

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

FRANK LANO VERN PRESTON III,
Petitioner.

No. 2 CA-CR 2015-0399-PR
Filed April 11, 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NOT FOR PUBLICATION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 Pinal County
No. S1100201202606
The Honorable Bradley M. Soos, Judge Pro Tempore

PETITION DISMISSED

COUNSEL

M. Lando Voyles, Pinal County Attorney
By Janina N. Walters, Deputy County Attorney, Florence
Counsel for Respondent

Frank Lano Vern Preston III, Safford
In Propria Persona

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MEMORANDUM DECISION

Judge Staring authored the decision of the Court, in which Presiding Judge Howard and Judge Espinosa concurred.

STARING, Judge:

¶1 Frank Preston III seeks review, pursuant to Rule 32.9, Ariz. R. Crim. P., of the trial court's denial of his "Pro Per Motion for Leave of Court (Nunc Pro Tunc) to Clarify Sentence." We conclude we lack jurisdiction to review the court's order, and we therefore dismiss the petition for review.

¶2 Preston had urged the trial court to "clarify" his sentence pursuant to Rule 24.4, Ariz. R. Crim. P., which provides that "[c]lerical mistakes in judgments, orders, or other parts of the record, and errors in the record arising from oversight or omission, may be corrected by the court at any time after such notice, if any, as the court orders." But Preston stated in his motion that the trial court had "cited everything correctly in [its] 8/5/2013 sentencing order," and he argued only that the Arizona Department of Corrections had "failed to properly comput[e]" his sentence expiration date. The trial court denied his motion, stating, "Time computations and release dates are set by the Department of Corrections, not the Court."

¶3 Preston did not file a notice of or petition for post-conviction relief pursuant to Rule 32. Nor has he alleged, in his motion below or on review, that he is presently "being held in custody after the sentence imposed has expired," Ariz. R. Crim. P. 32.1(d), or any other claim cognizable in a Rule 32 proceeding. *See State v. Davis*, 148 Ariz. 62, 64, 712 P.2d 975, 977 (App. 1985) (challenges to calculation of credits against sentence "not cognizable under Rule 32 unless they result in the defendant remaining in custody when he should otherwise be free"). Preston cites A.R.S. § 12-2101 and argues, by analogy, that this court has jurisdiction to

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review the trial court's denial of his request for clarification of his sentence. He is mistaken.

¶4 First, a criminal defendant's right to appeal is governed by A.R.S. § 13-4033, not § 12-2101. Preston is correct that, as a pleading defendant, he was precluded from appealing from his judgment or sentence, *see* § 13-4033(B), and could only challenge his conviction or sentence under Rule 32. *See, e.g., State v. Shrum*, 220 Ariz. 115, ¶ 10, 203 P.3d 1175, 1178 (2009). But claims that may be brought in a post-conviction proceeding are expressly limited by Rule 32.1; they are not co-extensive with claims that may be raised by a non-pleading defendant on direct appeal. *Cf. State v. Flores*, 218 Ariz. 407, ¶ 6, 188 P.3d 706, 708-09 (App. 2008) (plea agreement waives all nonjurisdictional defects unrelated to validity of plea, including constitutional claims). And, under Rule 32.9(c), our review is limited to a "final decision of the trial court" in Rule 32 proceedings. *See also* A.R.S. § 13-4239(C).

¶5 Moreover, although a decision granting relief on a post-trial motion, filed pursuant to Rule 24, may be a "separately appealable order[]" under § 13-4033(A)(3), which provides for an appeal from "[a]n order made after judgment affecting the substantial rights of the party," *see State v. Wynn*, 114 Ariz. 561, 563, 562 P.2d 734, 736 (App. 1977), a decision denying such a motion is not appealable, *see State v. Jimenez*, 188 Ariz. 342, 345, 935 P.2d 920, 923 (App. 1996). As we explained in *Jimenez*, a denial of a post-trial motion does not "actually change[] or modif[y] the judgment or sentence originally imposed," and so does not affect a defendant's substantial rights pursuant to § 13-4033(A)(3). *Id.*

¶6 This court's jurisdiction is limited by statute, *see* Ariz. Const. art. VI, § 9; A.R.S. § 12-120.21(A), and "we have an independent duty to examine and confirm our appellate jurisdiction," *State v. Serrano*, 234 Ariz. 491, ¶ 4, 323 P.3d 774, 776 (App. 2014). We conclude we are without jurisdiction to review the order Preston has challenged.

¶7 Accordingly, Preston's petition for review is dismissed.