

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

ELDON HEAD,
Petitioner.

No. 2 CA-CR 2014-0048-PR
Filed May 6, 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NOT FOR PUBLICATION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. CR2006030248001SE
The Honorable Joseph Kreamer, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

William G. Montgomery, Maricopa County Attorney
By Shaheen P. Torgoley, Deputy County Attorney, Phoenix
Counsel for Respondent

Eldon Thomas Head Jr., Florence
In Propria Persona

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MEMORANDUM DECISION

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

M I L L E R, Judge:

¶1 Petitioner Eldon Head seeks 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). We find no such abuse here.

¶2 Following a jury trial, Head was convicted of molestation of a child, and pursuant to a plea agreement, he was convicted of attempted molestation of a child. The trial court sentenced him to a thirteen-year prison term to be followed by lifetime probation. We affirmed his convictions and sentence on appeal. *State v. Head*, No. 1 CA-CR 06-0872 (memorandum decision filed Aug. 16, 2007). Head then sought post-conviction relief and, after two appointed attorneys notified the court they had been unable to find any claims to raise in a Rule 32 petition, Head filed a pro se petition for post-conviction relief in September 2012. The court summarily dismissed his petition, a twenty-seven page, single paragraph document, in which he raised claims of prosecutorial misconduct and abuse of discretion by the trial court, and asserted trial, appellate, and Rule 32 counsel had been ineffective. This petition for review followed.

¶3 On review, Head argues the trial court abused its discretion by precluding his claims of prosecutorial misconduct and that the court improperly had accepted a flawed indictment. He further argues that when the court found his claims “should have been raised on appeal,” it essentially determined appellate counsel had been ineffective for not having done so. The court correctly

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found that because Head could have, but did not, raise these claims on appeal, he is precluded from doing so now. *See* Ariz. R. Crim. P. 32.2(a)(3) (defendant precluded from relief on any ground “[t]hat has been waived . . . on appeal”). Moreover, by stating that the claims “should have been raised on appeal,” the court was not voicing an opinion that appellate counsel was incompetent for not having done so, rather, it was explaining that the claims should have been raised, if at all, on appeal.

¶4 Nor do we find persuasive Head’s unsupported assertion that preclusion does not apply because “exceptions [to preclusion] do exist in this case. [Rule 32.1](e) and (f) are applicable.” (Emphasis omitted.) In his petition below, Head apparently did not argue any exceptions to preclusion apply, and therefore we do not address this argument on review. *State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (court of appeals does not address issues raised for first time in petition for review); *see also* Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review should contain “issues which were decided by the trial court and which the defendant wishes to present to the appellate court for review”).

¶5 Head also seems to argue the trial court abused its discretion by denying his claim of ineffective assistance of trial counsel and concluding that the “arguments relat[ed] to . . . counsel’s alleged ineffectiveness are little more than unsupported, conclusive allegations that do not approach the specificity required,” citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (to establish claim of ineffective assistance of counsel, defendant must show both that counsel’s performance fell below prevailing professional norms and that outcome would have been different but for deficient performance). However, other than stating on review that he had “used [in his petition] facts of actual events to show why his trial counsel was ineffective,” Head has failed to explain how the court erred by denying his claim or why he is entitled to relief. *See* Ariz. R. Crim. P. 32.9(c)(1)(iv) (petition for review shall contain reasons relief should be granted).

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¶6 Additionally, Head maintains he “made no claim as to his constitutional rights being violated by the ineffectiveness of his appeal attorney or his PCR attorney,” despite having so argued in his petition below. Because Head appears to have abandoned any claim of ineffective assistance of appellate counsel on review, we do not address the court’s denial of that claim. However, despite claiming he did not challenge the performance of his Rule 32 attorneys, on review he nonetheless criticizes their conduct and contends “defendants do have a 6th Amendment right to effective assistance of counsel on a Rule 32.” (Emphasis omitted.) To the extent Head is challenging the court’s denial of his claim of ineffective assistance of Rule 32 counsel, we note that the court correctly determined that for a non-pleading defendant like Head there is no constitutional right to counsel in post-conviction proceedings. See *State v. Mata*, 185 Ariz. 319, 336-37, 916 P.2d 1035, 1052-53 (1996); *State v. Krum*, 183 Ariz. 288, 291-92 & n. 5, 903 P.2d 596, 599-600 & n. 5 (1995); *Osterkamp v. Browning*, 226 Ariz. 485, ¶ 18, 250 P.3d 551, 556 (App. 2011). Moreover, to the extent Head suggests *Martinez v. Ryan*, ___ U.S. ___, 132 S. Ct. 1309 (2012), constitutes a significant change in the law supporting a claim that he was constitutionally entitled to the effective assistance of Rule 32 counsel, he is incorrect. Nothing in *Martinez* alters established Arizona law that non-pleading defendants do not have a constitutional right to counsel in post-conviction proceedings. *State v. Escareno-Meraz*, 232 Ariz. 586, ¶¶ 4, 6, 307 P.3d 1013, 1014 (App. 2013).

¶7 Accordingly, we grant review but deny relief.