

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

ESTERLIN APPOLON,
Petitioner.

No. 2 CA-CR 2019-0222-PR
Filed March 6, 2020

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NOT FOR PUBLICATION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. 31.19(e).

Petition for Review from the Superior Court in Pima County
No. CR20151915001
The Honorable James E. Marner, Judge

REVIEW GRANTED; RELIEF DENIED

Esterlin Appolon, Safford
In Propria Persona

MEMORANDUM DECISION

Presiding Judge Staring authored the decision of the Court, in which Chief Judge Vásquez and Judge Brearcliffe concurred.

STARING, Presiding Judge:

¶1 Petitioner Esterlin Appolon seeks review of the trial court’s ruling summarily denying his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that ruling unless the court abused its discretion. *See State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). We find no such abuse here.

¶2 After a jury trial, Appolon was convicted of two counts of aggravated assault.¹ The convictions were based on an incident in which Appolon shot a friend who owed him money. Before sentencing, Appolon’s counsel filed a motion to withdraw because he believed that Appolon had a “colorable claim of ineffective assistance of counsel” based on his failure to watch body camera footage from one of the arresting officers. The trial court granted the motion, as well as Appolon’s request to proceed pro se, but it appointed advisory counsel for Appolon. The court sentenced Appolon to concurrent prison terms of 11.25 years.

¶3 Appolon filed a timely notice of appeal, but this court later dismissed that appeal pursuant to Appolon’s request. Appolon initiated this post-conviction relief proceeding, the trial court appointed counsel, and counsel filed a Rule 32 petition. However, upon Appolon’s request, the petition was struck, and Appolon was given leave to file a pro se petition. His subsequently filed pro se petition raised the following claims: the justice court lacked jurisdiction over the “initial appearance or complaint”; the superior court lacked jurisdiction “to render judgment or impose sentence”; and there was “insufficient evidence to justify a rational trier of facts to find guilt beyond a reasonable doubt.”

¶4 The trial court concluded that Appolon’s “jurisdictional argument regarding the initial appearance hearing” at the justice court was

¹A mistrial was declared during the first two trials after the juries were unable to reach verdicts.

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“not available” because Rule 32.1(b) “applies only to a court’s ability to render judgment or to impose a sentence.” It additionally noted that the argument was waived pursuant to Rule 32.2(a)(3) “if the basis of the jurisdictional attack” was “a lack of probable cause for the arrest that preceded the initial appearance hearing” because such a challenge could have been brought before trial. The court also rejected Appolon’s assertion that the superior court lacked jurisdiction, which it understood to be based on his lack of counsel at sentencing, reasoning that the record showed Appolon voluntarily represented himself and also had the assistance of advisory counsel. As to Appolon’s insufficient-evidence argument, the court reviewed the record and determined that Appolon had not met his burden of proof under Rule 32.1(h). The court therefore concluded Appolon “failed to present a colorable claim to warrant an evidentiary hearing.” Appolon filed a “Motion for a Hearing to Have Conviction Set Aside and/or Vacate[d] and/or Petition Granted,” which the court treated as a motion for rehearing pursuant to Rule 32.9(a) and denied. This petition for review followed.

¶5 Grounds for relief under Rule 32.1 include the following:²

(a) the defendant’s conviction was obtained, or the sentence was imposed, in violation of the United States or Arizona constitutions;

(b) the court did not have subject matter jurisdiction to render a judgment or to impose a sentence on the defendant;

....

(h) the defendant demonstrates by clear and convincing evidence that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would find the defendant guilty of the offense beyond a reasonable doubt.

²Rule 32 was amended effective January 1, 2020. Ariz. Sup. Ct. Order R-19-0012 (Aug. 28, 2019). Because application of the new rule is neither infeasible nor works an injustice here, we apply it. *See id.*

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A defendant is, however, precluded from relief under Rule 32.1(a) based on any ground “waived at trial or on appeal . . . except when the claim raises a violation of a constitutional right that can only be waived knowingly, voluntarily, and personally by the defendant.” Ariz. R. Crim. P. 32.2(a)(3). “Under Rule 32, a defendant is entitled to an evidentiary hearing if his petition for post-conviction relief presents a colorable claim, that is, ‘a claim which if his allegations are true might have changed the outcome.’” *State v. D’Ambrosio*, 156 Ariz. 71, 73 (1988) (quoting *State v. Schrock*, 149 Ariz. 433, 441 (1986)).

