

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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THE STATE OF ARIZONA,  
*Respondent,*

*v.*

JAMES KEVIN KNOLLEY,  
*Petitioner.*

No. 2 CA-CR 2014-0074-PR  
Filed May 14, 2014

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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NOT FOR PUBLICATION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.*

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Petition for Review from the Superior Court in Maricopa County

No. CR2011127328001SE

The Honorable Lisa Daniel Flores, Judge

**REVIEW GRANTED; RELIEF DENIED**

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COUNSEL

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

James Kevin Knolley, San Luis  
*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.

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H O W A R D, Chief Judge:

¶1 James Knolley 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.<sup>1</sup> 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). Knolley has not met his burden of demonstrating such abuse here.

¶2 Knolley pled guilty to armed robbery with one prior felony conviction and was sentenced to a presumptive 9.25-year prison term. Knolley filed a notice of post-conviction relief, and appointed counsel filed a notice stating she had reviewed the record but had found no claims "to be raised in post-conviction relief proceedings."

¶3 Knolley then filed a pro se petition for post-conviction relief arguing his trial counsel had been ineffective because he did not "interview the witnesses" or seek testing of evidence purportedly used to establish "probable cause." He also claimed counsel had not been aware a charge against him had been dropped, had "addressed [him] by another name" at a settlement conference, and had incorrectly informed Knolley that his prior felony conviction "could not [be] use[d as] a prior" at sentencing and that

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<sup>1</sup>Although Knolley's filing in this court is titled "Petition For Post-Conviction Relief," he asks this court to review the trial court's summary rejections of his claims, and he attaches the court's ruling as required by Rule 32.9(c)(1)(i). We therefore construe his filing as a petition for review.

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he would not be permitted to change counsel. Knolley asserted that, had counsel “properly handled” his case, he would have been “vindicated . . . or a much better plea” would have been offered.

¶4 Following the state’s response, Knolley expanded on these arguments in his reply. He explained that counsel had failed to interview a witness who purportedly could have offered evidence relevant to identification and a witness Knolley claims to have called “and told . . . what had happened to the victim,” thereby confirming his version of events. He further claimed counsel should have “lab tested” a pair of tennis shoes found in his car, asserting the “red spots” on those shoes were “from the baseball diamond where [he] umpire[s] high school baseball and little league” and not from blood as a police officer apparently believed. He also asserted that, had he been informed his prior conviction would be used to enhance his sentence, he “would have never signed a plea with a prior attached to it.”

¶5 The trial court summarily denied relief. It noted Knolley had not informed it about any concerns with counsel’s representation and had not filed a motion for new counsel. And it concluded that, even had counsel interviewed the two witnesses Knolley identified and had the shoes tested, it would not have provided evidence meaningfully probative of Knolley’s guilt or innocence and thus could not have changed Knolley’s decision whether to plead guilty. The court further concluded that any alleged confusion counsel may have had over Knolley’s charges played no role in his decision to plead guilty, and that Knolley clearly had been informed of the sentencing range and the effect of his prior conviction on that range.

¶6 On review, Knolley repeats his claim that counsel had incorrectly informed him that he would not be permitted new counsel. The trial court properly rejected this claim. To change counsel, the defendant must prove a genuine irreconcilable difference with trial counsel or that there was a total breakdown in communication. *State v. Torres*, 208 Ariz. 340, ¶ 8, 93 P.3d 1056, 1059 (2004). Mere animosity causing loss of trust or confidence is insufficient. *See State v. Paris-Sheldon*, 214 Ariz. 500, 505, ¶ 14, 154

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P.3d 1046, 1051-52 (App. 2007). A defendant must establish that he had such a “severe and pervasive conflict with his attorney or . . . that he had such minimal contact with the attorney that meaningful communication was not possible.” *Id.* ¶ 12. Knolley has not identified anything in the record suggesting a request for new counsel would have been granted.

¶7 Knolley also argues the trial court erred in rejecting his claim that counsel failed to interview a witness that might have offered evidence relevant to identification. He asserts the court incorrectly stated that he knew the victim, but cites nothing in the record showing the court was mistaken. *See* Ariz. R. Crim. P. 32.9(c)(1) (petition for review shall include “[t]he facts material to a consideration of the issues presented for review” with “specific references to the record”). And we note, at a minimum, the record shows he and the victim had extensive contact before the robbery. Thus, Knolley has not met his burden of demonstrating the court erred in rejecting this claim.

¶8 Knolley also briefly repeats his claim that counsel had misinformed him about the effect of his prior conviction on his sentencing, but he identifies no error in the trial court’s rejection of this argument—in particular its conclusion that he had been adequately informed of the consequences of admitting that conviction. Finally, to the extent he identifies new facts that he believes his counsel should have discussed at settlement, we do not address arguments or evidence raised for the first time on review. *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); *State v. Zuck*, 134 Ariz. 509, 512, 658 P.2d 162, 165 (1982) (refusing to consider affidavits of counsel attached to petition for review to supreme court “as an attempt to create new evidence”); *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”).

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