR2006-012527, Rodriguez was convicted pursuant to a plea agreement of sale or transportation of a dangerous drug and was sentenced to a 7.5-year prison term. That sentence apparently was ordered to be concurrent with the sentence imposed for Rodriguez's resulting probation violation in another cause number, CR2003-013217. Rodriguez filed a notice of post-conviction relief listing both cause numbers, and appointed counsel filed a notice stating she had reviewed the record and was "unable to find any claims for relief to raise in post-conviction relief proceedings."

¶3 In February 2011, Rodriguez filed a pro se petition raising numerous claims. The petition consisted of eighty-seven handwritten pages with approximately two hundred pages of exhibits attached. Pursuant to the state's motion, the trial court struck that petition, concluding it did not "contain a certification as required by Rule 32.5" that Rodriguez "has included every ground known to him for vacating, reducing, correcting or otherwise changing all judgments and sentences imposed" and that the petition exceeded the twenty-five page limit provided in Rule 32.5. The court gave Rodriguez permission to file a revised petition compliant with Rule 32.5.

¶4           Apparently relying on a notice of post-conviction relief subsequently filed by Rodriguez,<sup>1</sup> the trial court determined Rodriguez had provided an appropriate certification but again noted the February 2011 petition exceeded the applicable page limit and set a due date for him to file a revised petition. Rodriguez did so in December 2011. That petition consisted of approximately twenty-seven handwritten pages and, on the signature page, stated that Rodriguez “has included every ground known to him for” relief “in this Petition, including Appendix 1 and 2.” Appendix 1 was comprised of Rodriguez’s February 2011 petition, and Appendix 2 was titled “Grounds for Relief Petitioner Knows [A]bout” and was comprised of approximately twenty handwritten pages making various factual and legal assertions.

¶5           After the state filed a response and Rodriguez filed his reply, the case was assigned to a different trial judge for ruling. That judge subsequently entered a ruling finding several of Rodriguez’s claims precluded or not colorable, but concluding he had made colorable claims that his plea had been involuntary and that his trial counsel had rendered ineffective assistance of trial counsel. The court set an evidentiary hearing on those claims. Its ruling appeared to refer to paragraph numbers in Rodriguez’s February 2011 petition. On the day of the hearing, the court confirmed that its ruling was regarding the February 2011 petition and that it had reviewed the case file and discovered

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<sup>1</sup>That notice appears unrelated to Rodriguez’s February 2011 petition and instead raises a claim of ineffective assistance of post-conviction counsel. We have found nothing in the record suggesting the court further addressed this notice.

that petition had been “previously stricken.”<sup>2</sup> The court further stated it had reviewed the December 2011 petition, noted it was “extremely long,” and found it did not comply with Rule 32.5. Accordingly, the court struck the petition and dismissed the post-conviction proceeding.<sup>3</sup> This petition for review followed.

¶6 On review,<sup>4</sup> Rodriguez asserts the trial court abused its discretion by striking his petition because the appendices were included only because he believed the trial court “would not have his previous filings” and he only sought to “save space in the body of his petition by incorporating portions of his previously-filed pleadings.” Thus, he reasons, he was “conscientiously trying to comply with the court’s order to revise his petition to comply with the page limitation.” He argues the court was required to disregard “defects of form” by Rule 32.6(c) in reviewing his petition, and that the court therefore should have reviewed the substance of his petition “including any information incorporated by reference.”

¶7 Rule 32.5 states that an of-right petition for post-conviction relief, like Rodriguez’s, “shall not exceed 25 pages.” It requires a defendant to attach “[a]ffidavits, records, or other evidence currently available to the defendant supporting the allegations

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<sup>2</sup>The trial court mistakenly stated the petition had been stricken pursuant to Rule 32.6(c), which does not provide for the striking of a non-compliant petition. The trial court actually struck Rodriguez’s petition pursuant to Rule 32.5.

<sup>3</sup>In his petition for review, Rodriguez cites a transcript of this hearing, but it is not part of the record before us. We therefore presume the contents of the missing transcript support the trial court’s ruling. *See State v. Wilson*, 179 Ariz. 17, 19 n.1, 875 P.2d 1322, 1324 n.1 (App. 1993).

<sup>4</sup>Rodriguez is represented by counsel on review.

of the petition.” Ariz. R. Crim. P. 32.5. We reject the notion that Rodriguez’s second petition can reasonably be described as a good-faith effort to comply with Rule 32.5. Nothing in that rule permits a defendant to raise substantive claims in an appendix. The rule instead permits a defendant to attach only “[a]ffidavits, records, or other evidence.” Ariz. R. Crim. P. 32.5. Moreover, Rodriguez expressly asked the trial court to evaluate the claims raised in the attached appendices and thus clearly attempted to circumvent the twenty-five page limit. And Rule 32.5 states that, once a petition has been returned to a defendant for revision “to comply with the rule,” the court “shall dismiss the proceedings with prejudice” if the defendant does not return a complying petition for refiling. Finally, although Rodriguez correctly notes that a trial court must disregard “defects of form” pursuant to Rule 32.6(c), a petition exceeding the page limit by approximately one hundred pages cannot reasonably be characterized a “defect of form” as contemplated by that rule. Thus, we find no error in the trial court’s decision to strike Rodriguez’s December 2011 petition and dismiss the proceeding.

¶8 Rodriguez also asserts the trial court erred in concluding the February 2011 petition had been stricken. He claims that, by finding Rodriguez had provided an adequate certification under Rule 32.5, the court “reinstated” that petition. Nothing in the court’s order determining Rodriguez had complied with the certification requirement supports Rodriguez’s argument—the court unambiguously required Rodriguez to file a new petition.

¶9 Further, Rodriguez’s argument ignores the effect of Rule 32.5. Pursuant to that rule, when the trial court determines a petition is noncompliant, it is “returned by the

court . . . for revision with an order specifying how the petition fails to comply with rule.” The defendant must then “return[]” a compliant petition “for refiling” or the court is required to dismiss the proceedings. Ariz. R. Crim. P. 32.5. A returned, noncompliant petition is therefore of no effect—only a newly filed, compliant petition may be considered by the court.

¶10 For the reasons stated, although review is granted, relief is denied.

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

CONCURRING:

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

*/s/ Peter J. Eckerstrom*  
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PETER J. ECKERSTROM, Judge