

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Respondent*,

v.

JOHN FRANK HEINKEL, III, *Petitioner*.

No. 1 CA-CR 16-0328 PRPC
FILED 6-29-2017

Petition for Review from the Superior Court in Yavapai County

No. P1300CR201200664

The Honorable Tina R. Ainley, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Yavapai County Attorney's Office, Prescott
By Sheila Sullivan Polk
Counsel for Respondent

John Frank Heinkel, III, Tucson
Petitioner

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MEMORANDUM DECISION

Judge Paul J. McMurdie delivered the decision of the Court, in which Presiding Judge Kent E. Cattani and Judge Jon W. Thompson joined.

M c M U R D I E, Judge:

¶1 John Frank Heinkel petitions this court for review from the dismissal of his petition for post-conviction relief. After considering the petition for review, we grant review but deny relief.

¶2 A jury found Heinkel guilty of two counts of aggravated assault, both dangerous offenses. The superior court imposed mitigated and concurrent terms of imprisonment. On direct appeal, this court affirmed the convictions and sentences. *State v. Heinkel*, 1 CA-CR 13-0245, 2014 WL 861497 (Ariz. App. Mar. 4, 2014) (mem. decision).

¶3 Thereafter, Heinkel filed a petition for post-conviction relief (“PCR”), alleging constitutional errors from various evidence admitted at trial, prosecutorial misconduct, insufficiency of the evidence, and ineffective assistance of counsel.¹ The superior court dismissed the petition, finding that all claims, except the ineffective assistance of counsel (“IAC”) claim, were precluded by Rule 32.2(a) because they were, or could have been, raised in Heinkel’s direct appeal. The court rejected the IAC claims because Heinkel did not show that counsel’s performance was deficient or that but for counsel’s actions there was a reasonable probability the

¹ Appointed counsel did not find any colorable claims and Heinkel was permitted to file a *pro se* PCR. On review, Heinkel complains that he was deprived of his constitutional right to effective counsel in his post-conviction relief proceeding. However, even if this claim were properly presented in this proceeding, non-pleading defendants like Heinkel “have no constitutional right to counsel in post-conviction proceedings; thus, despite the existence of state rules providing counsel, a claim that Rule 32 counsel was ineffective is not a cognizable ground for relief in a subsequent Rule 32 proceeding.” *State v. Escareno-Meraz*, 232 Ariz. 586, 587, ¶ 4 (App. 2013); *see also, Davila v. Davis*, 2017 WL 2722418 (U.S. June 26, 2017).

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outcome of the trial would have been different. Heinkel timely petitioned this court for review.

¶4 Heinkel argues he was entitled to an evidentiary hearing on his IAC claims due to counsel's failure to preclude the admission of his statements to police, failure to object to prosecutorial vouching, and failure to object to hearsay evidence.² He does not argue his remaining claims were not precluded, but asserts they support his IAC claim and should be taken into consideration in the context of cumulative error.

¶5 Absent an abuse of discretion or error of law, this court will not disturb the trial court's ruling on a petition for post-conviction relief. *State v. Gutierrez*, 229 Ariz. 573, 577, ¶ 19 (2012). Heinkel has failed to show an abuse of discretion.

¶6 Heinkel first argues that because his affidavit is uncontroverted, his claims are colorable. Heinkel provides no citation to the record for this affidavit, and even if the affidavit exists, Heinkel is mistaken as to its effect. *See State v. Goswick*, 142 Ariz. 582, 585 (1984) (in context of an IAC claim, there is no sufficient factual basis to support an allegation based on defendant's self-serving affidavit); *see also State v. Wilson*, 179 Ariz. 17, 20 (App. 1993) (defendant's own affidavit was insufficient to overcome inference of waiver).

¶7 Next, we note counsel filed a motion to suppress Heinkel's statements. The trial court held an evidentiary hearing and found Heinkel's statements to police admissible. If Heinkel believed the court erred, Heinkel should have raised the issue on appeal.

¶8 Heinkel raised the issue of prosecutorial misconduct on appeal. *Heinkel*, 1 CA-CR 13-0245, at *1, ¶ 1. This court concluded that even if the prosecutor had improperly vouched, any error was harmless. *Id.* at ¶ 7. Thus, Heinkel cannot show prejudice from the asserted deficient performance.

² Heinkel argues on review that counsel failed to adequately investigate, or preclude the admission of evidence of an additional weapon; and that he was denied effective assistance of counsel in his PCR. Although Heinkel attempted to raise these issues in an untimely supplement, the superior court did not allow it. Because Heinkel did not properly raise these issues in superior court, we do not consider them on review. Ariz. R. Crim. P. 32.9(c)(1)(ii); *State v. Bortz*, 169 Ariz. 575, 577 (App. 1991); *State v. Wagstaff*, 161 Ariz. 66, 69 (App. 1988).

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¶9 Finally, Heinkel criticizes counsel for failing to object to hearsay statements admitted at trial, but he fails to specifically identify these statements or to provide citations to the record. He then speculates that had objections been made, the outcome of his trial, and perhaps his appeal, would have been different. The burden is on the petitioner seeking post-conviction relief to show ineffective assistance of counsel, and the showing must be that of a provable reality, not mere speculation. *State v. Rosario*, 195 Ariz. 264, 268, ¶ 23 (App. 1999).

¶10 Heinkel does not sufficiently argue that the result of his trial would have been different had trial counsel made hearsay objections. *See* Ariz. R. Crim. P. 32.9(c)(1) (a petition for review shall contain the facts material to a consideration of the issues presented, the reasons why the petition should be granted, and specific references to the record). Thus, Heinkel fails to demonstrate ineffective assistance of counsel, or furthermore, ineffective assistance of counsel that prejudiced him. Nor has Heinkel presented any concrete instances of ineffective assistance of counsel that we could consider cumulatively. Consequently, the superior court did not abuse its discretion by dismissing the IAC claims without an evidentiary hearing. *See State v. Borbon*, 146 Ariz. 392, 399 (1985) (trial court need not conduct an evidentiary hearing based on mere generalizations and unsubstantiated claims of ineffective assistance of counsel).

¶11 We grant review but deny relief.



AMY M. WOOD • Clerk of the Court
FILED: AA