IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

SHON DERAY GAULDIN,
Petitioner.

No. 2 CA-CR 2016-0086-PR
Filed April 28, 2016

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NOT FOR PUBLICATION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. CR2011146172001DT
The Honorable Bruce R. Cohen, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

William G. Montgomery, Maricopa County Attorney
By Karen Kemper, Deputy County Attorney, Phoenix
Counsel for Respondent

Shon Deray Gauldin, Tucson
In Propria Persona

MEMORANDUM DECISION

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Vásquez and Judge Miller concurred.

E C K E R S T R O M, Chief Judge:

¶1 Petitioner Shon Gauldin seeks review of the trial court's order denying his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. "We will not disturb a trial court's ruling on a petition for post-conviction relief absent a clear abuse of discretion." *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Gauldin has not sustained his burden of establishing such abuse here.

¶2 After a jury trial, Gauldin was convicted of possession of narcotic drugs. The trial court imposed an enhanced, presumptive, ten-year sentence. The conviction and sentence were affirmed on appeal. *State v. Gauldin*, No. 1 CA-CR 12-0500 (memorandum decision filed June 4, 2013).

¶3 Gauldin sought post-conviction relief, arguing in his petition that the trial court should have placed him on probation, that newly discovered evidence probably would have changed his verdict, and that he had received ineffective assistance of trial and appellate counsel. The trial court summarily denied relief.

¶4 On review, Gauldin again contends that his sentence was illegal and he should have been placed on probation and that he received ineffective assistance of appellate counsel in that counsel failed to raise his sentencing claim.[1] As the trial court correctly

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[1]We do not address the remainder of the claims Gauldin raised in his petition for post-conviction relief as he has abandoned them on review. Ariz. R. Crim. P. 32.9(c)(1) (petition for review shall contain "the reasons why the petition should be granted" and "specific references to the record"); *State v. Rodriguez*, 227 Ariz. 58,

determined, Gauldin's sentencing claim is precluded based on his failure to raise it on appeal. Contrary to Gauldin's assertions, claims of fundamental error are subject to preclusion. *See State v. Shrum*, 220 Ariz. 115, ¶¶ 6–7, 23, 203 P.3d 1175, 1177, 1180 (2009) (illegal sentence claim precluded); *Swoopes*, 216 Ariz. 390, ¶¶ 40–42, 166 P.3d at 958 (fundamental error not excepted from preclusion).

¶5 To establish a claim that his appellate counsel was ineffective in failing to raise the sentencing claim Gauldin was required to "show both that counsel's performance fell below objectively reasonable standards and that this deficiency prejudiced the defendant." *State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006); *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984). To show prejudice, a defendant must show that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

¶6 Pursuant to A.R.S. § 13-901.01(A), a defendant who "is convicted of personal possession or use of a controlled substance" is eligible for probation and the trial court is required to "suspend the imposition . . . of sentence and place the person on probation." Section 13-901.01(B), however, provides that "[a]ny person who has been convicted of or indicted for a violent crime . . . is not eligible for probation" under the provision of subsection (A). A violent crime is defined in § 13-901.03 as "any criminal act that results in death or *physical injury* or any criminal use of a *deadly weapon or dangerous instrument*." (Emphasis added.)

¶7 In this case, the state alleged, and the court found, Gauldin had been convicted of aggravated assault, "a Class 3 Felony." Gauldin was found guilty of the offense of aggravated assault "in violation of A.R.S. § 13-1204(A)(2),(B)." To commit aggravated assault under § 13-1204(A)(2), a defendant must commit assault "us[ing] a deadly weapon or dangerous instrument." To

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n.4, 251 P.3d 1045, 1048 n.4 (App. 2010) (declining to address argument not raised in petition for review).

commit aggravated assault under subsection (B), a defendant must impede the breathing of another by "applying pressure to the throat or neck or by obstructing the nose and mouth" as a domestic violence offense. *See* A.R.S. §§ 13-1204(B), 13-3601(A). In either case, the criminal act cannot be committed without physical injury or the use of a deadly weapon or dangerous instrument. *See* A.R.S. § 13-105(33) ("'Physical injury' means the impairment of physical condition."). Gauldin, therefore, was convicted of a violent offense that included either a physical injury or a deadly weapon or dangerous instrument,[2] as determined "based solely on the elements of the prior conviction." *State v. Joyner*, 215 Ariz. 134, ¶ 15, 158 P.3d 263, 269 (App. 2007); *cf. State v. Thompson*, 186 Ariz. 529, 532, 924 P.2d 1048, 1051 (App. 1996) ("State may qualify an out-of-state conviction as an enhancing prior felony by establishing that the defendant was convicted under a particular subsection of a foreign statute"). We therefore agree with the trial court that Gauldin failed to state a colorable claim of ineffective assistance of counsel.

¶8 Although we grant the petition for review, we deny relief.

[2] On review, Gauldin also contends that because his earlier offense was designated non-dangerous for sentencing enhancement purposes as part of a plea agreement it cannot disqualify him for probation under § 13-902.03. We rejected this argument in *Montero v. Foreman*, 204 Ariz. 378, ¶¶ 12-13, 64 P.3d 206, 209-210 (App. 2003).