

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

HILARIO VASQUEZ,
Petitioner.

No. 2 CA-CR 2014-0303-PR
Filed October 15, 2014

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NOT FOR PUBLICATION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.

Petition for Review from the Superior Court in Maricopa County

No. CR2009142391004DT

The Honorable Warren J. Granville, Judge

REVIEW GRANTED; RELIEF GRANTED

COUNSEL

Thomas C. Horne, Arizona Attorney General
By D. Matthew Conti, Assistant Attorney General, Phoenix
Counsel for Respondent

James J. Haas, Maricopa County Public Defender
By Tennie B. Martin, Deputy Public Defender, Phoenix
Counsel for Petitioner

MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Chief Judge Eckerstrom and Presiding Judge Miller concurred.

ESPINOSA, Judge:

¶1 Petitioner Hilario Vasquez 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, 166 P.3d 945, 948 (App. 2007). Because we conclude Vasquez has stated a colorable claim and was entitled to an evidentiary hearing, we grant relief.

¶2 After a bench trial, Vasquez was convicted of conspiracy and transportation of marijuana for sale. In May 2010, the trial court sentenced him to enhanced, presumptive, concurrent prison sentences of 15.75 years. In June 2012, Vasquez initiated a proceeding for post-conviction relief, arguing in a pro se petition filed with the notice that his "failure to file a timely notice of post-conviction relief was without fault on the defendant's part," that newly discovered evidence probably would have changed the verdict and sentence, and that the trial court had improperly sentenced him.

¶3 The trial court appointed counsel who filed a petition requesting a delayed appeal on the ground Vasquez "did not have a clue as to what steps needed to be taken to protect his rights" and he did not understand the rights he was giving up when he represented himself at trial and failed to appeal. Counsel also asserted that Vasquez's advisory counsel had not discussed his appeal rights with him. Counsel maintained "neither [advisory counsel] nor the court took any action to make sure that he understood his appeal rights." In an affidavit, Vasquez averred that at sentencing the trial court

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had informed him that “advisory counsel ‘can help you with that,’” but advisory counsel had withdrawn and not acted to file a notice of appeal. The trial court summarily denied relief, denying Vasquez’s request for a delayed appeal.

¶4 On review, Vasquez again asserts he wanted “to protect his rights by filing a Notice of Appeal in a timely manner,” but had not understood what to do or what rights he was giving up and asserts his advisory counsel should have filed a notice on his behalf. He maintains the trial court “erred by summarily denying [his] request to file a delayed notice of appeal.”

¶5 The state points out that Vasquez underwent an evaluation pursuant to Rule 11, Ariz. R. Crim. P., and was found competent.¹ The trial court also determined he had knowingly, intelligently, and voluntarily waived his right to counsel. Vasquez signed a form, filed on the day of sentencing, outlining his rights to appeal and to seek post-conviction relief that explained in some detail the steps necessary to exercise those rights.

¶6 But, at the close of sentencing, when the trial court advised Vasquez of his right to appeal, Vasquez asked where he should file the notice. The court told him:

You file it with the clerk, and [advisory counsel] will give you that paperwork . . . make sure you tell him that you want it done, and he’ll take care of it. All right? He has to do it within 20 days, and failure to file that notice within 20 days means you forever lose your right to appeal.

¹We note that the state in its response has attempted to introduce evidence not contained in the record on appeal, in violation of this court’s rules of procedure. *See* Ariz. R. Civ. App. P. 11(a)(1), (4) and 13(b), (d). We have disregarded that material and caution the state to refrain from such attempts in the future or face sanctions.

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¶7 Rule 32.1(f) provides relief when a defendant fails to appeal through no fault of his own, including when the trial court “did not advise him of his appeal rights” or “the defendant intended to appeal and though[t] timely appeal had been filed by his attorney when in reality it had not.” Ariz. R. Crim. P. 32.1(f) cmt. Relief under Rule 32.1(f) is not appropriate, however, when a defendant makes an “intelligent and voluntary choice between two known alternatives.” *State v. Stice*, 23 Ariz. App. 97, 99, 530 P.2d 1130, 1132 (1975).

¶8 “A defendant is entitled to an evidentiary hearing when he presents a colorable claim, that is a claim which, if defendant’s allegations are true, might have changed the outcome.” *State v. Watton*, 164 Ariz. 323, 328, 793 P.2d 80, 85 (1990). “When doubts exist, ‘a hearing should be held to allow the defendant to raise the relevant issues, to resolve the matter, and to make a record for review.’” *Id.*, quoting *State v. Schrock*, 149 Ariz. 433, 441, 719 P.2d 1049, 1057 (1986).

¶9 In this case, taking as true Vasquez’s claims that he believed advisory counsel would file any required notice, and particularly in light of the trial court’s statements at sentencing, some doubt exists as to whether or not Vasquez was without fault in relation to the filing of his notice of appeal. The record shows he acknowledged his right to appeal and, because he represented himself, he would generally be required to file a notice of appeal himself. *See, e.g., State v. Mott*, 162 Ariz. 452, 456-57, 784 P.2d 278, 282-83 (App. 1989) (self-representing defendant “held to the same standards as if he were represented by an attorney”). But the record also reflects that Vasquez was given conflicting information about what he and/or advisory counsel needed to do in order to assert his right. And, although the record shows Vasquez did file other documents asserting various civil claims, those documents were filed well after the time for appeal had expired. We therefore cannot say they, in isolation, establish that Vasquez affirmatively chose to file them as an alternative to appeal. Accordingly, because some doubt exists as to whether or not Vasquez was at fault for the failure

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to file a notice of appeal, the trial court abused its discretion in summarily denying his petition.

¶10 The petition for review is granted and we grant relief, remanding the matter for an evidentiary hearing to determine whether or not Vasquez is entitled to a delayed appeal pursuant to Rule 32.1(f).