¶6 On review, Appolon essentially reasserts his claims and maintains he “made a sufficient claim . . . to warrant . . . a hearing.” He also argues the trial court “misinterpret[ed his] jurisdictional challenge” because he raised issues with both subject-matter and personal jurisdiction. Relying on Rule 16.1(b), Ariz. R. Crim. P., he further contends that “lack of jurisdiction may be raised at any time.” But that portion of Rule 16.1(b) applies only to subject-matter jurisdiction; personal jurisdiction may be waived if not properly raised before trial. *State v. Marks*, 186 Ariz. 139, 142 (App. 1996); *see also* Ariz. R. Crim. P. 32.1(a), 32.2(a)(3).

¶7 Turning first to Appolon’s argument concerning the justice court’s jurisdiction, the issue is precluded. *See* Ariz. R. Crim. P. 32.1(a), 32.2(a)(3). Despite Appolon’s assertion that his claim is one of both personal and subject-matter jurisdiction, we agree with the trial court that it seems to be based on a lack of probable cause for his arrest, which constitutes an issue of personal jurisdiction.³ *See State ex rel. Baumert v. Mun. Court of City of Phoenix*, 124 Ariz. 543, 546 (App. 1979) (when defendant asserted deficiencies in probable-cause determination, he alleged defect in issuance of complaint, which goes to jurisdiction over person not

³To the extent Appolon’s challenge is directed at the sufficiency of the indictment, it is also precluded pursuant to Rule 32.2(a)(3). Challenges to an indictment must be raised before trial. *See* Ariz. R. Crim. P. 13.5(d) (defects in charging document must be raised in accordance with pretrial motion procedure under Rule 16); Ariz. R. Crim. P. 16.1(a) (Rule 16 governs pretrial motions); *State v. Fullem*, 185 Ariz. 134, 136 (App. 1995) (finding defendant waived challenge to indictment by failing to object before trial).

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subject matter). It therefore should have been raised during the trial proceedings but was not.⁴ *See id.* at 545-46; *see also Marks*, 186 Ariz. at 142.

¶8 Turning next to Appolon's claim that the superior court lacked jurisdiction, it appears to be based on his lack of counsel at sentencing. He claims the court obtained his signature on the waiver of counsel form by "fraud, undue influence, duress, misrep[re]sentation and overweening bargaining power." First, we fail to see how this claim is one of jurisdiction; instead, Appolon's argument seems to be that his sentences were imposed in violation of the state and federal constitutions under Rule 32.1(a). *Cf. State v. McLemore*, 230 Ariz. 571, ¶¶ 21-22 (App. 2012) (describing waiver of right to counsel as constitutional issue). Second, even if jurisdictional, the issue seems to be one of personal jurisdiction. *See State v. Payne*, 223 Ariz. 555, ¶ 6 (App. 2009) (subject-matter jurisdiction is power to hear and determine cases of general class to which particular proceedings belong).

¶9 Even assuming the claim were one of subject-matter jurisdiction under Rule 32.1(b), the record belies Appolon's argument concerning his waiver of counsel. Before granting Appolon's request to proceed pro se, the superior court engaged in a lengthy colloquy with Appolon to confirm that he was knowingly, intelligently, and voluntarily waiving the right to counsel. Despite the court's warnings against self-representation, Appolon confirmed multiple times during two different hearings that he wished to "give up [his] right to counsel and represent [himself]." *Cf. State v. Blazak*, 105 Ariz. 570, 571 (1970) (after court used "every means of persuasion to deter defendant" from self-representation and confirmed defendant's request was intelligently and competently made, it had no alternative but to grant request). The court therefore did not err in finding this claim not colorable.

¶10 Finally, as to Appolon's claim that the state presented "[in]sufficient evidence to justify a rational trier of facts to find guilt beyond a reasonable doubt," he asserts "[n]o gun, DNA, or other incriminating evidence such as bloody clothing was found or presented at trial." But a general challenge to the sufficiency of the evidence does not, without more, constitute a viable claim under Rule 32.1(h). Appolon points to evidence that does nothing more than contradict other evidence presented at trial,

⁴Although Appolon filed a pretrial motion to dismiss arguing that "probable cause didn't exist or warrant the arrest of [him]," he did not assert that the justice court lacked jurisdiction.

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including the victim's identification of him as the shooter, apparently challenging the weight thereof. He thus "does not conclusively demonstrate his innocence." *State v. Denz*, 232 Ariz. 441, ¶ 22 (App. 2013). The trial court therefore did not err in finding this claim not colorable.

¶11 Accordingly, although we grant the petition for review, we deny relief.