IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

JONATHAN LEIGH SOSNOWICZ,
Petitioner.

No. 2 CA-CR 2018-0058-PR
Filed July 18, 2018

Petition for Review from the Superior Court in Maricopa County
No. CR2008171268001SE
The Honorable Jay Ryan Adleman, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

William G. Montgomery, Maricopa County Attorney
By Robert E. Prather, Deputy County Attorney, Phoenix
Counsel for Respondent

Thomas J. Phalen, Phoenix
Counsel for Petitioner

MEMORANDUM DECISION

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Staring and Judge Brearcliffe concurred.

E C K E R S T R O M, Chief Judge:

¶1 Petitioner Jonathan Sosnowicz seeks review of the trial court's order denying his successive petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. We review a court's denial of post-conviction relief for an abuse of discretion. *State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). We find none here and, accordingly, although we grant review, we deny relief.

Factual and Procedural Background

¶2 After a jury trial, Sosnowicz was convicted of second-degree murder and three counts of aggravated assault. As detailed in our opinion on appeal, after being in a fist-fight with J.P. in a bar's parking lot at 2:00 a.m., Sosnowicz "took off real fast" and drove his Hummer into a group of people, running over J.P., who died of blunt force trauma. *State v. Sosnowicz*, 229 Ariz. 90, ¶¶ 2-7, 12 (App. 2012).

¶3 On appeal, this court agreed with Sosnowicz that the trial court had erred in allowing the medical examiner to testify that the manner of J.P.'s death was homicide.[1] *Id.* ¶¶ 25, 27. But we nonetheless affirmed his convictions, concluding the error was harmless. *Id.* ¶¶ 28-29. Relating the "extremely strong" evidence that Sosnowicz had "intentionally aimed his vehicle at the group of persons—including J.P.—with whom he had the altercation," *id.* ¶ 28, we wrote:

> Defendant was visibly angry after a physical altercation with J.P. Defendant then got in the vehicle and drove it out of the direct line of sight of the victims and returned shortly thereafter.

[1]Sosnowicz also argued on appeal that the trial court had erred in precluding evidence of J.P.'s blood alcohol content. *State v. Sosnowicz*, No. 1 CA-CR 10-789, ¶ 1 (Ariz. App. Mar. 8, 2012) (mem. decision). We found no error as to that claim. *Id.* ¶ 4.

> Multiple witnesses saw defendant drive "as fast as [he] could," with the engine "rev[ved]," hit J.P. from behind, and "[throw] him forward." Defendant admitted he saw people in front of him, but did not attempt to brake before he struck and fatally injured J.P. with the vehicle; neither did he remain at the scene and attempt to render aid. Instead, defendant, who testified that he believed he had run over a curb, left the parking lot with his friends and proceeded to purchase and use cocaine before returning to his residence. Although he initially told a paramedic and a police officer that he did not remember what happened that evening after he hit his head on the pavement, after the jail audiotape of his statement that he "remembered everything . . . that happened" was played for the jury, he admitted his initial statements were untruthful.

Id. The trial court denied his first petition for post-conviction relief, in which he had alleged his trial counsel had rendered ineffective assistance, and this court denied relief on review of that ruling. *State v. Sosnowicz*, No. 2 CA-CR 2016-0065-PR (Ariz. App. Apr. 13, 2016) (mem. decision).[2]

¶4 In March 2017, Sosnowicz filed a successive notice of and petition for post-conviction relief alleging claims of ineffective assistance of trial and appellate counsel and actual innocence. In its order setting a briefing schedule, the trial court found Sosnowicz's claims of ineffective assistance of trial counsel were time-barred and procedurally precluded, and it dismissed those claims. The court also rejected Sosnowicz's reliance on Rule 32.1(f) to suggest he was not at fault for untimely claims, noting that Rule 32.1(f) applies only to an of-right notice filed by a pleading

[2]In his first Rule 32 proceeding, Sosnowicz alleged his attorney had been ineffective in failing to object to the prosecutor's "repeated[]" references to Sosnowicz having had "two girlfriends" and in "calling defense witnesses who were drunk" at the time of the offenses and who "provided only damaging testimony." *Sosnowicz*, No. 2 CA-CR 2016-0065-PR, ¶ 3 (alteration in *Sosnowicz*).

defendant, not Rule 32 proceedings initiated after a jury trial and direct appeal.

¶5 But the trial court agreed with Sosnowicz that his claims of ineffective assistance of appellate counsel were not precluded by waiver, because the same attorney had represented him on appeal and in his first Rule 32 proceeding. *See State v. Bennett*, 213 Ariz. 562, ¶¶ 14-16 (2006) (because it would be improper for first Rule 32 counsel to assert he performed ineffectively on appeal, defendant represented by same attorney on appeal and in first Rule 32 proceeding not precluded by waiver from claiming ineffective assistance of appellate counsel in second Rule 32 petition).[3] Accordingly, the court ordered the parties to brief those claims as well as Sosnowicz's claim of actual innocence pursuant to Rule 32.1(h), a claim that may be raised in a successive or untimely proceeding. *See* Ariz. R. Crim. P. 32.2(b), 32.4(a)(2)(A). After briefing, the court summarily dismissed Sosnowicz's petition. This petition for review followed.

