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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. STEPHEN OLIVER SWARTZ, Petitioner.	2 CA-CR 2010-0390-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause Nos. CR20083507 and CR20093102001

Honorable Charles S. Sabalos, Judge

REVIEW GRANTED; RELIEF DENIED

Stephen O. Swartz — Buckeye
In Propria Persona

H O W A R D, Chief Judge.

¶1 Petitioner Stephen Swartz seeks review of the trial court's order denying his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P., in which he alleged (1) his counsel had been ineffective, (2) his conviction for possession of a firearm by a prohibited possessor violated his double jeopardy rights and the statute setting forth that offense was unconstitutionally vague and overbroad and violated his right to bear arms, (3) the grand jury proceedings had violated his due process rights, (4) the indictment against him was insufficient, (5) he had never been "sentenced to a 'civil death'" so as to be deprived of his right to bear arms, and (6) the trial court lacked jurisdiction to "prosecute and punish" him. "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). Swartz has not sustained his burden of establishing such abuse here.

¶2 In September 2008, Swartz was charged in CR20083507 with possession of a narcotic drug, possession of a deadly weapon by a prohibited possessor, and possession of drug paraphernalia. Pursuant to a plea agreement, he pled guilty to the prohibited-possessor charge. Before he was sentenced, he was charged in CR20093102001 with second-degree burglary and subsequently pled guilty to that charge. At a combined sentencing hearing, the trial court imposed a presumptive, 4.5-year prison term for the prohibited-possessor conviction and a presumptive 6.5-year term for the burglary conviction.

¶3 Thereafter, Swartz initiated Rule 32 proceedings in both causes. The trial court appointed an attorney to represent Swartz in each, but after she failed to find "any

arguable legal claim within the scope of Rule 32," the court allowed Swartz to file a pro se petition. Swartz filed a form petition in CR20083507 and later filed another pro se petition that included a memorandum of points and authorities in that cause as well, raising essentially the same issues. The state did not respond to Swartz's petitions.

¶4 In identical minute entries filed in each cause, the trial court summarily denied relief, stating it had "reviewed and considered the record and finds that the defendant's *pro* [*se*] Rule 32 Petition for Post-Conviction Relief fails to present a material issue of fact or law which would entitle [him] to relief." In a subsequent ruling in response to a motion for additional findings of fact and conclusions of law filed by Swartz, the court explained he had been "provided with effective assistance of counsel and that all of [his] remaining claims have been waived by virtue of [his] decision to enter into the Plea Agreement resulting in his imprisonment."[1]

¶5 On review, Swartz reasserts the arguments made below and contends his convictions and sentences are "invalid [and] also illegal" because, inter alia, the trial court lacked jurisdiction. He contends the court therefore erred in concluding he had waived the arguments made in his petition and summarily dismissing it. He also maintains the court violated Rule 32.8, Ariz. R. Crim. P., by failing to make specific findings of fact and conclusions of law.

[1]Although the two causes were not ordered consolidated, because the trial court ruled in both causes and Swartz did not object or file a separate petition in each cause, we treat them as consolidated for purposes of review.

¶6 As an initial matter, we note that Rule 32.8 applies to a ruling made after an evidentiary hearing, not to one summarily dismissing a petition. Pursuant to Rule 32.6(c), Ariz. R. Crim. P., on summary disposition, a trial court is required to "identify all claims that are procedurally precluded," but if it "determines that no remaining claim presents a material issue of fact or law which would entitle the defendant to relief" the court shall "order the petition dismissed."

¶7 Next, as the trial court noted, a defendant who enters a valid guilty plea waives the "right to assert on appeal all nonjurisdictional defenses, errors and defects occurring prior to the plea proceedings." *State v. Moreno*, 134 Ariz. 199, 200, 655 P.2d 23, 24 (App. 1982), *disapproved on other grounds by State ex rel. Dean v. Dolny*, 161 Ariz. 297, 778 P.2d 1193 (1989); *accord State v. Lerner*, 113 Ariz. 284, 284-85, 551 P.2d 553, 553-54 (1976). Thus, because he pled guilty, Swartz waived his nonjurisdictional claims, including his double-jeopardy claim, his due process claims, his claim that the indictment was insufficient, his claim that he had not properly been deprived of his right to bear arms so as to be a prohibited possessor, and his claims relating to the constitutionality of the prohibited-possessor statutes, except insofar as they relate to the trial court's jurisdiction.

¶8 According to Swartz, the trial court lacked jurisdiction because (1) "the initial finding of probable cause was invalid," (2) the grand jury proceedings were invalid and led to an insufficient indictment, and (3) the statutes under which he was charged were unconstitutional. But, his claim of a lack of probable cause is in fact a nonjurisdictional claim. *See State v. Diaz*, 121 Ariz. 16, 18, 588 P.2d 309, 311 (1978)

(noting that, in *State v. Nicholson*, 109 Ariz. 6, 503 P.2d 954 (1972), "an alleged evidentiary insufficiency and consequent failure to establish probable cause were considered non-jurisdictional"). Likewise, because he did not timely object to the indictment as required by Rules 13.5(e) and 16.1(c), Ariz. R. Crim. P., he cannot now challenge any defects therein.[2] *See State v. Toulouse*, 122 Ariz. 275, 277, 594 P.2d 529, 531 (1979).

