

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

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THE STATE OF ARIZONA,  
*Respondent,*

*v.*

ULYESSES MORAN TAYLOR,  
*Petitioner.*

No. 2 CA-CR 2013-0468-PR  
Filed February 21, 2014

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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NOT FOR PUBLICATION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); Ariz. R. Crim. P. 31.24.*

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Petition for Review from the Superior Court in Maricopa County

No. CR2010127956001SE

The Honorable Jerry B. Bernstein, Judge Pro Tempore

**REVIEW GRANTED; RELIEF DENIED**

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COUNSEL

William G. Montgomery, Maricopa County Attorney  
By Gerald R. Grant, Deputy County Attorney, Phoenix  
*Counsel for Respondent*

Bruce Peterson, Maricopa County Legal Advocate  
By Kerri L. Chamberlin, Deputy Legal Advocate, Phoenix  
*Counsel for Petitioner*

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**MEMORANDUM DECISION**

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

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H O W A R D, Chief Judge:

¶1 Charged with burglary, a class two felony, and aggravated assault, a class three felony, both dangerous offenses, petitioner Ulyesses Taylor pled guilty to and was convicted of the burglary charge pursuant to a plea agreement. He was sentenced to the stipulated, minimum prison term of seven years. *See* A.R.S. § 13-704(A). In this petition for review, Taylor challenges the trial court's order denying his petition for post-conviction relief pursuant to Rule 32.1(a) and (h), Ariz. R. Crim. P., after an evidentiary hearing. We will not disturb the trial court's ruling absent a clear abuse of discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Taylor has not sustained his burden of establishing such abuse here.

¶2 The gravamen of Taylor's claim in this proceeding is that he was living with the victim at the time of the offenses and could not, therefore, have committed first-degree burglary, in violation of A.R.S. §§ 13-1507 and 13-1508. He relies primarily on *State v. Altamirano*, 166 Ariz. 432, 803 P.2d 425 (App. 1990), for the proposition that one cannot burglarize one's own home. In his petition for post-conviction relief, filed in propria persona, Taylor asserted the trial court had erred in denying his motion to withdraw his guilty plea, filed before sentencing after he obtained a copy of the police report, which supported his claim that he had been living with the victim in her apartment at the time of the burglary. He attached to his supplement to the petition, filed by appointed counsel, an undated letter from the victim. He maintained the victim had tried to tell the prosecutor at the change-of-plea hearing that she had lied to police officers when she said Taylor had lived with her briefly after he was released from prison but she had ended the relationship and obtained an order of protection against him.

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Taylor also stated in his Rule 32 petition that the reason the victim had reported Taylor had broken into the home and attacked her with a knife was that she had been with another man in the apartment when he arrived there.

¶3 Taylor also attached to his petition the affidavit of an investigator, who averred the victim had told him she had lied to police officers when she had said that Taylor had moved out a month before the offenses were committed and that she had obtained an order of protection against him. According to the affidavit, she also had identified for the investigator photographs of her apartment from the police report that depicted Taylor's clothing in the closet of the apartment and had stated that other items of his personal property had been in the apartment. Taylor argued that based on all of this information, a sufficient factual basis for the plea had not been established at the change of plea and he was entitled to relief pursuant to Rule 32.1(h), because he was not guilty of burglary.

¶4 Finding Taylor had raised a colorable claim for relief, the trial court held an evidentiary hearing on August 17, 2012. The victim essentially confirmed the contents of her letter and the information in the investigator's affidavit, insisting Taylor had lived with her at the time of the offenses in an apartment she had been living in for a few years. She testified she had lied to police officers, explaining she had been taking pain medication when she had spoken to a law enforcement officer and had been angry at Taylor presumably because he had attacked her. She also testified she had tried to tell this to the prosecutor. The victim acknowledged that on the date of the offense, she had been in the apartment with another man; Taylor had been jealous, and he had "kicked in the door to the apartment and stabbed [her]."

¶5 The trial court questioned the victim about why she had not said anything to the court at the change-of-plea hearing when the court questioned her directly and asked if she had anything to say. She responded she had tried to do so, but the court pointed out that, as the transcript reflects, the only thing the victim had communicated to the court had been that she did not want Taylor sentenced to a prison term.