Precluded Claims of Ineffective Assistance of Trial Counsel

¶6 On review, Sosnowicz first argues the trial court abused its discretion in summarily dismissing as precluded his claims of ineffective assistance of trial counsel. In rejecting Sosnowicz's reliance on Rule 32.1(f), the court explained,

> Under Rule 32.1(f), relief is available to (1) a pleading defendant who seeks to file his first Petition for Post-Conviction Relief but has missed the filing deadline through no fault of his own; or (2) a trial defendant who seeks a delayed appeal because through no fault of his own the notice of appeal is not timely filed. Rule 32.1(f) provides no remedy when, as is the case here, the Rule 32 proceeding is not of-right.

[3]Unlike *Bennett*, where the trial court appointed the same counsel for both the direct appeal and the first Rule 32 proceeding, Sosnowicz asserts counsel he privately retained in both proceedings had been ineffective. We assume, without deciding, that *Bennett* nonetheless applies to permit Sosnowicz to proceed on a claim of ineffective assistance of appellate counsel. *Cf. Wheat v. United States*, 486 U.S. 153, 159 (1988) (noting ways in which "Sixth Amendment right to choose one's own counsel" may be circumscribed).

Sosnowicz argues the court was "wrong as a matter of law," asserting his first Rule 32 proceeding was a "nullity . . . as a matter of law." Without citation to authority, he maintains his attorney "was *for all purposes* disqualified" from representing Sosnowicz in that proceeding "because he was counsel on appeal." Thus, according to Sosnowicz, "the instant [proceeding] is the first [Rule 32 proceeding] of right and therefore the claims are not precluded."

¶7 But it is Sosnowicz who is mistaken. As the trial court explained, neither his first nor his second proceeding was an "of-right" proceeding entitling him to seek relief pursuant to Rule 32.1(f), because he is a non-pleading defendant. *See* Ariz. R. Crim. P. 32.1 (limiting "of-right notice" to defendants who pleaded "guilty or no contest," "who admitted a probation violation," or "who had an automatic probation violation based on a plea of guilty or no contest"). Moreover, no Arizona authority has held an initial Rule 32 proceeding is "void," as Sosnowicz suggests, because a defendant was represented in that matter by the same attorney who represented him on appeal. In *Bennett*, our supreme court held only that a defendant in such circumstance was not precluded from claiming ineffective assistance of appellate counsel in a second Rule 32 proceeding, because it would have been "improper" for the same attorney, acting as counsel in an initial Rule 32 proceeding, "to argue any inadequacies" related to his performance on direct appeal. 213 Ariz. 562, ¶¶ 14-16. But nothing prevented Sosnowicz's initial Rule 32 counsel from asserting claims of ineffective assistance of trial counsel, and he did so. As the trial court correctly concluded, Sosnowicz's additional claims of ineffective assistance of trial counsel are now time-barred. *See State v. Lopez*, 234 Ariz. 513, ¶ 8 (App. 2014).[4]

[4]The trial court also correctly distinguished Sosnowicz's position from the "unusual circumstances" in *State v. Diaz*, in which our supreme court declined to find Diaz had waived a claim of ineffective assistance of counsel, when initial Rule 32 counsel, appointed after Diaz filed a timely notice, failed to file a petition on his behalf, resulting in the dismissal of the proceeding. 236 Ariz. 361, ¶¶ 10, 13 (2014). Sosnowicz essentially maintains that certain claims were not previously raised "due to the incompetence" of his first Rule 32 counsel. But, for a non-pleading defendant like Sosnowicz, "a claim that Rule 32 counsel was ineffective is

Ineffective Assistance of Appellate Counsel

¶8 "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." *Bennett*, 213 Ariz. 562, ¶ 21. We presume that appellate counsel provided effective assistance. *Id.* ¶ 22. And, because "[a]ppellate counsel is responsible for reviewing the record and selecting the most promising issues to raise on appeal," counsel "'is not ineffective for selecting some issues and rejecting others.'" *Id.*, *quoting State v. Herrera*, 183 Ariz. 642, 647 (App. 1995). To state a colorable claim that his attorney's performance was deficient, a defendant must set forth "some factors that demonstrate that the attorney's representation fell below the prevailing objective standards." *State v. Borbon*, 146 Ariz. 392, 399 (1985). To show the required prejudice, he must also "offer evidence of a reasonable probability that but for counsel's unprofessional errors, the outcome of the appeal would have been different." *Herrera*, 183 Ariz. at 647.

