

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

VINCENT ROMAN BARBA,
Petitioner.

No. 2 CA-CR 2017-0111-PR
Filed April 20, 2017

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Maricopa County
No. CR2011157856001DT
The Honorable Peter C. Reinstein, Judge

REVIEW GRANTED; RELIEF GRANTED

COUNSEL

William G. Montgomery, Maricopa County Attorney
By Lisa Marie Martin, Deputy County Attorney, Phoenix
Counsel for Respondent

Vincent Roman Barba, San Luis
In Propria Persona

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MEMORANDUM DECISION

Presiding Judge Howard authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Vásquez concurred.

H O W A R D, Presiding Judge:

¶1 Vincent Barba seeks review of the trial court’s order summarily denying his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that order unless the court clearly abused its discretion. *State v. Roseberry*, 237 Ariz. 507, ¶ 7, 353 P.3d 847, 848 (2015). Because the court erred by failing to consider Barba’s timely filed reply to the state’s response to his petition, we accept review and grant relief.

¶2 After a jury trial, Barba was convicted of aggravated assault, discharge of a firearm at a structure, and drive-by shooting. The trial court sentenced him to concurrent prison terms, the longest of which is ten years. This court affirmed his convictions on appeal; we vacated the portion of his sentence requiring him to pay for DNA¹ testing, but otherwise affirmed the sentences imposed. *State v. Barba*, No. 1 CA-CR 13-0491, ¶ 1 (Ariz. App. Jul. 22, 2014) (mem. decision).

¶3 Barba sought post-conviction relief, and appointed counsel filed a notice stating he had reviewed the record but found no claims to raise in a petition for post-conviction relief. Barba filed a pro se petition asserting his trial counsel had failed to advise him adequately about his chances of prevailing at trial, leading to his rejection of a plea offer from the state. The state filed its response on September 2, 2015, and the trial court ordered Barba’s reply would be due “no later than September 17, 2015.” Barba filed a reply, which he dated September 15 but was filed September 18. On

¹Deoxyribonucleic acid.

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September 29, the court summarily denied relief, noting “No Reply has been filed.” This petition for review followed.

¶4 On review, Barba asserts the trial court erred in summarily rejecting his claims and by failing to consider his reply to the state’s response. He included with his petition copies of what appear to be mailing receipts for legal documents dated September 15, 2015. In its “limited” response, the state “agrees that the trial court should have the opportunity to consider [Barba’s] timely-filed Reply.”

¶5 Pursuant to Rule 32.6(c), a trial court is required to review “the petition, response, reply, [and] files and records” in evaluating whether to summarily dispose of a petition. Barba’s reply was stamped as filed one day after it was due. *See* Ariz. R. Crim. P. 32.6(b). However, the trial court did not find the reply untimely, noting only that one had not been filed. Additionally, under the “prisoner mailbox rule,” a pro se prisoner is deemed to have filed a document when he or she delivers it, “properly addressed, to the proper prison authorities to be forwarded to the clerk of the superior court.” *State v. Goracke*, 210 Ariz. 20, ¶¶ 5-6, 8, 13, 106 P.3d 1035, 1037-38 (App. 2005), *quoting* *Mayer v. State*, 184 Ariz. 242, 245, 908 P.2d 56, 59 (App. 1995). In light of this rule, and given that Barba’s reply was timestamped only a day later than it was due and he has provided documents suggesting it was mailed in advance of September 17, we agree with Barba and the state that Barba’s reply should be deemed timely filed. The court was thus required to consider it by Rule 32.6(c).

¶6 Accordingly, we grant review and relief. We vacate the trial court’s order denying Barba’s petition for post-conviction relief and remand for proceedings consistent with this decision.