

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

OCT 22 2013

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2013-0245-PR
)	DEPARTMENT B
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
AMOS BEVERETT,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20091782001

Honorable Danelle B. Liwski, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
Attorneys for Respondent

Amos Beverett

San Luis
In Propria Persona

K E L L Y, Presiding Judge.

¶1 Amos Beverett seeks review of the trial court's order summarily dismissing his "statutory petition for special action," which the court treated as a successive notice and petition of post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will

not disturb the court's ruling unless it clearly has abused its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 Beverett was convicted of three counts of sale and/or transfer of a narcotic drug and sentenced to concurrent, presumptive 15.75-year prison terms. We affirmed his convictions and sentences on appeal. *State v. Beverett*, No. 2 CA-CR 2010-0397 (memorandum decision filed Dec. 14, 2011). Beverett then sought post-conviction relief, arguing his trial counsel had been ineffective.¹ The trial court summarily dismissed that claim and, although we granted his petition for review of that ruling, we denied relief. *State v. Beverett*, No. 2 CA-CR 2012-0419-PR (memorandum decision filed Feb. 21, 2013).

¶3 Shortly thereafter, Beverett filed his “statutory petition for special action,” arguing the indictment was flawed because it stated he had committed “sale and/or transfer” of a narcotic drug but referenced only A.R.S. § 13-3408(A)(7) without including a reference to subsection (A)(2) or alleging that he “possess[ed] a narcotic drug for sale.” Thus, Beverett reasoned, because the indictment did not “state all of the elements of the charged offense,” the trial court “proceeded without or in excess of jurisdiction,” requiring that his convictions and sentences be vacated. As we noted above, the court characterized that filing as a successive notice and petition for post-conviction relief and summarily dismissed it, concluding the claim was precluded because it could have been raised on appeal or in Beverett’s first Rule 32 proceeding.

¹Although the trial court initially appointed counsel, it granted Beverett’s request to proceed pro se.

¶4 First, to the extent Beverett suggests on review the trial court erred by treating his filing as an attempt to seek post-conviction relief pursuant to Rule 32, we reject that argument. Rule 32 proceedings “displace[] and incorporate[] all trial court post-trial remedies except post-trial motions and habeas corpus” and encompass “any claim attacking the validity of his or her conviction or sentence.” Ariz. R. Crim. P. 32.3. Thus, however Beverett characterized his claim, the trial court correctly treated it as a post-conviction proceeding under Rule 32.

¶5 Beverett further argues that his claim that the indictment was defective is jurisdictional and cannot be waived, and—at least implicitly—that it may therefore be raised in a successive Rule 32 proceeding. *See* Ariz. R. Crim. P. 32.2(a)(3) (petitioner precluded from relief for claim “[t]hat has been waived at trial, on appeal, or in any previous collateral proceeding”). Even if the indictment were defective, however, Beverett is incorrect that such a claim is not subject to waiver. The United States Supreme Court clarified in *United States v. Cotton*, 535 U.S. 625, 630 (2002) that “defects in an indictment do not deprive a court of its power to adjudicate a case.” And Arizona law does not permit a defendant to challenge the sufficiency of a charging document for the first time in a Rule 32 petition. Indeed, challenges to an indictment must be raised before trial. *See* Ariz. R. Crim. P. 13.5(e) (defects in charging document must be raised in accordance with Rule 16 pretrial motion procedure); Ariz. R. Crim. P. 16.1(a) (Rule 16 governs pretrial motions); *State v. Fullem*, 185 Ariz. 134, 136, 912 P.2d 1363, 1365 (App. 1995) (finding defendant waived challenge to indictment by failing to

object before trial). Thus, the trial court did not err in finding this claim precluded pursuant to Rule 32.2(a)(2).

¶6 For the reasons stated, although review is granted, relief is denied.²

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

CONCURRING:

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

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

²Beverett also filed in this court a “Petition for Review Supplement,” attaching a copy of a trial court ruling in a civil action dismissing for lack of jurisdiction Beverett’s “Special Action claim that asserts Pima County Superior Court lacked jurisdiction to adjudicate the underlying criminal matter.” He asks us to “include [the attached] ruling as part of [his] Petition.” That civil matter is not properly before this court, and we will not consider that filing. *See* Ariz. R. Crim. P. 32.9(c) (party may file in appellate court petition for review of “the final decision of the trial court on the petition for post-conviction relief”).