

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

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THE STATE OF ARIZONA,  
*Respondent,*

*v.*

JAMES THORNTON,  
*Petitioner.*

No. 2 CA-CR 2023-0052-PR  
Filed March 29, 2023

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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NOT FOR PUBLICATION  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. CR2016005397001DT  
The Honorable Ronda R. Fisk, Judge

**REVIEW GRANTED; RELIEF DENIED**

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COUNSEL

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By Michael T. O'Toole, Assistant Attorney General, Phoenix  
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**MEMORANDUM DECISION**

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

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BREARCLIFFE, Judge:

¶1 James Thornton seeks review of the trial court’s order summarily dismissing his petition for post-conviction relief filed pursuant to Rule 33, Ariz. R. Crim. P. We will not disturb that ruling unless the court abused its discretion. *See State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). Thornton has not met his burden of establishing such abuse here.

¶2 After a jury trial, Thornton was found guilty of fraudulent schemes and artifices and theft, both class two felonies. His convictions stemmed from a real estate transaction in which he represented the seller who had been given permission by the lienholders to conduct a short sale to resolve defaulted loans. Thornton not only removed appliances from the property and portrayed it in a negative light in the real estate listing, he also failed to inform the lienholders of numerous favorable offers. He later arranged a sale to his parents’ holding company for less than the bulk of the offers, reinstalled the removed appliances, and the holding company resold the property for a substantial profit – for which Thornton received a second commission.

¶3 The trial court sentenced Thornton to a three-year prison term for fraudulent schemes and, for theft, suspended the imposition of sentence and placed Thornton on a consecutive, six-month term of probation. We affirmed his convictions, prison term, and term of probation on appeal. *State v. Thornton*, No. 1 CA-CR 18-0308 (Ariz. App. Apr. 30, 2019) (mem. decision).

¶4 Immediately after our mandate issued, Thornton filed a notice of post-conviction relief. After being granted numerous extensions, Thornton filed his petition for post-conviction relief in July 2021. Thornton first argued there was insufficient evidence to support his conviction for fraudulent schemes and artifices because he owed no duty to the victim lienholder. Relatedly, he asserted that the theft could not have occurred “without a fraudulent scheme to support it.” Thornton further argued his theft conviction was improper because the evidence “failed to establish” he

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had “obtained [the] property of another,” namely that he never possessed the lienholder’s only relevant property – a security interest in the property. Thornton referred to a claim of actual innocence in his petition but did not specify the basis for that claim. In his reply to the state’s response, he asserted the claim was based on a lack of “some legal duty to the alleged victim” and the fact that “no theft could have occurred.” Lastly, Thornton argued his probation term violated double jeopardy and A.R.S. § 13-116 because his convictions were based on the same conduct.

¶5 The trial court summarily dismissed Thornton’s petition. The court concluded Thornton’s actual innocence argument was, essentially, a claim of insufficient evidence, which was precluded because it had been rejected on appeal. It addressed his double jeopardy claim on the merits but found his claim under § 13-116 to be moot because Thornton had completed both his prison and probation term. After the court denied Thornton’s motion for rehearing, Thornton filed this petition for review.

¶6 On review, Thornton first argues the trial court erred in finding precluded his claim under Rule 32.1(h) that he is actually innocent of theft. Thornton again contends he did not commit theft because he did not obtain any interest in the property from the lienholder.<sup>1</sup> He further maintains that a claim under Rule 32.1(h) “cannot be precluded.”

¶7 Although a claim of actual innocence under Rule 32.1(h) is not subject to preclusion on waiver grounds under Rule 32.2(a)(3), it is subject to preclusion if it was “finally adjudicated on the merits in an appeal or in any previous post-conviction proceeding.” Ariz. R. Crim. P. 32.2(a)(3), (b). On appeal, this court rejected Thornton’s argument that the theft charge should have been dismissed, concluding Thornton had committed theft against the lienholder by “fraudulently induc[ing] the company to accept the proceeds of his hand-crafted short sale,” causing the lienholders to “relinquish[] their mortgage interest for *less money*” than they could have obtained otherwise. *Thornton*, No. 1 CA-CR 18-0308, ¶ 19. Our analysis on appeal addressed the same legal question he now frames as a claim of actual innocence. Thus, the trial court did not err in finding Thornton’s Rule 32.1(h) claim precluded.

¶8 Thornton next argues the trial court erred in finding his claim based on § 13-116 to be moot because he had completed both his prison

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<sup>1</sup>Thornton has abandoned his argument that he did not owe the lienholder any duty.

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term and his term of probation. *See State v. Loney*, 231 Ariz. 474, ¶ 2 (App. 2013) (sentencing claim moot upon release from confinement). He contends his claim is not moot because, if his consecutive probation term was improper, he could recoup \$435 in probation fees, which he describes as a “collateral consequence.”

¶9 We will review “an otherwise moot order if the consequences of that order will continue to affect a party.” *Cardoso v. Soldo*, 230 Ariz. 614, ¶ 9 (App. 2012). Thornton has cited no evidence or authority suggesting that probation fees he has already paid would continue to affect him. In short, he has identified no “ongoing collateral legal consequence[,]” *id.* ¶ 10, warranting a court addressing his claim under Rule 32.1(c). The trial court did not err in concluding Thornton’s sentencing claim is moot.

¶10 Moreover, it is not certain Thornton would receive the relief he seeks. He seems to recognize that, if this court were to vacate his probation term, the trial court would resentence him and could impose a prison term for his theft conviction. He asserts, however, that prison term “should not exceed the three-year prison term already imposed and served” for fraudulent schemes and artifice.

¶11 But no authority requires that outcome – the trial court would instead be entitled to reconsider the sentencing calculus in light of the fact that a consecutive probation term was improper. *See State v. Viramontes*, 163 Ariz. 334, 340 (1990) (remanding when supreme court could not determine if trial court would have imposed same sentence had it known consecutive sentences not available); *see also* Ariz. R. Crim. P. 26.14(c) (trial court permitted to impose “more severe” sentence at resentencing in appropriate circumstances when “there is no reasonable likelihood that an increase in the sentence is the product of actual vindictiveness by the sentencing judge”).

¶12 We grant review but deny relief.