

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

JUN 29 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2012-0148-PR
)	DEPARTMENT A
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
STEPHEN MICHAEL GALAVIZ,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF MARICOPA COUNTY

Cause No. CR2004043069001SE

Honorable Glenn M. Davis, Judge

REVIEW GRANTED; RELIEF DENIED

William G. Montgomery, Maricopa County Attorney
By Linda Van Brakel

Phoenix
Attorneys for Respondent

Stephen Galaviz

Phoenix
In Propria Persona

E C K E R S T R O M, Presiding Judge.

¶1 Petitioner Stephen Galaviz seeks review of the trial court's summary dismissal of his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We grant review but deny relief.

¶2 In 2005, Galaviz was convicted of two counts of attempted sexual conduct with a minor and one count of sexual abuse after pleading “no contest” to those charges pursuant to a plea agreement. The trial court sentenced him to 2.5 years’ imprisonment for the sexual abuse conviction and lifetime probation for the attempted sexual conduct counts. Since then, he twice has been found in violation of his probation, and the court has reinstated his probation, most recently on October 2, 2009.

¶3 On June 21, 2011, Galaviz filed his first, pro se petition for post-conviction relief pursuant to Rule 32.¹ In that petition, Galaviz maintained the trial court had erred “in imposing consecutive sentences after consolidating all counts for trial,” in violation of double jeopardy principles. Relying on *State v. Vargas-Burgos*, 162 Ariz. 325, 783 P.2d 264 (App. 1989), he argued the court “lack[ed] jurisdiction to impose an illegal sentence and jurisdiction can be raised at any time.” The trial court found Galaviz’s Rule 32 proceeding “untimely filed” and concluded he had “fail[ed] to state a claim for which relief can be granted in an untimely Rule 32 proceeding.” *See* Ariz. R. Crim. P. 32.2(b) (untimely notice subject to summary dismissal for failure to state specific exception to preclusion, pursuant to Rule 32.1(d), (e), (f), (g), or (h), or “meritorious reasons . . . indicating why the claim was not stated . . . in a timely manner”).

¶4 In the petition for review that followed, Galaviz argues the merits of his claim of sentencing error and asserts that “[j]urisdictional errors in which a defendant is sentenced to an illegal term and which were ‘never’ personally waived are not precluded

¹Because Galaviz did not first file a notice of post-conviction relief, as required by Rule 32.4(a), the trial court appears to have construed this filing as both a notice and petition for post-conviction relief.

[under] Rule 32.2.” We review a trial court’s summary denial of post-conviction relief for an abuse of discretion. *See State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006). We find none here.

¶5 To the extent Galaviz suggests he may challenge the legality of his sentence at any time because such a claim is jurisdictional in nature, he is mistaken. In *State v. Bryant*, we explained, “Subject matter jurisdiction is ‘the power of a court to hear and determine a controversy.’” 219 Ariz. 514, ¶ 14, 200 P.3d 1011, 1014 (App. 2008), quoting *Marks v. LaBerge*, 146 Ariz. 12, 15, 703 P.2d 559, 562 (App. 1985). We thus “conclude[d] that we used the word ‘jurisdiction’ imprecisely” in *Vargas-Burgos* and stated that “when the trial court has jurisdiction over the subject matter and parties,” its judgment, “even if voidable and erroneous, [can] only be modified on appeal or by proper and timely post-judgment motion.” *Bryant*, 219 Ariz. 514, ¶¶ 13, 15, 17, 200 P.3d at 1014, 1015. The trial court here had jurisdiction to sentence Galaviz. *See id.* ¶ 17. He has forfeited any challenge to the legality of that sentence by failing to raise it in a timely proceeding. *See* Ariz. R. Crim. P. 32.2(b), 32.4(a); *cf. State v. Shrum*, 220 Ariz. 115, ¶¶ 6-7, 23, 203 P.3d 1175, 1177, 1180 (2009) (claims of illegal sentence subject to preclusion under Rule 32.2(a)(3)).²

²To the extent Galaviz refers to the availability of claims of ineffective assistance of trial and appellate counsel to support his argument that his claim is not precluded, no such ineffective assistance claims are before us. *See* Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review shall contain “[t]he issues which were decided by the trial court and which the defendant wishes to present to the appellate court for review”); *State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (issues may not be raised for first time in petition for review). We note that, had such claims been raised, they also would be precluded by Rule 32.4(a). *See State v. Petty*, 225 Ariz. 369, ¶ 11, 238 P.3d

¶6 We thus agree with the trial court’s determination that Galaviz’s claim is precluded by his failure to raise it in a timely Rule 32 proceeding. We therefore approve and adopt the court’s ruling. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993).

¶7 Accordingly, we grant review but deny relief.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

637, 641 (App. 2010) (ineffective assistance of counsel claim “does not fall within Rule 32.1(d), (e), (f), (g), or (h)” but within Rule 32.1(a)); *State v. Swoopes*, 216 Ariz. 390, ¶ 28, 166 P.3d 945, 954 (App. 2007) (“An alleged violation of the general due process right of every defendant to a fair trial, without more, does not save that belated claim from preclusion.”).