

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

---

THE STATE OF ARIZONA,  
*Respondent,*

*v.*

JERRY FLYNN WALKER,  
*Petitioner.*

No. 2 CA-CR 2016-0070-PR  
Filed May 25, 2016

---

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NOT FOR PUBLICATION  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)(1); Ariz. R. Crim. P. 31.24.*

---

Petition for Review from the Superior Court in Pima County  
No. CR20073435001  
The Honorable Howard Fell, Judge Pro Tempore

**REVIEW GRANTED; RELIEF DENIED**

---

COUNSEL

Barbara LaWall, Pima County Attorney  
By Jacob R. Lines, Deputy County Attorney, Tucson  
*Counsel for Respondent*

Jerry Flynn Walker, Buckeye  
*In Propria Persona*

STATE v. WALKER  
Decision of the Court

---

**MEMORANDUM DECISION**

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

---

M I L L E R, Judge:

¶1 Petitioner Jerry Walker seeks review of the trial court’s order denying relief in this proceeding for post-conviction relief, pursuant to Rule 32, Ariz. R. Crim. P. “We will not disturb a trial court’s ruling on a petition for post-conviction relief absent a clear abuse of discretion.” *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Walker has not sustained his burden of establishing such abuse here.

¶2 After a jury trial, Walker was convicted of sale of a narcotic drug and possession of a narcotic drug for sale. The trial court then granted his motion for new trial on the possession count, and sentenced him to 15.75 years’ imprisonment on the sale count. Walker filed a motion to vacate the judgment on the sale count, which the trial court granted, but this court reversed and remanded. The trial court resentenced Walker to the same term on the sale count and dismissed the possession count on the state’s motion. Walker’s conviction was affirmed on appeal after resentencing. *State v. Walker*, No. 2 CA-CR 2012-0128 (memorandum decision filed Mar. 13, 2013). Walker sought and was denied post-conviction relief, and this court denied relief on review. *State v. Walker*, No. 2 CA-CR 2014-0130 (memorandum decision filed July 14, 2014).

¶3 Walker filed a petition for a writ of habeas corpus in September 2015,<sup>1</sup> claiming this court’s decision in *State v. Lizardi*, 234

---

<sup>1</sup>The trial court correctly deemed the petition one for post-conviction relief. *See* Ariz. R. Crim. P. 32.3.

STATE v. WALKER  
Decision of the Court

Ariz. 501, 323 P.3d 1152 (App. 2014), was a significant change in the law that entitled him to relief. As in *Lizardi*, the trial court found that Walker had been on parole at the time of his offense. *Id.* ¶ 11. In *Lizardi* we concluded that the United States Supreme Court's decision in *Alleyne v. United States*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 2151 (2013), required a jury to make such a finding. *Id.* ¶ 13. And we determined that such error was trial error, making it subject to either harmless or fundamental error review. *Id.* ¶ 18. Because *Lizardi* had requested a jury finding on his release status, we reviewed for harmless error. *Id.* ¶ 19.

¶4 The trial court concluded that although *Alleyne* had been decided before the filing of Walker's first petition, courts had allowed a claim based on a significant change in the law in regard to "successive Rule 32 petitions with similar timelines," and determined Walker's claim was not precluded. It concluded, however, that "[a]lthough[] this change in the law is significant, it is not probable that [Walker's] sentence would be overturned." It went on to conclude the error was harmless because, as in *Lizardi*, no reasonable jury would have found Walker was not on parole at the time of the offense. The court therefore denied relief.

¶5 On review, Walker argues the trial court abused its discretion in concluding that any sentencing error was harmless. He contends that his sentence on an earlier conviction was "void" because he should have been placed on probation under A.R.S. § 13-901.01. And had his sentence been suspended, "he would not have been on parole" at the time of the offense at issue in this matter. Thus, apparently he contends a jury could have concluded he was not on release at the time of the instant offense, and the court's having found that fact was not harmless error.

¶6 A claim that a petitioner is entitled to relief based on a significant change in the law may be raised in a successive Rule 32 proceeding. *See* Ariz. R. Crim. P. 32.1(g), 32.2(b). Even assuming *Alleyne* and *Lizardi* constitute such a change, Walker has not established he is entitled to relief. Because Walker did not object to the court's finding his release status, his claim would be reviewed for fundamental error, requiring that he establish he was prejudiced

STATE v. WALKER  
Decision of the Court

by the court's finding the relevant facts instead of a jury. *State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). In other words, he would be required to "show that a reasonable jury, applying the appropriate standard of proof, could have reached a different result [in finding an aggravator] than did the trial judge." *Id.* ¶ 27. His argument on review constitutes a collateral attack on his previous conviction, which would not have been allowed even had his release status been tried to a jury. See *State v. Simmons*, 131 Ariz. 482, 483, 642 P.2d 479, 480 (App. 1982) (barring collateral attack on conviction alleged to enhance sentence); cf. *State v. Mangum*, 214 Ariz. 165, ¶ 16, 150 P.3d 252, 256-57 (App. 2007) (defendant guilty of status offense of possession of a weapon by a prohibited possessor when on prohibited status at the time of possession, even though prior conviction later vacated). Thus, we agree with the trial court's detailed ruling that no reasonable jury would have failed to find that Walker was on parole at the time of his offense. Walker has not established prejudice resulting from the denial of his right to a jury finding on his release status.<sup>2</sup>

¶7 Although we grant the petition for review, we deny relief.

---

<sup>2</sup>Walker also contends this question is one of subject matter jurisdiction, and although he "did not raise this issue below" he can therefore raise it "at any point in the proceedings." We note, however, that this claim does not implicate subject matter jurisdiction, and that such claims are, in any event, subject to preclusion. Although some authorities suggest a challenge to subject matter jurisdiction "can never be forfeited or waived," *United States v. Cotton*, 535 U.S. 625, 630 (2002), express provisions in Rule 32 designate claims of subject matter jurisdiction under Rule 32.1(b), and such claims are subject to preclusion, see Ariz. R. Crim. P. 32.2(a), (b). Because the trial court deemed his claim not precluded, however, we address the claim in our discretion.