

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

BRUCE CLARKE,
Petitioner.

No. 2 CA-CR 2013-0384-PR
Filed November 29, 2013

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NOT FOR PUBLICATION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. CR2007104982001DT
The Honorable Karen L. O'Connor, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

William G. Montgomery, Maricopa County Attorney
By Diane Meloche, Deputy County Attorney, Phoenix
Counsel for Respondent

Bruce W. Clark, Florence
In Propria Persona

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MEMORANDUM DECISION

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

H O W A R D, Chief Judge:

¶1 Following a jury trial, petitioner Bruce Clarke was convicted of three counts of sexual abuse and five counts of sexual conduct with a minor. The trial court imposed consecutive and concurrent prison sentences totaling 105 years. We affirmed Clarke’s convictions and sentences on appeal. *State v. Clarke*, No. 1 CA-CR 08-0211 (memorandum decision filed Feb. 18, 2010).

¶2 Clarke then filed a pro se notice of post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P. Appointed counsel notified the trial court he had reviewed the record and found nothing to warrant relief under Rule 32, and consistent with *Lammie v. Barker*, 185 Ariz. 263, 264, 915 P.2d 662, 663 (1996), the court permitted Clarke to file a pro se petition. Clarke now seeks review from the court’s summary denial of that petition. We review a court’s summary dismissal of a petition for post-conviction relief for an abuse of discretion. See *State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006). We find no abuse here.

¶3 In his petition for review, Clarke asserts the trial court erred by finding precluded his claims of prosecutorial misconduct and his challenges to the indictment. Clarke also maintains the court erred by failing to review “the files and records” before finding these claims precluded. In its ruling denying the petition, the court noted it had reviewed the revised petition for post-conviction relief, Clarke’s affidavit, the state’s response, Clarke’s reply, and his motion for constitutional compliance. Notably, Clarke does not explain what additional portions of the record the court should have reviewed and how that review would have impacted its ruling.

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¶4 To the extent Clarke suggests his claims regarding prosecutorial misconduct and the indictment were not subject to preclusion, he is incorrect. *See* Ariz. R. Crim. P. 32.2(a)(3) (precluding claim “waived at trial, on appeal, or in any previous collateral proceeding”); Ariz. R. Crim. P. 32.2(c) (“[A]ny court on review of the record may determine and hold that an issue is precluded”). Clarke could have raised the claims of prosecutorial misconduct at trial and on appeal, and he could have challenged the indictment in a pretrial motion.¹ *See State v. Fullem*, 185 Ariz. 134, 136, 912 P.2d 1363, 1365 (App. 1995) (finding defendant waived challenge to indictment by failing to object in trial court). Accordingly, the court properly found these claims precluded.²

¶5 In a related claim, Clarke argues the flawed indictment deprived the trial court of subject matter jurisdiction, an argument he asserts he can raise at any time. *See State v. Buckley*, 153 Ariz. 91, 93, 734 P.2d 1047, 1049 (App. 1987) (subject matter jurisdiction can be raised at any time). However, because subject matter jurisdiction is established when the indictment is filed, *see State v. Fimbres*, 222 Ariz. 293, ¶ 33, 213 P.3d 1020, 1029-30 (App. 2009), an event which was not challenged below, any claims related to the indictment are precluded, as the court properly found.

¹*See* Ariz. R. Crim. P. 13.5(e), 16.1(c) (challenge to indictment must be raised in pretrial motion); *see also* Ariz. R. Crim. P. 12.9(a) (grand jury proceedings may be challenged only by a pretrial motion for new finding of probable cause).

²Moreover, we reject Clarke’s assertion that, by having suggested these claims *could* have been raised at trial or on appeal, the trial court essentially concluded that trial, appellate, and Rule 32 counsel were ineffective for not having raised them. Rather, the court merely was stating that because the claims could have been raised previously, Clarke had waived the opportunity to raise them in a post-conviction proceeding. Nor are these claims of the type that must be personally waived under Rule 32.2(a)(3). *See Stewart v. Smith*, 202 Ariz. 446, ¶ 9, 46 P.3d 1067, 1070-71 (2002).

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¶6 Clarke also argues the trial court erred by rejecting his claim that appellate and Rule 32 counsel were ineffective for failing to file notices of appearance pursuant to Rule 5.1(a), Ariz. R. Civ. P., and Rule 6.3(a), Ariz. R. Crim. P., and by concluding those rules do not apply to criminal appeals. “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.” *Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d at 68. “Failure to satisfy either prong of the *Strickland* test is fatal to an ineffective assistance of counsel claim.” *Id.*, citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Here, Clarke has not asserted much less demonstrated that he was prejudiced by counsels’ failure to file notices of appearance. Therefore, because Clarke failed to sustain the prejudice prong of his claims of ineffective assistance of counsel, the trial court correctly dismissed them. *See id.*

¶7 Additionally, Clarke asserts for the first time on review that “the trial court failed to directly rule on the prosecutor’s duty to also file a notice of appearance.” However, because it does not appear Clarke raised this claim in his petition below, we do not consider it. *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 limited to “issues which were decided by the trial court and which the defendant wishes to present to the appellate court for review”).

¶8 Clarke has not shown the trial court abused its discretion in denying his petition for post-conviction relief. Therefore, although we grant review, we deny relief.