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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THE STATE OF ARIZONA, Respondent, v. ADAM ALCANTAR, Petitioner.	2 CA-CR 2013-0077-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. S1100CR200601723

Honorable Robert C. Brown, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

Adam Alcantar — Florence
In Propria Persona

V Á S Q U E Z, Presiding Judge.

¶1 Petitioner Adam Alcantar seeks review of the trial court's order dismissing his pro se petition for post-conviction relief. We will not disturb the ruling unless the court clearly has abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We see no such abuse here.

¶2 After a jury trial, Alcantar was convicted of indecent exposure, two counts of child molestation, three counts of attempted sexual conduct with a minor, and four counts of sexual conduct with a minor. We affirmed the convictions and sentences on appeal. *State v. Alcantar*, No. 2 CA-CR 2009-0109 (memorandum decision filed Apr. 30, 2010). Alcantar filed a notice of post-conviction relief, and appointed counsel later filed a notice pursuant to Rule 32.4(c), Ariz. R. Crim. P., stating he had reviewed the entire record, interviewed Alcantar and trial counsel, and researched all possible issues, but could find no colorable claims to raise. Alcantar then filed a pro se petition in which he asserted he had received ineffective assistance of counsel "at all stages," including trial, appeal, and the post-conviction proceeding.

¶3 Other than granting Alcantar additional credit for presentence incarceration on the sentence for count one, the trial court rejected Alcantar's claims and dismissed the petition without an evidentiary hearing in a well-reasoned minute entry order, in which it correctly resolved the claims it identified. No purpose would be served by restating the ruling here. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993). Rather, because the ruling is correct with respect to the claims the court expressly identified and resolved, and Alcantar has not persuaded us otherwise, we adopt that ruling.

¶4 We also reject Alcantar's contention that he is entitled to relief on review because the trial court did not expressly address all of his claims. Even if we were to agree with Alcantar, he has not persuaded us he is entitled to relief. For example, he seems to argue the court did not address his claim of prosecutorial misconduct in

connection with his claim of ineffective assistance of appellate counsel. Although the court arguably did not expressly reject this claim in the context of the claim of ineffective assistance of appellate counsel, the court nevertheless did not abuse its discretion in denying Alcantar post-conviction relief.

¶5 Although the court correctly found the claim of prosecutorial misconduct waived and therefore precluded because it could have been raised on appeal, Ariz. R. Crim. P. 32.2(a)(3), it addressed the claim on the merits in any event, stating the record did not support it. Alcantar has not persuaded us the court erred in this regard. Consequently, he was not prejudiced by the fact that appellate counsel did not raise the issue on appeal, and, therefore, any related claim of ineffective assistance of appellate counsel necessarily fails. *See State v. Herrera*, 183 Ariz. 642, 647, 905 P.2d 1377, 1382 (App. 1995) (to establish colorable claim of ineffective assistance of appellate counsel, defendant must show deficient performance on appeal and "reasonable probability . . . but for counsel's unprofessional errors, the outcome of the appeal would have been different").

¶6 With respect to the other claims that Alcantar complains the trial court did not expressly address,[1] we presume the court considered them and that they are subsumed

[1]On review, Alcantar obliquely refers to the claim that Rule 32 counsel had been ineffective, which he raised in a summary manner in his Rule 32 petition and which the trial court implicitly rejected by dismissing the petition. But there is no authority for the proposition that a non-pleading defendant is entitled to assert a constitutional claim that Rule 32 counsel had been ineffective. *See State v. Mata*, 185 Ariz. 319, 336–37, 916 P.2d 1035, 1052–53 (1996). And, the Supreme Court expressly stated it was not deciding that question in *Martinez v. Ryan*, ___ U.S. ___, 132 S. Ct. 1309, 1313 (2012), significantly limiting its holding. Further, even assuming he was entitled to assert such a

in its finding that Alcantar had not shown trial or appellate counsel had been ineffective and its order "denying any further relief in this matter." He also asserts, in a conclusory fashion, that he is entitled at the very least to an evidentiary hearing. But Alcantar has not persuaded us he raised a colorable claim warranting such a hearing. *See State v. Schrock*, 149 Ariz. 433, 441, 719 P.2d 1049, 1057 (1986) (defining colorable claim warranting evidentiary hearing as one which, if taken as true, "might have changed the outcome").

¶7 For the reasons stated, we grant Alcantar's petition for review but deny relief.

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

CONCURRING:

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

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

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claim, because it was not sufficiently developed on review and because the claim raised below was not colorable, he has established no basis for relief.