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

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. RENE GUADALUPE ORANTEZ, Petitioner.	2 CA-CR 2010-0069-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20063684

Honorable Richard Nichols, Judge

REVIEW GRANTED; RELIEF DENIED

Law Offices of John William Lovell, P.C.
By John William Lovell — Tucson
Attorney for Petitioner

B R A M M E R, Judge.

¶1 After a jury trial was held in his absence, petitioner Rene Guadalupe Orantez was convicted of two counts of aggravated assault and one count of disorderly conduct. On appeal he contended the trial court had abused its discretion in denying his motion for a new trial and in admitting two photographs into evidence. *State v. Orantez*,

No. 2 CA-CR 2008-0103 (memorandum decision filed Jan. 26, 2009). This court did not address Orantez's challenge to the denial of his motion for new trial because it had been filed untimely, thereby depriving the trial court of jurisdiction to rule on the motion. Rejecting the evidentiary argument, we affirmed the convictions and sentences. Orantez now seeks review of the court's order denying his petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., in which he had claimed his trial counsel had rendered ineffective assistance by not filing a timely motion for new trial. We will not disturb that ruling on review absent an abuse of discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). As discussed below, we conclude the court did not abuse its discretion.

¶2 In order to establish a colorable claim of ineffective assistance of counsel, a defendant must show counsel's performance was deficient, based on prevailing professional norms, and prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687-88, 692 (1984). To demonstrate the requisite prejudice, the defendant must show there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694. A colorable claim entitling the defendant to an evidentiary hearing is one which, if taken as true, "might have changed the outcome." *State v. Schrock*, 149 Ariz. 433, 441, 719 P.2d 1049, 1057 (1986).

¶3 In his petition for post-conviction relief, Orantez contended as he does on review that trial counsel had been ineffective for failing to file a timely motion for new trial, a failure that had resulted in this court's refusal to address the propriety of the trial court's ruling denying that motion. The court denied relief, in part, based on its

conclusion that Orantez had not been prejudiced by counsel's performance, because he would be able to raise the claim in a petition for post-conviction relief pursuant to Rule 32.1(e) and, if denied, obtain appellate review of the issue by this court through a petition for review.[1] We do not believe that is the correct application of *Strickland* in this context. Rather, the question is whether, absent counsel's failure to file a timely motion, preserving review of the issue on appeal, the outcome would have been different. *Cf. State v. Berryman*, 178 Ariz. 617, 622, 875 P.2d 850, 855 (App. 1984) (in determining whether defendant had raised claim of ineffective assistance of counsel entitling him to relief, inquiry is whether reasonable likelihood exists that, had counsel filed motion to suppress, it would have been successful). Orantez has not established the outcome likely would have been different, because we cannot say the court abused its discretion in denying the motion for mistrial, the propriety of which the court reaffirmed in its denial of post-conviction relief.

¶4 It was for the trial court to decide, in the exercise of its discretion, whether the recanted testimony, which was the basis for the motion for new trial, warranted a new trial. *See State v. Fisher*, 141 Ariz. 227, 251, 686 P.2d 750, 774 (1984). If, as it did here, "the motion relies on the existence of a witness willing to testify and present the new evidence at a new trial, such witness must appear to be credible to the trial judge hearing the motion." *Id*. When it initially ruled on the motion for new trial at the end of the

[1]We are assuming, for purposes of this decision, that counsel's performance was deficient. It appears counsel might not have received the information upon which the motion was based in time to file a timely motion pursuant to Rule 24.1, Ariz. R. Crim. P., within ten days after the verdict has been rendered. Under such circumstances, counsel could have sought relief pursuant to Rule 32.1(e) based on newly discovered evidence.

evidentiary hearing, the court found the witness's trial testimony had been credible, adding, "[y]our explanation [for recanting the trial testimony] makes no sense. I'm rejecting it in its entirety." Reiterating its previous ruling, the court found in this post-conviction proceeding that the recantation had been "fabricated," and that Orantez was not entitled to a new trial. The judge who both had presided over the trial and conducted the evidentiary hearing ruled on the petition for post-conviction relief; we will not interfere with the court's discretionary assessment of the witness's credibility. Orantez essentially asks us to conduct our own evaluation of the witness's credibility, based on certain factors; this we will not do.

¶5 Counsel's failure to file a timely motion for new trial was not prejudicial, even if deficient, because there is no basis for disturbing the trial court's ruling on that motion. Because the court had not abused its discretion by denying Orantez's motion for new trial, it did not abuse its discretion in rejecting the related claim of ineffective assistance of counsel. Thus, although we grant the petition for review, we deny relief.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

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

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Judge