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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

MATTHEW A. CLACK, Petitioner/Appellant, v. RONALD CREDIO, Warden, Arizona State Prison Complex-Eyman, Respondent/Appellee.	2 CA-HC 2012-0011 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. S1100CV201202878

Honorable Bradley M. Soos, Judge Pro Tempore

AFFIRMED

Matthew A. Clack — Florence
In Propria Persona

V Á S Q U E Z, Presiding Judge.

¶1 Matthew Clack appeals from the trial court's denial of his "Petition for Writ of Habeas Corpus and for Declaratory Judgment." Clack was convicted of kidnapping and attempted molestation of a child, both dangerous crimes against children, pursuant to a plea agreement stipulating he would be sentenced to seventeen years' imprisonment for the kidnapping conviction, followed by a life term of probation for the molestation. The

trial court accepted the plea agreement and sentenced him accordingly. Clack then filed a notice and pro-se petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., alleging wrongful charging and ineffective assistance of counsel and challenging his sentence. The court denied relief, and we denied relief on review. *State v. Clack*, No. 2 CA-CR 2011-0236-PR (memorandum decision filed Nov. 29, 2011).

¶2 Clack subsequently filed a "Petition for Writ of Habeas Corpus and for Declaratory Judgment," seeking his immediate release from confinement based on proposed constructions of sentencing provisions that would have precluded the trial court from imposing his enhanced, consecutive sentences. Apparently recognizing the court likely would consider his petition as a successive petition for relief pursuant to Rule 32, *see* Ariz. R. Crim. P. 32.3,[1] he also asserted that "[h]abeas corpus proceedings are subordinated to, yet available independently from," Rule 32 proceedings. The court denied relief, finding Clack was "not entitled to habeas corpus relief" because he "is still serving a lawfully imposed sentence and does not allege any facts showing he is entitled to immediate release." *See Brown v. State*, 117 Ariz. 476, 477, 573 P.2d 876, 877 (1978).

¶3 In his appeal from the trial court's ruling, Clack explains "his habeas corpus claims are dependent upon the declaratory judgment[s]" he sought. As

[1]Rule 32.3 provides, in relevant part:

> If a defendant applies for a writ of habeas corpus in a trial court having jurisdiction of his or her person raising any claim attacking the validity of his or her conviction or sentence, that court shall under this rule transfer the cause to the court where the defendant was convicted or sentenced and the latter court shall treat it as a petition for relief under this rule and the procedures of this rule shall govern.

"[a]ssignments of error," he asserts (1) "Arizona statute[s] and rules of court allow for joining, or consolidating, claims for declaratory judgment with habeas corpus . . . claims," maintaining this is "an issue of first impression for which there is no controlling Arizona appellate court precedent"; (2) the court abused its discretion in summarily denying his declaratory judgment claims "in the absence of controlling precedent relevant to the statutory construction requested"; (3) the court's ruling "is void for want of jurisdiction and for want of due process of law" because it was entered before his petition was served; and (4) the court's "[s]ummary denial of a petition for writ of habeas corpus that is dependent upon entry of declaratory judgment is an abuse of discretion and is void for want of due process of law." Clack then restates the claims he raised below.

¶4 Essentially, Clack contends former A.R.S. § 13-604.01 "is a fully integrated, inextricably united, subpart of A.R.S. § 13-604," and he therefore could not be convicted of a dangerous crime against children because there was no evidence his offenses had involved the "discharge, use or threatening exhibition of a deadly weapon or dangerous instrument or the intentional or knowing infliction of serious physical injury upon another." He also contends "the concurrent sentencing provisions of A.R.S § 13-116 are superior, or paramount, to the consecutive sentencing provisions of A.R.S. § 13-1304(B)," in order to "satisfy and implement the constitutional prohibition against double jeopardy," and his consecutive sentences therefore were improper. He argues his attorney was ineffective in failing to recognize or argue these propositions in negotiating a plea agreement and, regardless of his attorney's "incompetence," the sentencing stipulations in his plea agreement

> misrepresent Arizona's penalty provisions[,] and the court's subsequent acceptance and continuing enforcement of the plea agreement's sentencing stipulations is the functional equivalent to amending one or more of Arizona's criminal statutory provisions in violation of Arizona['s constitutional] separation of powers command as well as a violation of Clack's constitutionally protected rights to, at minimum, equal protection of law, due process of law, impartial trial, prohibited double jeopardy, and prohibited cruel and unusual punishment.

Clack maintains he is entitled to immediate release because he already has served more than five years in prison, the term he alleges he would have served "pursuant to a lawful sentence,"[2] and also claims he is eligible for early release credits.