¶9 Swartz's claims relating to defects in the grand jury proceedings against him also are nonjursidictional. *See State v. Reed*, 121 Ariz. 547, 548-49, 592 P.2d 381, 382-83 (App. 1979). And, in any event, most of Swartz's claims relate to the fact that an officer who apparently had not been present at the time of his offense testified before the grand jury and gave hearsay testimony, rather than testimony based on personal knowledge. But in Arizona, the rules of evidence do not apply to grand jury proceedings, and hearsay may be admitted. *See* Ariz. R. Evid. 1101(d) ("The rules [of evidence] (other than with respect to privileges) do not apply to proceedings before grand juries."); *see also Franzi v. Superior Court*, 139 Ariz. 556, 565, 679 P.2d 1043, 1052 (1984) ("[H]earsay evidence in a grand jury proceeding is not objectionable."); *State ex rel. Berger v. Myers*, 108 Ariz. 248, 250, 495 P.2d 844, 846 (1972) ("In pursuing its investigations, the grand jury is not bound to act on the customary rules of evidence.").

¶10 And, even assuming, without deciding, that Swartz is correct that a court lacks jurisdiction to try a case if a statute is facially unconstitutional, *see People v.*

[2]Swartz did object to the grand jury proceedings, but he did not point to any defects in the indictment. Rather, his argument focused solely on an alleged lack of due process in the proceedings.

Katrinak, 185 Cal. Rptr. 869, 872 n.4 (Ct. App. 1982), his arguments concerning the prohibited possessor statute have been rejected in Arizona. He claims that statute is (1) unconstitutionally vague,[3] (2) overbroad because it impinges on the right to bear arms, (3) a "status crime" that creates "selective prosecution" and violates equal protection principles, and (4) requires "no criminal intent and no knowledge of wrong doing" and therefore creates "a mandatory presumption of mens rea." Each of these claims has been rejected expressly or implicitly as to this statute or its predecessor and is therefore without merit. *See State v. Rascon*, 110 Ariz. 338, 339, 519 P.2d 37, 38 (1974) (rejecting equal protection claim and concluding prohibited possessor statute does not infringe second-amendment rights); *State v. Tyler*, 149 Ariz. 312, 316, 718 P.2d 214, 218 (App. 1986) (conviction for prohibited possession of weapon does not require criminal intent, but rather "knowing possession"); *State v. Harmon*, 25 Ariz. App. 137, 138-39, 541 P.2d 600, 601-02 (1975) (former A.R.S. § 13-919(A) not unconstitutionally vague and "punishes the act of possession of a [weapon] by one charged by law with knowledge that such possession . . . is unlawful").

¶11 Finally, we address Swartz's claim of ineffective assistance of counsel. He contends counsel was ineffective in failing, inter alia, to communicate with him, to adequately investigate the charges against him, to file motions and appear in court, and to challenge the grand jury proceedings. A claim of ineffective assistance of counsel

[3]Swartz also claims the statute is unconstitutional because the definition of "prohibited possessor" is located in another section, requiring "legal research" and depriving individuals of the knowledge of illegal activity required to establish intent. Swartz cites no authority to support the argument that a statute is made unconstitutional by referring to terms defined in another statute. We therefore do not address it.

brought by a pleading defendant such as Swartz does not encompass all errors that might be raised after a trial; rather, the claim is limited to those errors relating to the validity of his plea. *See State v. Quick*, 177 Ariz. 314, 316, 868 P.2d 327, 329 (App. 1993) (by entering guilty plea, defendant waives all nonjurisdictional defects, including claims of ineffective assistance of counsel, except as they relate to validity of plea).

¶12 Thus, to the extent a defendant claims counsel was incompetent in failing to investigate evidence or file pretrial motions, he must establish that counsel's advice to plead guilty was outside the "range of competence demanded of attorneys in criminal cases." *McMann v. Richardson*, 397 U.S. 759, 771 (1970). And, "[t]o establish prejudice in the context of a plea agreement, a defendant must show a reasonable probability that except for his lawyer's error he would not have waived his right to trial and entered a plea." *State v. Ysea*, 191 Ariz. 372, ¶ 17, 956 P.2d 499, 504 (1998). "[W]here the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence," prejudice will depend on "the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea," which, "in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

¶13 In this case, Swartz asserted that counsel's failure to adequately investigate "was one of the main reasons [he] decided to accept the state's plea offer rather than go to trial." But, in support of his claim, Swartz presents only an unsworn letter, apparently from an investigator, about whether a man named "Tom" lived in a certain apartment building and broad allegations about witnesses and videotapes that he argues would have

been exculpatory. These claims are highly speculative, particularly in light of the police report stating that two officers had seen Swartz with a gun in his possession and the fact that Swartz would have faced two more felony charges had he proceeded to trial. *Cf. State v. Meeker*, 143 Ariz. 256, 264, 693 P.2d 911, 919 (1984) ("Proof of ineffectiveness must be a demonstrable reality rather than a matter of speculation."). We therefore cannot say the trial court abused its discretion in concluding Swartz had failed to present a colorable claim of ineffective assistance of counsel. In sum, although we grant the petition for review, we deny relief.

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

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge