

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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THE STATE OF ARIZONA,  
*Respondent,*

*v.*

LORENZO EDWARD DELGADO,  
*Petitioner.*

No. 2 CA-CR 2017-0347-PR  
Filed January 19, 2018

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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NOT FOR PUBLICATION  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. 31.19(e).*

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Petition for Review from the Superior Court in Maricopa County  
No. CR2011129647001DT  
The Honorable Susanna C. Pineda, Judge

**REVIEW GRANTED; RELIEF DENIED**

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Lorenzo Delgado, San Luis  
*In Propria Persona*

**MEMORANDUM DECISION**

Judge Eppich authored the decision of the Court, in which Presiding Judge Vásquez and Judge Espinosa concurred.

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E P P I C H, Judge:

¶1 Petitioner Lorenzo Delgado seeks review of the trial court’s order denying his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. “We will not disturb a trial court’s ruling on a petition for post-conviction relief absent a clear abuse of discretion.” *State v. Swoopes*, 216 Ariz. 390, ¶ 4 (App. 2007). Delgado has not sustained his burden of establishing such abuse here.

¶2 After a jury trial, Delgado was convicted of discharge of a firearm at a structure and aggravated assault. An additional charge of weapons misconduct with two prior felony convictions was severed from the other counts before trial, and Delgado was convicted of that offense pursuant to a plea agreement. The trial court sentenced him to enhanced, aggravated and presumptive, concurrent prison terms, the longest of which were eighteen years.

¶3 Delgado filed a notice of post-conviction relief as to the weapons misconduct charge and appealed from the other convictions. In the Rule 32 proceeding, counsel filed a notice stating he had reviewed the record and was “unable to find any claims for relief to raise.” Delgado asked the trial court to stay that proceeding pending the outcome of the appeal, but the court dismissed the proceeding “without prejudice” and allowed Delgado to “re-file it at the conclusion of his direct appeal.”

¶4 Delgado’s convictions for discharge of a firearm and aggravated assault were affirmed on appeal. *State v. Delgado*, No. 1 CA-CR 13-0179 (Ariz. App. July 3, 2014) (mem. decision). Delgado filed a notice of post-conviction relief as to those counts in March 2015, and the trial court dismissed the proceeding as untimely, the appellate mandate having been issued in October 2014. Delgado then filed a motion for rehearing, including with his motion an order of the Arizona Supreme Court indicating it had denied his petition for review on March 17, 2015. Concluding that the mandate had been prematurely issued, the trial court granted the motion.

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¶5 Assigned counsel again filed a notice stating he had reviewed the record and found no “colorable claims for relief.” But in a pro se, supplemental petition Delgado argued he had received ineffective of counsel. During trial, while making a motion pursuant to Rule 20, Ariz. R. Crim. P., counsel stated he had recently discovered that Arizona law did not allow a charge of reckless attempted second-degree murder. *See State v. Curry*, 187 Ariz. 623 (App. 1996). Delgado had been charged with two counts of that offense, and counsel argued those charges should be dismissed. The trial court agreed and dismissed the charges.

¶6 During the discussion on that issue, counsel argued, inter alia, that, had the case been properly charged, he “would have been trying to prove reckless conduct,” but had instead “stayed away from the whole reckless argument because of the fact that that’s what was being charged.” Delgado claims counsel’s performance was deficient because he failed to realize the charge was improper before the start of trial, and he contends that these comments by counsel establish prejudice to his defense. The trial court summarily denied relief.

¶7 On review, Delgado repeats his claim of ineffective assistance. “To state a colorable claim of ineffective assistance of counsel, a defendant must show both that counsel’s performance fell below objectively reasonable standards and that this deficiency prejudiced the defendant.” *State v. Bennett*, 213 Ariz. 562, ¶ 21 (2006); *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984). To show prejudice, a defendant must establish that there is a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* Assuming *arguendo*, as did the trial court, that counsel’s performance was deficient, we agree with the trial court that Delgado has not established prejudice.

¶8 Preliminarily, we disagree with the trial court’s conclusion that “[t]he fact that Defense counsel stated that he refrained from developing ‘reckless’ evidence was of no consequence to the remaining charges.” The remaining charges, as set forth in the indictment, all required the state to prove Delgado had acted “intentionally” or “knowingly.” Thus, claiming he had acted recklessly arguably might have been a defense. However, as the court also found, Delgado has not “present[ed] any evidence that would have been introduced to defend against the remaining charges” had his attorney relied on a recklessness theory. We therefore

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cannot say the court abused its discretion in denying relief. *See State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015) (“We will affirm a trial court’s decision if it is legally correct for any reason.”).

¶9 Delgado also contends the trial court abused its discretion in denying his request, made before he filed his pro se Rule 32 petition, that the court unseal the transcript of his codefendant’s change-of-plea hearing. We review the court’s ruling for an abuse of discretion. *State v. Moreno*, 153 Ariz. 67, 70 (App. 1986) (post-conviction discovery ruling reviewed for abuse of discretion). Given that Delgado’s request was in the nature of post-conviction discovery, the court could properly have denied it based on his having made it before filing his post-conviction relief petition. *See generally Canion v. Cole*, 210 Ariz. 598 (2005). In any event, even assuming Delgado sufficiently provided the court some context for his request by arguing the transcript would show his actual innocence, we cannot say the court abused its discretion in denying the request.

¶10 Delgado contends the transcript “was important because the prosecutor . . . stated [Delgado] drove the vehicle, and the driver was the shooter.” And he contends his codefendant’s statements would have shown that the codefendant had been the driver, not Delgado. But at trial, the prosecutor acknowledged, “There will be some discrepancy about who was driving the car.” And he argued that whether Delgado or his codefendant had done the driving or the shooting, each could be convicted because each would, at minimum, be an accomplice. Furthermore, three witnesses stated Delgado was the driver of the vehicle. And, in statements made during a “free talk” with the state, Delgado’s codefendant stated he had been driving, but he claimed Delgado was the shooter. In view of the conflicting evidence presented to the jury and to the trial court in Delgado’s request for the transcript, we cannot say the court erred in denying that request. Whatever Delgado’s codefendant may have said in entering his plea, it could not have been “sufficient to establish that no reasonable fact-finder would find [Delgado] guilty beyond a reasonable doubt,” in light of the state’s express theory of accomplice liability. Ariz. R. Crim. P. 32.1(h).

¶11 Although we grant the petition for review, we deny relief.