

EXHIBIT

A

(TRIAL COURT DECISION)

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 2000-017362

12/21/2017

HONORABLE JO LYNN GENTRY

CLERK OF THE COURT

A. Moore
Deputy

STATE OF ARIZONA

DANIEL STRANGE

v.

FOX JOSEPH SALERNO (A)

MARK HEATH

COURT ADMIN-CRIMINAL-PCR

UNDER ADVISEMENT RULING –
PCR DISMISSED

Defendant Salerno claims relief based upon newly discovered material evidence that probably would have changed the conviction or sentence under Arizona Rule of Criminal Procedure 32.1(e). Although such claims are not necessarily precluded under Rule 32.2(a), when raised they “must set forth the substance of the specific exception and the reasons for not raising the claim . . . in a timely manner.” Ariz. R. Crim. P. 32.2(b); *see also* Ariz. R. Crim. P. 32.1(e). “If . . . meritorious reasons do not appear substantiating the claim and indicating why the claim was not stated . . . in a timely manner, the notice shall be summarily dismissed.” Ariz. R. Crim. P. 32.2(b).

In 2001, a jury convicted Salerno of theft, a class three felony, and the superior court sentenced him to an aggravated twenty-year prison term. Between 2003 and 2009, Salerno filed multiple petitions for post-conviction relief, all of which were unsuccessful. In addition to these proceedings in the criminal action, Salerno also sought relief through civil court proceedings. A recurring theme in several of the petitions for post-conviction relief and the civil proceedings was Salerno’s claim that the victim and the prosecutor withheld evidence that would have established his innocence of the theft charge. In his current Petition for Post-Conviction-Relief, Salerno claims newly discovered evidence. Salerno claims he, for the first time, found documents in the prosecutor’s file that if disclosed, would have changed the outcome of the case. Salerno gained access to the prosecutor’s file in 2012 through a 42 U.S.C. § 1983 action against the Maricopa County Attorney’s Office. Among the documents found in the file were undisclosed business records that Salerno alleges support his defense that he paid for the

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merchandise that he was accused of stealing. He claims he also discovered a letter from the prosecutor to his trial attorney offering a favorable plea agreement that Salerno alleges was never presented to him by his counsel for consideration.

On November 22, 2017, the court held an evidentiary hearing on the allegations that the prosecutor withheld evidence and that a favorable plea offer was made but never communicated to him.

To be entitled to post-conviction relief based on newly discovered evidence, the defendant must show that the evidence was discovered after trial although existed before trial; the evidence could not have been discovered and produced at trial or on appeal through reasonable diligence; the evidence is neither solely cumulative nor impeaching; the evidence is material; and the evidence probably would have changed the verdict or sentence. *State v. Saenz*, 197 Ariz. 487, 489, ¶ 7, 4 P.3d 1030, 1032 (App. 2000), *see also* Ariz. R. Crim. P. 32.1(e). To put it another way, the relevant inquiry for determining whether the defendant is entitled to an evidentiary hearing is whether he has alleged facts which, if true, “would *probably* have changed the verdict or sentence.” *State v. Amaral*, 239 Ariz. 217, 220, ¶ 11, 368 P.3d 925, 928 (2016) (emphasis in original).

Defendant was a manager at a Taco Bell. As an employee, he was familiar with the requisition practices and paperwork when items were purchased for the Corporation. Defendant testified that on occasion, he would use the corporate account to purchase items for his personal use but he claims he reimbursed the corporation for these items. He purportedly requested the Expense Detail Reports (EDR) and call tracking records from Taco Bell at the time of trial. He was told the requested paperwork did not exist because there had been a break-in and files were stolen, including the file that he alleges would have contained the EDRs and call tracking records. Salerno testified at trial that the witness from Taco Bell also testified that the EDRs and call tracking records had been stolen in a break-in. After trial, Salerno was convicted of the offense and sentenced to 20 years in the Department of Corrections. In 2003, Salerno filed a Petition for Post-Conviction Relief and included as exhibits to his petition the same paperwork he now claims was denied him at trial and that he found for the first time in his review of the Prosecutor’s file after the 42 U.S.C. § 1983 action. Now, fifteen years later, Salerno claims he has newly discovered evidence though in reality, he has been in possession of the “newly discovered evidence” at least since 2003.

In his Petition, Salerno alleges that the newly discovered evidence was obtained by him in 2012 when he gained access to the file in 2012 through a 42 U.S.C. § 1983 action against the Maricopa County Attorney’s Office. He attached copies of the “newly discovered evidence” as exhibits to his current Petition for Post-Conviction Relief. It appears he did in fact find copies of the exhibits that he claims are newly discovered evidence and which he alleges were wrongfully

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withheld from him at trial. As he acknowledged at the November 22, 2017 evidentiary hearing however, the business documents he discovered in the Maricopa County Attorney's file and attached to his current PCR as exhibits were actually duplicates of the exhibits he himself had filed as exhibits to his 2003 Petition for Post-Conviction Relief. Defendant has thus been in possession of the newly discovered evidence at least since 2003. Defendant offered no evidence that the state was in possession of the business records at the time of trial or before he supplied the records as an attachment to his 2003 Petition for Post-Conviction Relief.

Salerno's second claim is that a favorable plea offer was made by the State to his then counsel but she never communicated the offer to him. Salerno claims now that had he known about the plea offer, he would have accepted it in "a heartbeat" because the plea offer stipulated to a term of probation in exchange for a guilty plea to a Class 5 Felony. Salerno claims that his trial counsel was ineffective for failing to communicate the plea offer to him. To be entitled to post-conviction relief based on this newly discovered evidence, Salerno must show the evidence probably would have changed the verdict or sentence.