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¶6 After hearing additional testimony from three other witnesses, including Taylor, who insisted he had been living with the victim at the time of the offense, the trial court denied the petition, stating its reasons on the record. The court noted that at the change-of-plea hearing, Taylor’s counsel established the factual basis for the plea and had stated Taylor had entered the residence “of his ex-girlfriend,” intending to commit a felony while possessing a knife. The court noted that when it had asked Taylor whether counsel’s statements were true, Taylor had responded they were, never claiming the apartment was also his because he had been living there at the time. The court also pointed out that the victim only emphasized at that time that she did not want Taylor to be sentenced to prison. The court added, “[I]f he was alleging that he lived there, I would not have accepted the plea.”

¶7 The trial court commented that this was “a very, very close issue,” but weighed all of the evidence before it, including the police report, and concluded it had a right to rely on the representations made at the time of the change-of-plea hearing, which included Taylor’s representation to the court that the apartment belonged to the victim. The court concluded he was not entitled to relief based on the ground the conviction was in violation of the state or federal constitutions under Rule. 32.1(a), or based on actual innocence, pursuant to Rule 32.1(h), the only two grounds upon which relief was sought.

¶8 In his petition for review, Taylor contends his plea had an insufficient factual basis and the trial court therefore erred in denying his motion to vacate his guilty plea and in denying post-conviction relief on this ground. He claims the denial permitted him to remain convicted of burglary, an offense he could not have committed because “the evidence showed that Defendant in fact lived at the residence that he was charged with burglarizing.” Although he repeatedly blended his claims below and does so on review, he seems to be stating that, independent of the insufficient factual basis for the plea and the resulting error in the court’s denial of his motion to withdraw the plea, the court also abused its discretion in denying relief pursuant to Rule 32.1(h). He insists that, based on the evidence, including the evidence he presented at the

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Rule 32 evidentiary hearing, he sustained his burden of showing his actual innocence.

¶9 Denying post-conviction relief, the trial court concluded that at the time of the change-of-plea hearing, Taylor had provided a sufficient factual basis for the plea. In reaching that conclusion, the court made clear that it had focused on what had been before it at the time the factual basis was established, emphasizing it had the right to believe the representations made to it at that time. The court also noted that the victim and Taylor each had the opportunity to tell the court that Taylor had actually lived with the victim at the time of the offense and that they both had regarded it as their home, not just the victim's. The court also noted the police report showed Taylor had kicked in the back door of the victim's residence and stabbed the victim. The court concluded, based on the police report, counsel's representations to the court that Taylor had entered "the residence of his ex-girlfriend," and Taylor's concession that counsel's statement had been accurate, an adequate factual basis for Taylor's guilty plea had been established.

¶10 The factual basis for a plea is "established by 'strong evidence' of guilt and does not require a finding of guilt beyond a reasonable doubt." *State v. Salinas*, 181 Ariz. 104, 106, 887 P.2d 985, 987 (1994), quoting *State v. Wallace*, 151 Ariz. 362, 365, 728 P.2d 232, 235 (1986). And the trial court had the right to rely on statements and representations or assurances made to it at the time Taylor entered the plea. See *State v. Hamilton*, 142 Ariz. 91, 93, 688 P.2d 983, 985 (1984); see also *State v. Djerf*, 191 Ariz. 583, ¶ 25, 959 P.2d 1274, 1283 (1998) ("defendant's appropriate and rational responses" relevant to conclusion that defendant fully understood consequences of waiver), abrogated on other grounds by *Tennard v. Dretke*, 542 U.S. 274 (2004).

¶11 With respect to Taylor's challenge to the factual basis for the plea and the court's refusal to set it aside, he fails to identify any defect in the factual basis presented to the trial court at the change-of-plea hearing. He claims the issue of where Taylor lived at the time was not addressed. But as the trial court pointed out in denying post-conviction relief, Taylor admitted he had entered the victim's residence. And it was never disputed he had stabbed her

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once he gained entry. In the absence of any claim by Taylor at that time that it also was his residence, a sufficient factual basis was established to sustain the conviction.

