

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

FILED BY CLERK

MAY -8 2013

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2013-0100-PR
)	DEPARTMENT A
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
DAVID WAYNE TAYLOR,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF MARICOPA COUNTY

Cause No. CR2007176688001DT

Honorable Robert L. Gottsfield, Judge

REVIEW GRANTED; RELIEF DENIED

William G. Montgomery, Maricopa County Attorney
By E. Catherine Leisch

Phoenix
Attorneys for Respondent

David Wayne Taylor

San Luis
In Propria Persona

ECKERSTROM, Presiding Judge.

¶1 David Taylor petitions this court for review of the trial court's order summarily dismissing his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that ruling unless the court clearly has abused its

discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Taylor has not met his burden of establishing such abuse here.

¶2 Taylor was convicted after a jury trial of theft of a means of transportation, possession of burglary tools, and possession of a narcotic drug. Based on Taylor’s admission that he had two previous felony convictions and that he had been on release at the time of his offenses, the trial court sentenced him to enhanced, concurrent prison terms, the longest of which was 11.25 years. We affirmed his convictions and sentences on appeal. *State v. Taylor*, No. 1 CA-CR 09-0628 (memorandum decision filed Feb. 17, 2011). Taylor filed a notice of post-conviction relief, and appointed counsel filed a notice stating she had reviewed the record but had been “unable to find a tenable issue . . . pursuant to Rule 32.”

¶3 Taylor then filed a pro se petition for post-conviction relief arguing his trial counsel had provided ineffective assistance because counsel did not interview all police officers involved in his arrest in an effort to show that another officer had fabricated his testimony and because counsel improperly “allow[ed him] to plead to a second prior conviction.” He further asserted that the use of one of his prior convictions for enhancement purposes was an improper retroactive application of the sentencing statutes and that his sentence was illegal because the state had not alleged in the indictment that he had been on release at the time of his offenses.

¶4 The trial court summarily dismissed Taylor’s petition. It “adopt[ed] the reasoning of the state” in rejecting Taylor’s claims regarding counsel’s conduct in preparing for trial and in allowing Taylor to admit a previous felony conviction. The

court further determined that Taylor’s sentencing claims were precluded and meritless, noting the sentencing statutes “were not applied retroactively” and the state properly had alleged that Taylor had been on release at the time of his offenses.

¶5 On review, Taylor repeats his claims that the sentencing statutes could not be applied retroactively and that the state was required to allege in the indictment that he had been on release. He asserts his trial counsel had been ineffective in failing to object to the use of one of his prior convictions for sentencing purposes. He does not contend on review that the trial court erred in rejecting his other claims of ineffective assistance of counsel.

¶6 Although Taylor broadly asserted in his petition for post-conviction relief that trial counsel had been ineffective, he never squarely raised, much less developed, an argument that counsel was ineffective for failing to argue that one of his prior convictions could not be used for enhancement.¹ We will not address on review arguments not properly presented to the trial court. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980); *see also* Ariz. R. Crim. P. 32.9(c) (“[P]arty aggrieved may petition the appropriate appellate court for review of the actions of the trial court.”). In addition, Taylor’s sentencing claims could have been raised on appeal but were not, and therefore

¹Taylor asserted in his reply to the state’s response to his petition for post-conviction relief that his appellate counsel had failed to raise his “issue of [an] illegal sentence” although he “had asked him many times” to do so. He also claimed his “illegal sentence is because of his attorney . . . not objecting to the use[] of that second prior or . . . being out on release.” A trial court does not abuse its discretion by refusing to consider claims raised for the first time in a reply to the state’s response to the defendant’s petition for post-conviction relief. *State v. Lopez*, 223 Ariz. 238, ¶¶ 6-7, 221 P.3d 1052, 1054 (App. 2009).

are precluded pursuant to Rule 32.2(a)(3). Accordingly, the trial court did not abuse its discretion in summarily dismissing Taylor's petition for post-conviction relief. *See* Ariz. R. Crim. P. 32.6(c).

¶7 For the reasons stated, although review is granted, relief is denied.

/s/ Peter J. Eckerstrom

PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

/s/ Michael Miller

MICHAEL MILLER, Judge