

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

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THE STATE OF ARIZONA,  
*Respondent,*

*v.*

MICHAEL EDWARD FINCK,  
*Petitioner.*

No. 2 CA-CR 2016-0299-PR  
Filed November 23, 2016

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NOT FOR PUBLICATION  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

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Petition for Review from the Superior Court in Pima County  
No. CR20110480001  
The Honorable Richard D. Nichols, Judge

**REVIEW GRANTED; RELIEF DENIED**

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COUNSEL

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

Harold L. Higgins, P.C., Tucson  
By Harold Higgins  
*Counsel for Petitioner*

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**MEMORANDUM DECISION**

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

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STARING, Judge:

¶1 Petitioner Michael Finck seeks review of the trial court’s order dismissing his petition for post-conviction relief, filed 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). We find no such abuse here.

¶2 After a jury trial, Finck was convicted of three counts of possession of a deadly weapon by a prohibited possessor, all while he was on release status. The trial court sentenced him to enhanced, maximum, concurrent prison terms totaling fourteen years. This court affirmed his convictions and sentences on appeal. *State v. Finck*, No. 2 CA-CR 2013-0039 (Ariz. App. Sept. 2, 2014) (mem. decision).

¶3 On review, Finck raises three claims of ineffective assistance of appellate counsel. After counsel filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967), Finck filed a supplemental brief. We concluded Finck’s argument regarding his right to counsel was not frivolous and ordered appellate counsel to file a brief related to that issue and Rule 4.2, Ariz. R. Crim. P. We then determined that although the trial court had erroneously failed to properly advise Finck of his right to counsel at a second arraignment after two additional prohibited possessor charges had been added to the first such charge, Finck nonetheless “clearly and expressly had waived” that right in a detailed written statement and

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that he was not prejudiced by that error.<sup>1</sup> *Finck*, No. 2 CA-CR 2013-0039, ¶¶ 5-10. We also declined to address Finck's challenge to the

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<sup>1</sup>After counsel was appointed to represent Finck on his initial prohibited possession charge, the trial court granted Finck's request to represent himself and appointed advisory counsel; although the minute entry for Finck's second arraignment, held in March 2012, indicates Finck was representing himself, the court failed to properly advise him of his right to counsel or specifically inform him of the new charges filed against him. *Finck*, No. 2 CA-CR 2013-0039, ¶¶ 5-7. On appeal, we found Finck had not been prejudiced by this error for the following reasons:

Finck clearly and expressly had waived his right to counsel in a detailed writing. When the court reappointed counsel in January 2012, Finck again clarified that he wanted to represent himself. Furthermore, the additional charges filed against Finck were not different from the charge originally filed . . . . And Finck makes no claim that either the nature of the weapons-misconduct charge or the consequences related to a single conviction for that charge were not properly explained to him at his original arraignment. Nor did he indicate any uncertainty as to the charges at the second arraignment, stating he had received the new indictment and wished to proceed to interviewing witnesses.

Additionally, . . . this is not Finck's first criminal proceeding and he has represented himself in other proceedings . . . . Finck informed the court he has "a diploma in paralegal studies" and had represented himself "all the way up to the [Ninth C]ircuit in one criminal appeal" and in some civil matters. In view of Finck's

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search warrant leading to his convictions based on his failure to adequately address that argument in his supplemental brief on appeal, and rejected his argument that the court had erred in failing to provide certain requested jury instructions at trial. *Id.* ¶¶ 16-17.

¶4 On review, Finck first asserts appellate counsel’s argument on the issue of self-representation was inadequate and omitted essential facts and he maintains counsel’s performance “substantial[ly] contribut[ed]” to this court’s finding on appeal that the trial court’s error “could be excused.” “To state a colorable claim of ineffective assistance of counsel, a defendant must show both that counsel’s performance fell below objectively reasonable standards and that this deficiency prejudiced the defendant.” *State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006); *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984).

¶5 We reject Finck’s claim for several reasons. He essentially reasserts the arguments he raised in his petition below without explaining how the trial court abused its discretion in denying them. *See* Rule 32.9(c)(1)(iv) (petition for review shall contain “reasons why the petition should be granted”). In addition, because we addressed on appeal the underlying issue regarding the right to assistance of counsel at the second initial appearance and arraignment, and found Finck was not prejudiced by the trial court’s error, *Finck*, No. 2 CA-CR 2013-0039, ¶¶ 7, 10, his claim of ineffective assistance of appellate counsel cannot stand. *See Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d at 68. Moreover, to the extent Finck attempts to challenge our ruling on appeal by now asserting, “the appellate

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experience, his statements on the record regarding his desire to represent himself, and the nature of the charges, we cannot say that Finck was prejudiced by the trial court’s failure to properly advise him pursuant to Rule 4.2 or that the court abused its discretion in concluding Finck had validly waived his right to counsel.

*Finck*, No. 2 CA-CR 2013-0039, ¶¶ 9-10.

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court . . . erred when it determined that the clear error of March 26 [the second arraignment hearing] could be excused,” he cannot do so in a Rule 32 proceeding. *See* Ariz. R. Crim. P. 31.19. Finally, to the extent Finck raises for the first time on review an argument based on statutory construction, we do not address it. *See* Rule 32.9(c)(1)(ii) (petition for review must contain “issues which were decided by the trial court and which the defendant wishes to present to the appellate court for review”); *see also 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).

¶6 Finck next argues that his motion to suppress the search warrant leading to the discovery of the weapons should have been granted, asserting appellate counsel was ineffective for having failed to raise this issue on appeal and asking us to consider his original motion to suppress. Finck presents facts, arguments and case law to support his motion to suppress that he did not raise in his petition below. We do not consider on review arguments not presented to the court below. *See* Rule 32.9(c)(1)(ii). Moreover, Finck fails to explain how the trial court abused its discretion by concluding “there was clearly probable cause upon which to issue the [search] warrant,” which it found to be “valid,” and that “any alleged ineffectiveness by appellate counsel for failing to argue the issue did not prejudice [Finck] in any way.” Because Finck has not explained how the court abused its discretion in so finding, we do not consider his argument. *See* Rule 32.9(c)(1)(iv).

¶7 Finally, Finck argues appellate counsel should have challenged the trial court’s denial of his request for jury instructions on duress and necessity, an issue he raised in his supplemental brief on appeal. To the extent Finck challenges this court’s reasoning on appeal regarding the jury instruction issue, he cannot do so in a Rule 32 proceeding. *See* Rule 31.19. Moreover, because we addressed the underlying issue regarding the jury instructions on appeal and found “the evidence did not reasonably support” giving the requested instructions, *Finck*, No. 2 CA-CR 2013-0039, ¶ 16, it follows that Finck was not prejudiced by appellate counsel’s failure to raise this claim on appeal. *See Bennett*, 213 Ariz. 562, ¶ 21, 146

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P.3d at 68. Accordingly, the court did not abuse its discretion by dismissing this argument below.

¶8 Because Finck has not sustained his burden on review of establishing the trial court abused its discretion in dismissing his petition, we grant the petition for review but deny relief.