¶12 Again, because Taylor blends his claims, he focuses portions of his argument regarding the sufficiency of the factual basis on evidence adduced at the Rule 32 evidentiary hearing. But the only evidence relevant to the sufficiency of the factual basis and the propriety of the court's denial of the motion to set aside the guilty plea, is that which was before the court at the time Taylor entered the plea and at the time of the hearing on the motion to withdraw the plea. A plea may be withdrawn "when necessary to correct a manifest injustice." Ariz. R. Crim. P. 17.5. Taylor has not persuaded us the trial court abused its discretion in denying his motion to vacate therefore the court did not abuse its discretion in denying post-conviction relief on this ground.

¶13 We reject Taylor's suggestion that he was entitled to relief as a matter of law based on this court's decision in *Altamirano*. That case is distinguishable. There, the defendant was convicted of burglary after admitting he had sexually abused his daughter in his own home. *Altamirano*, 166 Ariz. at 433, 437, 803 P.2d at 427, 430. Distinguishing *State v. Van Dyke*, 127 Ariz. 335, 621 P.2d 22 (1980), and cases from other jurisdictions in which courts had upheld burglary convictions even though defendants had either used the victim's home occasionally or with permission, we concluded *Altamirano* "had an absolute and unconditional right to enter and remain on the property where he committed the crime," and could not have committed burglary of his own home. *Id.* at 434-37, 803 P.2d at 426-30. Here, at the time Taylor entered the plea, the record did not show Taylor had "an absolute and unconditional right" to enter the victim's apartment. *See id.* at 437, 803 P.2d at 430. Rather, representations to the court at the time Taylor entered his plea showed he had entered the home of his former girlfriend intending to commit a felony; these representations provided an adequate factual basis for the plea. And again, the police report shows he kicked in the door to gain entry. The trial court did not abuse its discretion in denying the motion to withdraw the plea, which was supported by an adequate factual basis.

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¶14 To the extent Taylor’s claim under Rule 32.1(h) is intertwined with his challenge to the sufficiency of the factual basis for his plea, we necessarily reject it. But insofar as Taylor raised a distinct claim under Rule 32.1(h),<sup>1</sup> he has not sustained his burden of establishing the trial court abused its discretion in rejecting it. Based on its comments at the end of the Rule 32 hearing and its express rejection of the claim under Rule 32.1(h), the court weighed all of the evidence before it, including the evidence presented at the evidentiary hearing, in concluding Taylor did not sustain his burden. It is for the trial court, not this court, to assess and weigh the evidence presented at an evidentiary hearing based on its evaluation of the witnesses’ credibility. *See State v. Fritz*, 157 Ariz. 139, 141, 755 P.2d 444, 446 (App. 1988). The court noted various discrepancies between what the victim had represented to the court at the time the court accepted the plea, what she had initially told law enforcement officers, and her subsequent recantations of the accusations she had made. Finally, any permission Taylor may have

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<sup>1</sup>We assume, without deciding, a defendant who has entered a valid plea can raise a cognizable claim under Rule 32.1(h). We do question, however, whether a defendant such as Taylor, who knowingly, voluntarily and intelligently entered a guilty plea, can raise a cognizable claim pursuant to Rule 32.1(h), having admitted he is guilty and having expressly waived his right to have a trier of fact determine he is guilty beyond a reasonable doubt. *See State v. Norgard*, 92 Ariz. 313, 315, 376 P.2d 776, 778 (1962) (characterizing as “frivolous” motion to withdraw from plea based on defendant having “changed his mind,” claiming to be innocent); *State v. McFord*, 125 Ariz. 377, 379, 609 P.2d 1077, 1079 (App. 1980) (agreeing with trial court that “when a plea is knowingly and voluntarily entered with effective assistance of counsel, and when there is a factual basis for the plea, ‘the foundation and purpose of plea bargaining would be undermined by allowing a party to later recant and request withdrawal of his guilty plea’”); *see also State v. Flores*, 218 Ariz. 407, ¶ 6, 188 P.3d 706, 708–09 (App. 2008) (plea agreement waives all non-jurisdictional defects, including violation of constitutional rights).

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had to enter the residence at some time would not extend to stabbing the victim.

¶15 Thus, together with Taylor's agreement with the prosecutor's statement at the change-of-plea hearing that he had "entered the residential structure of his ex-girlfriend," sufficient evidence was before the court to support its implicit finding that Taylor had not presented "clear and convincing evidence that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would have found defendant guilty of the underlying offense beyond a reasonable doubt." Ariz. R. Crim. P. 32.1(h).

¶16 We grant the petition for review but for the reasons stated herein, we deny relief.