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.

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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OF ARIZONA, Respondent, v. JUAN FRANCISCO MARTINEZ, Petitioner.	2 CA-CR 2011-0072-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court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 No. CR20093202003

Honorable Teresa Godoy, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

Law Office of Ronald Zack
By Ronald Zack
Tucson
Attorney for Petitioner

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

¶1 Petitioner Juan Martinez seeks review of the trial court's order denying 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). Martinez has not sustained his burden of establishing such abuse here.

¶2 Pursuant to a plea agreement, Martinez was convicted of one count of theft by control. The trial court suspended the imposition of sentence and placed Martinez on probation for a period of two years. During Martinez's sentencing hearing, at which he was present, questions about the amount of restitution arose, and the court set a "status conference" approximately six weeks later to allow the parties to sort out "an accounting issue" and "what's truly owed." Martinez did not attend the scheduled conference. The conference later was continued twice and finally concluded in May 2010. As she had at the three previous conferences, Martinez's counsel waived his presence at the May 2010 conference. No evidence was received at the three-minute conference, but counsel indicated she had interviewed "the insurance agents" for the victims and determined the "victims are due their restitution." The court ordered Martinez to pay $58,967.51 in restitution to the victims.[1]

¶3 Martinez thereafter initiated Rule 32 proceedings, claiming in his petition that the restitution order violated his "right to due process as [he] was not given notice . . . of the amount he was ultimately ordered to pay . . . and was not given notice and opportunity to be heard . . . regarding the amount of restitution" at the conference, which he denominates a restitution hearing. He also asserted trial counsel had been ineffective in failing "to notify [him] of the restitution hearing and to object to the restitution award."

[1]Martinez and a co-defendant were held "jointly and severally liable" for the restitution.

¶4 The trial court summarily dismissed the petition, concluding that, because Martinez had agreed to waive his right to a restitution hearing in his plea agreement, his due process rights had not been violated by his absence when the restitution hearing was held and that he had not stated a colorable claim of ineffective assistance of counsel. On review Martinez essentially repeats the arguments he made below and claims the court abused its discretion in denying him relief.[2] Even assuming, however, that the court erred in concluding Martinez had waived his right to appear at the restitution hearing that was held by waiving his right to have a restitution hearing at all, we cannot say the court abused its discretion in dismissing Martinez's petition.

¶5 As Martinez correctly points out, Rule 26.9, Ariz. R. Crim. P., requires that a defendant be present at sentencing, and restitution is a part of sentencing. *See State v. Lewus*, 170 Ariz. 412, 414, 825 P.2d 471, 473 (App. 1992); *see also State v. Guadagni*, 218 Ariz. 1, ¶ 21, 178 P.3d 473, 479 (App. 2008); *State v. Scroggins*, 168 Ariz. 8, 9, 810 P.2d 631, 632 (App. 1991). Thus, the court erred in imposing restitution without Martinez present. *See Lewus*, 170 Ariz. at 414, 825 P.2d at 473 ("Once the judge determined that restitution was legally appropriate, he should have afforded defendant an opportunity to contest the information on which the award was based or, if the

[2]Martinez also asks that this court "strike the plea agreement stipulation whereby [he] waived his right to participate in the restitution process." He did not, however, make such a request below, nor does he cite any authority in support of such a request. We therefore decline to address the argument. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980); *see also* 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" for review).

appropriate amount of the award was evident . . . , ordered defendant's presence when he imposed restitution.").

¶6 But "not all species of 'presence error' are necessarily structural," requiring automatic reversal. *State v. Forte*, 222 Ariz. 389, ¶¶ 14-15, 214 P.3d 1030, 1035 (App. 2009). Rather, a court must evaluate "'the character of the proceeding from which the defendant was excluded'" in order "'to ascertain the impact of the constitutional violation on the overall structure of the criminal proceeding.'" *Id.*, *quoting State v. Garcia-Contreras*, 191 Ariz. 144, ¶ 16, 953 P.2d 536, 540 (1998).

¶7 In *State v. Fettis*, 136 Ariz. 58, 59, 664 P.2d 208, 209 (1983), our supreme court concluded that Rule 26.9, Ariz. R. Crim. P., required that a defendant be present at sentencing. In reaching its conclusion, the court pointed out that the defendant's presence was necessary to ensure that he or she received "'the essential warnings and information required to be given after sentence is pronounced,'" to allow a defendant to exercise the right to allocution, and to allow "the judge to personally question and observe the defendant." *Fettis*, 136 Ariz. at 59, 664 P.2d at 209, *quoting* Ariz. R. Crim. P. 26.9 cmt. In this case, all of these concerns were met at Martinez's sentencing.