The state's position was that even if the plea offer was never communicated, the lack of communication was harmless because the plea, as written, could not have been accepted because the avowals were incorrect and, if accepted, would have been rejected by the court because Salerno could not have made a factual basis to allow the Court to accept the plea. At the evidentiary hearing, Salerno acknowledged that the plea contained an avowal that incorrectly stated Defendant had two prior felonies. Defendant actually had four prior felonies. The State argued that if the Plea Offer had been made and accepted, the error would have been discovered in the presentence investigation and the State would have withdrawn the plea due to the erroneous avowal.

Defendant further maintained his claim of innocence and he was asked at the evidentiary hearing how he could therefore make a factual basis for a crime he claims he did not commit. He responded that his attorney would have stood before the court and stated "the evidence would show" and then give a factual basis to which Salerno could simply reply "yes." It was his position at the evidentiary hearing that in the plea colloquy, he could have pled guilty to a crime he did not commit because his attorney would be the one lying to the court by stating "the evidence would show" and he could admit, not that he committed the crime, but that "the evidence would show" he committed the crime.

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Given the erroneous avowal at Paragraph 5 of the probation plea (Exhibit 4) and Defendant's admission that the factual basis for a plea would have been a fraud on the court, Defendant has failed to prove facts which, if true, "would *probably* have changed the verdict or sentence."

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In sum, Defendant's submissions do not state any claims for which Rule 32 can provide relief. The defendant has the burden of alleging substantive claims, supporting those claims with specific facts, and adequately explaining why the claims are untimely. Ariz. R. Crim. P. 32.2(b). Defendant has failed to meet this standard. The Court finds that no purpose would be served by further proceedings.

IT IS THEREFORE ORDERED dismissing Defendant's Notice of Post-Conviction and "Post- Conviction Relief," which the Court deems a single Notice of Post-Conviction Relief, pursuant to Arizona Rule of Criminal Procedure 32.2(b).

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Given the erroneous avowal at Paragraph 5 of the probation plea (Exhibit 4) and Defendant's admission that the factual basis for a plea would have been a fraud on the court, Defendant has failed to prove facts which, if true, "would *probably* have changed the verdict or sentence."

- EXHIBIT B -

(Appellate Court Decision)

State v. Salerno, 2018 Ariz. App. Unpub. LEXIS 1078

Court of Appeals of Arizona, Division One

July 24, 2018, Filed

No. 1 CA-CR 18-0063 PRPC

Reporter

2018 Ariz. App. Unpub. LEXIS 1078 *

STATE OF ARIZONA, Respondent, v. FOX JOSEPH SALERNO, Petitioner.

NOTICE: NOT FOR OFFICIAL PUBLICATION. UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

Subsequent History: Review denied by State v. Salerno, 2019 Ariz. LEXIS 137 (Ariz., Apr. 30, 2019)

Prior History:

[*1] Petition for Review from the Superior Court in Maricopa County. No. CR2000-017362. The Honorable Jo Lynn Gentry, Judge.

State v. Salerno, 2009 Ariz. App. Unpub. LEXIS 802 (Nov. 24, 2009)

Disposition:

REVIEW GRANTED; RELIEF DENIED.

Core Terms

post-conviction, superior court's order, abuse of discretion, law law law, disturb, abused

Counsel: Maricopa County Attorney's Office, Phoenix, By Daniel Strange, Counsel for Respondent.

Fox Joseph Salerno, Buena Vista, Colorado, Petitioner.

Judges: Presiding Judge Kenton D. Jones, Judge Michael J. Brown, and Judge JonW. Thompson delivered the decision of the Court.

Opinion

MEMORANDUM DECISION

PER CURIAM:

P1 Petitioner **Fox Salerno** seeks review of the superior court's order denying his petition for post-conviction relief, filed pursuant to Arizona Rule of Criminal Procedure 32.1. This is the petitioner's seventh successive petition.

P2 Absent an abuse of discretion or error of law, this Court will not disturb a superior court's ruling on a petition for post-conviction relief. State v. Gutierrez, 229 Ariz. 573, 576-77, ¶ 19, 278 P.3d 1276 (2012). It is the petitioner's burden to show that the superior court abused its discretion in denying the petition. See State v. Poblete, 227 Ariz. 537, 538, ¶ 1, 260 P.3d 1102 (App. 2011).

P3 We have reviewed the record in this matter, the superior court's order denying the petition for post-conviction relief, and the petition for review. We find that petitioner has not shown any abuse of discretion.

P4 Accordingly, we grant review and deny relief.

- EXHIBIT C -

(STATE SUPREME COURT DECISION)

State v. Salerno, 2019 Ariz. LEXIS 137

Supreme Court of Arizona

April 30, 2019, Decided

CR-18-0416-PR

Reporter

2019 Ariz. LEXIS 137 *

STATE OF ARIZONA v. FOX JOSEPH SALERNO

Notice:

DECISION WITHOUT PUBLISHED OPINION

Prior History:

[*1] Court of Appeals, Division One. 1 CA-CR 18-0063 PRPC.

State v. Salerno, 2018 Ariz. App. Unpub. LEXIS 1078 (July 24, 2018)

Opinion

ORDERED: Amended Petition for Review DENIED.

EXHIBIT D

(Evidentiary HEARING TRANSCRIPTS)

**Additional material
from this filing is
available in the
Clerk's Office.**