¶5 "The decision whether to issue a writ of habeas corpus is entrusted to the sound discretion of the trial court, and we will not disturb the trial court's decision unless we see an abuse of that discretion." *State v. Cowles*, 207 Ariz. 8, ¶ 3, 82 P.3d 369, 370 (App. 2004). We review de novo issues of law and mixed questions of fact and law, *Gamez v. Brush Wellman, Inc.*, 201 Ariz. 266, ¶ 4, 34 P.3d 375, 378 (App. 2001), including whether a party's claim for a declaratory judgment pursuant to A.R.S. § 12-1831 falls within the scope of that statute, *see Glassford v. Glassford*, 76 Ariz. 220, 226-27, 262 P.2d 382, 386 (1953). *See also McMann v. City of Tucson*, 202 Ariz. 468, ¶¶ 20-21, 47 P.3d 672, 678-79 (App. 2002) (trial court erred in concluding plaintiff failed to state justiciable controversy subject to § 12-1831).

[2]According to Clack, "the lawful term of imprisonment" for his offenses would have been five years for the kidnapping offense and 3.5 years for attempted child molestation, served concurrently.

¶6 We conclude the trial court neither erred nor abused its discretion in denying all relief, and we also affirm the court's ruling on the alternative ground that Clack's claims are precluded pursuant to Rule 32.2(a)(3). *See Linder v. Brown & Herrick*, 189 Ariz. 398, 402, 943 P.2d 758, 762 (App. 1997) (appellate court may affirm dismissal of claims "for reasons other than those relied upon by the trial court"); *cf. State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984) (appellate court obliged to affirm trial court's ruling if result legally correct for any reason).

¶7 Arizona's Uniform Declaratory Judgments Act, A.R.S. §§ 12-1831 through 12-1846, is an "instrument of preventive justice" that "provide[s] a means by which rights and obligations may be adjudicated in cases involving an actual controversy that has not reached the stage at which either party may seek a coercive remedy." *Elkins v. Vana*, 25 Ariz. App. 122, 126, 541 P.2d 585, 589 (1975); *see also Planned Parenthood Ctr. of Tucson, Inc. v. Marks*, 17 Ariz. App. 308, 310, 497 P.2d 534, 536 (1972) ("[I]t is well settled that a declaratory judgment must be based on an actual controversy which must be real and not theoretical.").

¶8 But "'[q]uestions already adjudicated by a court having jurisdiction of the subject matter and the parties cannot thereafter be the subject, between such parties and their privies, of an actual controversy'" giving rise to a declaratory judgment action. *Shattuck v. Shattuck*, 67 Ariz. 122, 132, 192 P.2d 229, 235 (1948) (alteration added), *quoting* 16 Am. Jur. *Declaratory Judgments* § 23, *disapproved of on other grounds by Marvin Johnson, P.C. v. Myers*, 184 Ariz. 98, 101, 907 P.2d 67, 70 (1995). Arizona's Declaratory Judgments Act

> has not detracted from the rule that judgments are not subject to collateral attack . . . [and] does not expressly or by implication authorize a court to entertain a proceeding to determine any questions of the construction or validity of a judgment or decree of a court of competent jurisdiction, or to declare the rights or legal relations of interested parties thereunder.

Id. Thus, "'a declaratory judgment proceeding is not an appropriate method'" of modifying or vacating a judgment, and "'it would be entirely beyond the purpose and scope of the statute as well as contrary to fundamental principles for a court to attempt, in such a proceeding, to review and determine the validity of a judgment of a court of coordinate jurisdiction.'" *Id.* at 132, 192 P.2d at 235-36, *quoting* 16 Am. Jur. *Declaratory Judgments* § 23; *see also Glassford*, 76 Ariz. at 227, 262 P.2d at 386 ("[D]eclaratory judgment statute does not contemplate a declaration of one's status or rights under a decree of a court of competent jurisdiction.").

¶9 As in *Shattuck* and *Glassford*, Clack has launched an impermissible collateral attack against his judgment of convictions and sentences. *See Cox v. Mackenzie*, 70 Ariz. 308, 312, 219 P.2d 1048, 1051 (1950) (defining collateral attack as "effort to obtain another and independent judgment which will destroy the effect of the former judgment"). And a court may not overturn a judgment challenged by collateral attack unless it is "'void upon its face'"—because the court lacked jurisdiction over the subject matter, over the parties, or to render the judgment—even if that judgment is "'erroneous or wrong, so that it could be reversed on appeal or set aside on direct attack.'" *Walker v. Davies*, 113 Ariz. 233, 235, 550 P.2d 230, 232 (1976), *quoting Sch.*

Dist. No. 1 of Navajo Cnty. v. Snowflake Union High Sch. Dist. of Navajo Cnty., 100 Ariz. 389, 391-92, 414 P.2d 985, 987 (1966).