¶8 Additionally, although Martinez was not present at the restitution hearing, his attorney took an active role, and her statements showed that, through counsel, Martinez had the opportunity to "contest the information on which the [restitution] award [wa]s based." *Lewus*, 170 Ariz. at 414, 825 P.2d at 473. Therefore, we cannot say that Martinez's absence from the proceeding "so undermined the basic framework of [Martinez's] sentencing such that it no longer served its core function." *Forte*, 222 Ariz.

389, ¶ 20, 214 P.3d at 1036. This is particularly so for three reasons. First, Martinez had waived his right to have any hearing on restitution. *See State v. Steffy*, 173 Ariz. 90, 93, 839 P.2d 1135, 1138 (App. 1992) ("[T]he right to be heard as to the amount of restitution may be waived."). Second, he did not assert any intention to attend the restitution hearing at his sentencing. *Cf. State v. Dann*, 205 Ariz. 557, ¶ 68, 74 P.3d 231, 249 (2003) (defendant may not "sit on his hands, fail to assert his desire to be present" and then claim fundamental error based on his absence). And, finally, he did not appear at the first scheduled conference although he had received notice of the date at sentencing. *See State v. Tudgay*, 128 Ariz. 1, 3, 623 P.2d 360, 362 (1981) ("Even if appellant never actually received notice of the continued trial date, . . . 'it was the appellant's duty under the conditions of his release to maintain contact with the court and/or his attorney as to the trial date and any changes in that date.'"), *quoting State v. Rice*, 116 Ariz. 182, 186, 568 P.2d 1080, 1084 (App. 1977) (omission in *Tudgay*). Although Martinez challenges the amount of restitution in relation to the amount listed in his plea agreement, he has not argued in the Rule 32 proceeding that the amount of restitution was not calculated correctly based on the victims' losses.

¶9 In sum, although the trial court erred in imposing restitution outside of Martinez's presence, that error was not structural. And because Martinez did not object below, he must establish that any error was fundamental and that "he was prejudiced by his lack of physical presence" when restitution was ordered. *Forte*, 222 Ariz. 389, ¶ 22, 214 P.3d at 1036; *see also State v. Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d 601, 607-08 (2005). He has failed to do so.

¶10 In addition to his argument that his due process rights were violated by his absence at the restitution hearing, Martinez also maintains that a "plea is not knowingly, intelligently, or voluntarily made" if the court fails to "inform the defendant of the exact amount of restitution sought, or of the approximate monetary range in which it falls." He is correct. *See State v. Hernandez*, 163 Ariz. 578, 580, 789 P.2d 1079, 1081 (App. 1990). But Martinez has only requested that the court "vacate the order of restitution," he has not requested that he be allowed to withdraw from his plea agreement. We therefore do not address whether he should have been allowed to withdraw from his plea on the basis of his purported lack of notice of the amount of restitution.

¶11 Furthermore, we cannot say the trial court abused its discretion in concluding Martinez had failed to raise a colorable claim of ineffective assistance of counsel. To present a colorable claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient under prevailing professional norms and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Ysea*, 191 Ariz. 372, ¶ 15, 956 P.2d 499, 504 (1998). "A colorable claim of post-conviction relief is 'one that, if the allegations are true, might have changed the outcome.'" *State v. Jackson*, 209 Ariz. 13, ¶ 2, 97 P.3d 113, 114 (App. 2004), *quoting State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993).

¶12 Martinez first claimed counsel was ineffective in failing to notify him of the continued date of the hearing at which restitution was imposed. We agree with the trial court that because Martinez had agreed in his plea agreement to waive a restitution hearing, to accept the victims' restitution claim form "as conclusive proof" of their loss,

and to pay more than the amount listed on the plea agreement, he has not established there was a "'reasonable probability'" that "'the result of the proceeding would have been different'" had counsel notified him of the date of the hearing. *State v. Lee*, 142 Ariz. 210, 214, 689 P.2d 153, 157 (1984), *quoting Strickland*, 466 U.S. at 694. We therefore need not address whether counsel's performance in this regard was deficient. *State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985).

¶13 Martinez also contended counsel was ineffective in failing to object to the restitution award. The trial court correctly resolved Martinez's claims on this point "in a fashion that will allow any court in the future to understand the resolution[, and n]o useful purpose would be served by this court rehashing the trial court's correct ruling." *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993).

¶14 For the reasons above, we grant the petition for review, but deny relief.

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

CONCURRING:

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

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Judge