

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

FILED BY CLERK

MAR 27 2013

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2012-0488-PR
)	DEPARTMENT A
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
JESUS HUMBERTO SOTO,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause Nos. CR20031147 and CR20040081

Honorable James Marner, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
Attorneys for Respondent

Jesus Humberto Soto

Kingman
In Propria Persona

MILLER, Judge.

¶1 Jesus Soto petitions this court for review of the trial court's order summarily denying his petitions for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that ruling unless the court clearly has abused its

discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Soto has not met his burden of establishing such abuse here.

¶2 In CR20031147, Soto was convicted after a jury trial of possession of a deadly weapon by a prohibited possessor and sentenced to a presumptive, ten-year prison term. In CR20040081, he was convicted after a jury trial of possession of cocaine for sale, cocaine base for sale, marijuana, and drug paraphernalia and sentenced to concurrent prison terms, the longest of which was thirteen years. We affirmed his convictions and sentences on appeal. *State v. Soto*, No. 2 CA-CR 2008-0405 (memorandum decision filed May 5, 2011); *State v. Soto*, No. 2 CA-CR 2008-0406 (memorandum decision filed Jun. 30, 2011).

¶3 Soto filed a notice of post-conviction relief in both cause numbers, and appointed counsel filed notifications stating he had reviewed the record but found no arguable issues to raise in post-conviction relief proceedings. Soto then filed identical pro se petitions for post-conviction relief, arguing: (1) the state was relieved “of its[] burden of proof on the essential element” of possession of a weapon by a prohibited possessor, apparently because the evidence was insufficient; (2) defense counsel in CR20031147 had been ineffective for failing to impeach the testimony of the arresting police officers “with prior acts of misconduct involving excessive use of force”; (3) in CR20031147, the trial court was required to “submit the state’s allegation of prior [felonies] to the jury; and (4) in CR20040081, the trial court erred in denying trial counsel’s motion to withdraw.

¶4 The trial court summarily denied relief, concluding Soto’s claims were precluded pursuant to Rule 32.2(a) because Soto could have raised them “either on Direct Appeal or in his previous Petition for Post-Conviction Relief.” The court also determined his claims were not colorable because Soto had not demonstrated prejudice, further noting Soto had not made a colorable claim that counsel’s conduct fell below prevailing professional norms nor that counsel’s conduct had prejudiced him.

¶5 On review, Soto first argues the trial court erred in finding his claims precluded. He asserts his claims cannot be precluded on the basis of waiver because he had not knowingly, voluntarily, and intelligently waived them. He further contends that, because the petitions he filed below were his “initial filing[s],” the court erred in finding his claims precluded on the basis that Soto could have raised his claims in his previous petition. First, irrespective of whether Soto previously sought post-conviction relief, he plainly had the opportunity to raise his claims—save his claim of ineffective assistance of trial counsel—on appeal. *See State v. Spreitz*, 202 Ariz. 1, ¶ 9, 39 P.3d 525, 527 (2002) (appellate court will not address claim of ineffective assistance of counsel on appeal). Indeed, in his appeal from his convictions in CR20040081, he raised and this court rejected his argument that the trial court had erred in denying his requests for new counsel. *Soto*, No. 2 CA-CR 2008-0406, ¶¶ 4-12. Thus, that claim plainly is precluded pursuant to Rule 32.2(a)(2), which bars any claim “[f]inally adjudicated on the merits on appeal or in any previous collateral proceeding.”

¶6 Although he cites no relevant Arizona authority, Soto is correct that certain claims are not subject to preclusion on the basis of waiver pursuant to Rule 32.2(a)(3).

State v. Smith, 202 Ariz. 446, ¶¶ 9-10, 12, 46 P.3d 1067, 1070-71 (2002). Specifically, claims involving constitutional rights that require a voluntary, knowing, and intelligent waiver by the defendant may, absent such waiver, be raised in a Rule 32 proceeding. *Id.* But Soto cites no authority to support, and does not adequately develop, an argument that any of his claims fall within this narrow exception to the preclusive effect of Rule 32.2(a)(3). Accordingly, we do not address this argument further. *See State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (insufficient argument waives claim on review).

¶7 We agree with Soto, however, that nothing in the record suggests he previously had sought post-conviction relief in CR20031147, or indeed in either cause number. Thus, his claim of ineffective assistance of trial counsel is not subject to preclusion pursuant to Rule 32.2(a)(3) because Soto has not had the opportunity to raise this claim. *See Spreitz*, 202 Ariz. 1, ¶ 9, 39 P.3d at 527. But, in any event, the trial court did not err in summarily rejecting it. “To state a colorable claim of ineffective assistance of counsel, a defendant must show both that counsel’s performance fell below objectively reasonable standards and that this deficiency prejudiced the defendant.” *State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006). As we noted above, Soto’s claim of ineffective assistance of trial counsel is based on his assertion that counsel should have obtained and used for impeachment evidence of prior misconduct by the arresting police officers. But Soto has not provided any evidence suggesting there was, in fact, prior misconduct by those officers. Thus, he cannot demonstrate counsel was ineffective in failing to obtain evidence of that misconduct.

¶8 Because we have concluded the trial court did not err in finding Soto’s previously raised or waived claims precluded, we need not address Soto’s argument that those claims were otherwise colorable. And, to the extent he now argues his trial counsel was ineffective for failing to raise these arguments, he did not raise these claims below. Accordingly, we do not address them. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (appellate court will not consider on review claims not raised below); *see also* Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review must contain “issues which were decided by the trial court and which the defendant wishes to present to the appellate court for review”).

¶9 For the reasons stated, although review is granted, relief is denied.

/s/ Michael Miller

MICHAEL MILLER, Judge

CONCURRING:

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

/s/ Peter J. Eckerstrom

PETER J. ECKERSTROM, Presiding Judge