¶10 Similarly, "[i]n Arizona, the writ of habeas corpus may be used only to review matters affecting a court's jurisdiction." *In re Oppenheimer*, 95 Ariz. 292, 297, 389 P.2d 696, 700 (1964). Thus, "[t]he writ of habeas corpus is not the appropriate remedy to review irregularities or mistakes in a lower court unless they pertain to jurisdiction." *State v. Court of Appeals*, 101 Ariz. 166, 168, 416 P.2d 599, 601 (1966).

¶11 Relying in part on this court's dicta in *State v. Vargas-Burgos*, Clack contends his allegations are jurisdictional because he has argued his sentences were "outside the parameters of the applicable statutes." 162 Ariz. 325, 326, 783 P.2d 264, 265 (App. 1989) (suggesting such claim "raises a question of subject matter jurisdiction"). But in *State v. Bryant*, we explained, "Subject matter jurisdiction is 'the power of a court to hear and determine a controversy.'" 219 Ariz. 514, ¶ 14, 200 P.3d 1011, 1014 (App. 2008), *quoting Marks v. LaBerge*, 146 Ariz. 12, 15, 703 P.2d 559, 562 (App. 1985). We thus "conclude[d] that we used the word 'jurisdiction' imprecisely" in *Vargas-Burgos* and stated that "when the trial court has jurisdiction over the subject matter and parties," its judgment, "even if voidable and erroneous, [can] only be modified on appeal or by proper and timely post-judgment motion." *Bryant*, 219 Ariz. 514, ¶¶ 13, 15, 17, 200 P.3d at 1014-15. The sentencing court had jurisdiction to sentence Clack, *see id.* ¶ 17, and the court below therefore did not err or abuse its discretion in denying declaratory or habeas corpus relief, *see State v. Court of Appeals*, 101 Ariz. at 168, 416 P.2d at 601; *Glassford*, 76 Ariz. at 227, 262 P.2d at 386.

¶12 We affirm the denial of relief for the additional reason that Clack's statutory and ineffective assistance claims, properly considered as raised under Rule 32.1, are precluded pursuant to Rule 32.2(a)(3). Although Clack attempted to characterize his claims as pertaining to the court's jurisdiction, they actually relate to the validity of his sentences and the court's allegedly erroneous application of sentencing law. Such claims are properly addressed in a Rule 32 proceeding. Ariz. R. Crim. P. 32.1(a), (c); Ariz. R. Crim. P. 32.3 (court "shall treat" habeas claim attacking validity of conviction or sentence as petition for post-conviction relief); *cf. State v. Manning*, 143 Ariz. 139, 141, 692 P.2d 318, 320 (App. 1984) (defendant contesting probation or parole revocation, not then addressed in Rule 32, could seek habeas corpus review).

¶13 Thus, the trial court should have treated Clack's petition as a petition for post-conviction relief and summarily dismissed the new claims Clack raises here as precluded by his failure to raise them at trial or in his first Rule 32 petition. *See* Ariz. R. Crim. P. 32.2(a)(3); *Clack*, No. 2 CA-CR 2011-0236-PR, ¶¶ 6-7.[3] But we will affirm a ruling that is correct for any reason, *see Perez*, 141 Ariz. at 464, 687 P.2d at 1219, and the court here correctly denied relief. Accordingly, we affirm its conclusion that Clack's petition should be denied, and we specifically affirm the court's denial of relief on the

[3]In his first petition for post-conviction relief, Clack appears to have argued he was wrongly charged under the kidnapping statute because he, allegedly, voluntarily released the victim without injury in a safe place, and the state was required to prove otherwise to support a conviction for felony class two kidnapping or a sentence enhancement for a dangerous crime against children. To the extent he suggests that same argument in this proceeding, it is precluded pursuant to Rule 32.2(a)(2).

ground that Clack's claims are precluded. *See* Ariz. R. Crim. P. 32.2(c) (any reviewing court may find issue precluded).

¶14 For the foregoing reasons, we affirm the trial court's ruling denying Clack's petition for declaratory and habeas corpus relief

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

CONCURRING:

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

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

*A retired judge of the Arizona Court of Appeals authorized and assigned to sit as a judge on the Court of Appeals, Division Two, pursuant to Arizona Supreme Court Order filed December 12, 2012.