¶9 Sosnowicz argues, as he did below, that appellate counsel was ineffective in failing to challenge "the court's preclusion of expert testimony that Sosnowicz suffered from the neurological effects of being knocked unconscious and acted involuntarily and without criminal intent" and "the admission of remote prior bad act evidence."[5] We agree with the trial court that Sosnowicz failed to make the colorable showing required to warrant an evidentiary hearing on either issue.

¶10 As an initial matter, we find no abuse of discretion in the trial court's determination that Sosnowicz failed to state a colorable claim of prejudice based on counsel's omission of these two issues on appeal. *See Strickland v. Washington*, 466 U.S. 668, 697 (1984) (court may address issue of prejudice before considering whether counsel's performance was deficient). According to Sosnowicz, both of these rulings affected his

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not a cognizable ground for relief in a subsequent Rule 32 proceeding." *State v. Escareno-Meraz*, 232 Ariz. 586, ¶ 4 (App. 2013).

[5]Over Sosnowicz's objection, the state cross-examined him about a 1998 incident involving a traffic collision with his girlfriend's vehicle, and he denied telling a police officer that he had twice intentionally "rammed" her vehicle because he was angry with her, but that he had not intended to cause her personal injury. In rebuttal, the state called the officer who had responded to that scene, and he testified Sosnowicz had initially made such admissions, but had later maintained the collisions were accidental.

defense that his actions were accidental or involuntary. And, in addressing prejudice, he contends that defense found support in lay testimony about his appearance immediately prior to the offenses and in "inconsistencies" in testimony about how those offenses unfolded.

¶11 In our decision on appeal, we concluded admission of the medical examiner's opinion about the manner of death was harmless error, noting the "extremely strong" evidence supporting the jury's verdicts. *Sosnowicz*, 229 Ariz. 90, ¶ 28. We also concluded Sosnowicz's "explanation that he was still dazed as a result of the fight, when coupled with his subsequent actions, is not plausible." *Id.* Sosnowicz has not offered any reason those assessments would be different had appellate counsel raised the arguments he now urges. In particular, we again note the likely effect on the jury of the recorded telephone call in which Sosnowicz stated he "remembered everything . . . that happened," and his trial admission that he originally lied to the police, *Sosnowicz*, 229 Ariz. 90, ¶ 28, and apparently to his neuropsychological examiner, when he claimed to have had no memory of events after the fight until "coming to" at his home.[6] In light of that evidence, there is no reasonable probability that we would have

[6]In his claim of ineffective assistance of appellate counsel, Sosnowicz refers to the exclusion of expert testimony from John R. Walker III, Psy.D., who conducted a neuropsychological consultation of Sosnowicz nearly six months after he committed these offenses. Noting that "it is not uncommon [for] a person who has experienced a significant concussion/mild traumatic brain injury to be unaware of their actions for a brief period of time," Dr. Walker appears to have relied primarily on Sosnowicz's self-report that he had "los[t] consciousness of what was occurring" during the fight, with "only a vague recollection" of being punched and kicked, and with his "next recall" being "that of 'coming to' at home with his friend," when he immediately contacted authorities. We are not persuaded that Walker's observations about the potential effect of a concussion, as a general matter, would constitute admissible "observational" evidence, as Sosnowicz contends. *Cf. State v. Leteve*, 237 Ariz. 516, ¶ 24 (2015) (trial court erred in excluding psychologist's testimony that defendant "had a general character trait for impulsivity"). But Sosnowicz's trial admissions eroded the very basis for Dr. Walker's retrospective opinion that he "was in a mental state such that he was not able to assess his actions" at the time of the crime—an opinion that was clearly inadmissible. *Cf. id.* ¶ 23. Thus, even were we to assume that some portion of Walker's testimony was admissible under Arizona law, there is no reasonable probability that this court would have concluded its exclusion was reversible error.

reversed Sosnowicz's convictions on appeal had appellate counsel performed differently. *See Bennett*, 213 Ariz. 562, ¶ 25.

¶12 Our conclusion that appellate counsel's allegedly unprofessional omissions were unlikely to have succeeded on appeal also suggests that the trial court did not abuse its discretion in finding an insufficient showing that counsel had performed deficiently. Sosnowicz has not overcome the "strong presumption" that appellate counsel provided effective assistance. *Id.* ¶ 22.

Actual Innocence

¶13 Rule 32.1(h) provides a ground for post-conviction relief if "the defendant demonstrates by clear and convincing evidence that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would find [him] guilty beyond a reasonable doubt." As addressed in our decision on appeal, the jury's verdicts were supported by "extremely strong" evidence. *Sosnowicz*, 229 Ariz. 90, ¶ 28. And, as addressed above, we are not persuaded by Sosnowicz's argument that "no reasonable [jury] would find . . . that he acted voluntarily" had Dr. Walker been permitted to testify. *See supra* n.6. Sosnowicz has not stated a colorable claim of actual innocence.

Disposition

¶14 For the foregoing reasons, we grant review, but we deny relief.