

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

JONATHAN MCALLISTER SR.,
Petitioner.

No. 2 CA-CR 2013-0556-PR
Filed April 9, 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NOT FOR PUBLICATION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. CR2008120957001DT
The Honorable Roger E. Brodman, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Jonathan McAllister Sr., Kingman
In Propria Persona

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MEMORANDUM DECISION

Judge Miller authored the decision of the Court, in which Chief Judge Howard and Judge Brammer¹ concurred.

M I L L E R, Judge:

¶1 Jonathan McAllister Sr. petitions this court for review of the trial court's order summarily dismissing his petition 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). McAllister has not met his burden of demonstrating such abuse here.

¶2 After a jury trial, McAllister was convicted of two counts of sale or transportation of marijuana and sentenced to concurrent, 6.5-year prison terms. We affirmed his convictions and sentences on appeal.² *State v. McAllister*, 1 CA-CR 08-1067 (memorandum decision filed Jul. 29, 2010). McAllister filed a notice of post-conviction relief, and appointed counsel filed a notice stating he had reviewed the record but found no "colorable issue to submit to the court pursuant to Rule 32."

¹The Hon. J. William Brammer, Jr., a retired judge of this court, is called back to active duty and is assigned to serve on this case pursuant to orders of this court and the supreme court.

²McAllister was permitted a delayed appeal pursuant to Rule 32.1(f). He also appealed from the trial court's denial of his motion made pursuant to Rule 24.2, Ariz. R. Crim. P., in which he raised several of the arguments he made in his petition for post-conviction relief. We affirmed the court's denial. *State v. McAllister*, No. 1 CA-CR 11-0073 (memorandum decision filed Jan. 3, 2012).

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¶3 McAllister then filed a pro se petition for post-conviction relief raising numerous claims. He argued: (1) there had been prejudicial “preaccusation delay”; (2) the trial court lacked jurisdiction because the indictment was faulty, the state failed to adequately prove jurisdiction, he did not receive adequate notice of the charges against him, and there was “racial and gender discrimination” during the grand jury process; (3) his due process rights were violated because he did not have counsel at his initial appearance, the court had denied his later motion to proceed in propria persona, he had not requested a continuance ultimately granted by the court, had not been present at a status conference, and a scheduled preliminary hearing had been vacated; (4) his trial and appellate counsel had been ineffective; and (5) the court erred because it did not sua sponte order a psychiatric evaluation.

¶4 The trial court summarily dismissed McAllister’s petition. It determined his claims of pre-indictment delay, lack of jurisdiction, and due process violations were precluded because he could have raised them in previous proceedings. It rejected McAllister’s claim of ineffective assistance of trial counsel, noting that he had represented himself for the majority of the proceedings and that he had not demonstrated any prejudice resulting from counsel’s conduct. And it concluded there had been no reason to order a psychiatric evaluation based on McAllister’s behavior. Finally, the court stated McAllister had demonstrated neither that appellate counsel had been ineffective nor that the arguments he believed counsel should have raised would have changed the outcome of his appeal.

¶5 On review, McAllister generally reasserts his claims regarding due process, jurisdiction, pre-indictment delay, and the trial court’s failure to order a psychiatric evaluation. These claims are precluded pursuant to Rule 32.2(a)(2) because he could have raised them on appeal. McAllister asserts, however, that he is permitted to argue the court lacked jurisdiction despite his having failed to raise that issue on appeal.

¶6 McAllister argues the trial court lacked jurisdiction because he did not have adequate “notice.” But even if we assume,

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without deciding, that a lack of notice implicates a trial court's subject matter jurisdiction, McAllister's claim fails. His notice claim appears to be based on his belief that a preliminary hearing was vacated improperly when the state superseded the direct complaint with a grand jury indictment. But a preliminary hearing is not necessary when a defendant initially charged by complaint has been charged subsequently by indictment.³ See Ariz. R. Crim. P. 5.1(a); *Segura v. Cunanan*, 219 Ariz. 228, ¶ 22, 196 P.3d 831, 837 (App. 2008) ("A supervening indictment eliminates a defendant's right to a preliminary hearing on a prior complaint."). And the record clearly shows McAllister was arraigned pursuant to that indictment. See generally Ariz. R. Crim. P. 14.3.

¶7 McAllister further suggests the state did not "prove[]" jurisdiction was proper. But he cites no supporting authority and does not explain the basis for this argument. Accordingly, we do not address it. See *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (insufficient argument waives claim on review).

¶8 McAllister argues on review that trial counsel was ineffective for "attempting to coerce[]" him into accepting "an unwritten plea agreement offered by the court," thus improperly "advocating on behalf of" the state. McAllister did not raise this argument below, and we therefore do not address 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"). And McAllister does not argue on review the trial court erred in summarily rejecting his other claims of ineffective assistance of counsel; thus, he has waived those claims. Ariz. R. Crim. P. 32.9(c)(1)(ii).

³ Although McAllister suggests the indictment was not "supervening," the record demonstrates he was informed of a supervening indictment. In any event, any defect in labeling the indictment would have no effect on the court's jurisdiction.

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¶9 Finally, McAllister argues the trial court erred in failing to grant his several motions to obtain transcripts of hearings that had been recorded electronically. But he has not identified any non-precluded claim these transcripts conceivably could support. Thus, we need not address this argument.

¶10 For the reasons stated, although we grant review, we deny relief.