IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

KENNETH GERALD WACKLER JR.,
Petitioner.

No. 2 CA-CR 2015-0314-PR
Filed September 24, 2015

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Maricopa County
No. CR2011134635001DT
The Honorable Harriett Chavez, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

William G. Montgomery, Maricopa County Attorney
By Robert E. Prather, Deputy County Attorney, Phoenix
Counsel for Respondent

Kenneth Gerald Wackler Jr., Florence
In Propria Persona

MEMORANDUM DECISION

Presiding Judge Vásquez authored the decision of the Court, in which Judge Howard and Judge Kelly[1] concurred.

V Á S Q U E Z, Presiding Judge:

¶1 Kenneth Wackler seeks review of the trial court's order denying his of-right petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that ruling unless the court clearly abused its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Wackler has not met his burden of demonstrating such abuse here.

¶2 Wackler pled guilty to sexual conduct with a minor and two counts of attempted sexual conduct with a minor. Consistent with the plea agreement, the trial court sentenced Wackler to an eighteen-year prison term for sexual conduct and suspended the imposition of sentence for Wackler's attempt convictions, placing him on terms of lifetime probation.

¶3 Wackler sought post-conviction relief, and appointed counsel filed a notice stating she had reviewed the record but was "unable to raise any claims in post-conviction relief proceedings on [Wackler's] behalf." Wackler then filed a pro se petition, arguing his trial counsel had been ineffective in failing to advise him of various rights related to the grand jury proceedings, to challenge the indictment, and to provide him with a transcript of his interview with police. He asserted that, as a result, he was improperly coerced into pleading guilty because he lacked an understanding of the strength of the state's case. He also asserted that his counsel failed to inform him "of his right to sever" the charged offenses, that he

[1]The Hon. Virginia C. Kelly, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and our supreme court.

was "unlawfully sentence[d] . . . to multiple sentences for the same offense," and that the factual basis for his guilty plea was insufficient.

¶4 The trial court summarily denied relief, concluding that, by pleading guilty, Wackler had waived his claims and was "precluded from gaining relief on this claim of ineffective assistance of counsel." The court further stated Wackler had not demonstrated counsel's conduct was unreasonable or that he had been prejudiced. This petition for review followed the court's denial of Wackler's motion for rehearing.

¶5 Wackler presents numerous issues in his petition for review. He first asserts the trial court erred in failing to sever the charges pursuant to Rule 13.4(a), Ariz. R. Crim. P., "after learning of the unlawful multiplicitous indictment." Wackler did not raise this claim in his petition below, instead asserting counsel was ineffective for failing to seek severance and raise the multiplicity issue. We need not address claims raised for the first time on review. *Cf. State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980). But, in any event, Wackler has not demonstrated his indictment was multiplicitous. An indictment is multiplicitous when it charges a single offense in multiple counts. *State v. Brown*, 217 Ariz. 617, ¶ 7, 177 P.3d 878, 881 (App. 2008). Wackler's indictment unambiguously describes eight separate offenses. Nor has Wackler shown severance would have been "necessary to promote a fair determination" of his guilt or innocence, as required for severance under Rule 13.4(a).

¶6 Wackler further asserts the trial court coerced him into pleading guilty. He did not raise this claim below and, in any event, does not describe any improper coercion by the trial court. Instead, at a settlement conference, the court advised Wackler that the evidence against him was "pretty strong" and correctly informed him he would spend his life in prison if convicted as charged. *See Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) ("While confronting a defendant with the risk of more severe punishment clearly may have a 'discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable'—and permissible 'attribute of any legitimate system which tolerates

and encourages the negotiation of pleas.'"), *quoting Chaffin v. Stynchcombe*, 412 U.S. 17, 31 (1973) (alteration in *Bordenkircher*). Accordingly, we do not address this argument further. *Cf. Ramirez*, 126 Ariz. at 468, 616 P.2d at 928.

¶7 Wackler next argues the trial court erred in imposing lifetime probation, "amounting to a rejection of the plea." To the extent Wackler raised this claim below, it plainly does not warrant relief given that the plea agreement expressly called for lifetime probation to be imposed. Wackler further suggests that imposing probation resulted in improper multiple "double punishment" for the same conduct. But this claim necessarily fails because Wackler admitted to three separate offenses occurring at different times.

¶8 In several related arguments, Wackler complains the trial court improperly rejected his claim of ineffective assistance of counsel. We agree with Wackler that he is permitted to raise a claim of ineffective assistance of counsel; he can only raise such a claim, however, to the extent that counsel's deficiencies relate to the validity of his plea. *See State v. Quick*, 177 Ariz. 314, 316, 868 P.2d 327, 329 (App. 1993) (by entering guilty plea defendant waives all nonjurisdictional defects, including claim of ineffective assistance of counsel, except those that relate to validity of plea). Thus, we agree with the court that Wackler's claim warrants summary rejection.

¶9 The core of Wackler's claim on review seems to be that counsel failed to seek to present evidence to the grand jury and failed to challenge the indictment. But he has identified no evidence that should have been presented to the grand jury. And we have rejected his argument that the indictment was multiplicitous. Thus, he has not demonstrated that counsel fell below prevailing professional norms or that he was prejudiced thereby. *See State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006) (to establish colorable ineffective assistance claim, "defendant must show both that counsel's performance fell below objectively reasonable standards and that this deficiency prejudiced the defendant"); *see also Strickland v. Washington*, 466 U.S. 668, 687-88 (1984).

¶10 We grant review but deny relief.