

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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THE STATE OF ARIZONA,  
*Respondent,*

*v.*

JAMES NORMAN ZIEGENFUSS,  
*Petitioner.*

No. 2 CA-CR 2020-0206-PR  
Filed December 10, 2020

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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NOT FOR PUBLICATION  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).*

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Petition for Review from the Superior Court in Maricopa County  
No. CR2015136002001DT  
The Honorable Virginia L. Richter, Judge Pro Tempore

**REVIEW GRANTED; RELIEF DENIED**

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COUNSEL

Allister Adel, Maricopa County Attorney  
By Lisa Marie Martin, Deputy County Attorney, Phoenix  
*Counsel for Respondent*

James Norman Ziegenfuss, Eloy  
*In Propria Persona*

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MEMORANDUM DECISION

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

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S T A R I N G, Presiding Judge:

¶1 James Ziegenfuss seeks review of the trial court’s ruling dismissing his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P.<sup>1</sup> We will not disturb that ruling unless the court abused its discretion. *See State v. Kolmann*, 239 Ariz. 157, ¶ 8 (2016). Ziegenfuss has not met his burden of establishing such abuse here.

¶2 After a jury trial in which Ziegenfuss represented himself, he was convicted of second-degree burglary.<sup>2</sup> He was also convicted after a bench trial of false reporting to a law enforcement agency. The trial court sentenced him to concurrent terms, the longer of which is ten years imprisonment.<sup>3</sup> On appeal, Ziegenfuss initially sought to represent

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<sup>1</sup> Our supreme court amended the post-conviction relief rules, effective January 1, 2020. Ariz. Sup. Ct. Order R-19-0012 (Aug. 29, 2019). “The amendments apply to all cases pending on the effective date unless a court determines that ‘applying the rule or amendment would be infeasible or work an injustice.’” *State v. Mendoza*, 249 Ariz. 180, n.1 (App. 2020) (quoting Ariz. Sup. Ct. Order R-19-0012). “Because it is neither infeasible nor works an injustice here, we cite to and apply the current version of the rules.” *Id.*

<sup>2</sup>Ziegenfuss’s first jury trial ended when the jury could not reach a verdict, and the trial court declared a mistrial. Although he was represented by counsel during the first trial, Ziegenfuss represented himself during the second trial with his original attorney serving as advisory counsel.

<sup>3</sup>Contrary to Ziegenfuss’s assertion, he was not sentenced to time served for false reporting on September 30, 2016. On that date, the trial court issued its under-advisement ruling finding Ziegenfuss guilty of that offense. The court specifically noted that sentencing was pending based on

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himself, but he withdrew that request after this court remanded the case for the trial court to determine whether his waiver of counsel had been made knowingly, intelligently, and voluntarily. Appointed counsel subsequently filed a brief, pursuant to *Anders v. California*, 386 U.S. 738 (1967), avowing that she could find no meritorious issues to raise on appeal. Ziegenfuss was given leave to file a supplemental brief, but he did not do so. After our own independent review, this court affirmed his convictions and sentences. *State v. Ziegenfuss*, No. 1 CA-CR 17-0181 (Ariz. App. June 12, 2018) (mem. decision).

¶3 In February 2018, while his appeal was pending, Ziegenfuss filed a notice of post-conviction relief, requesting to proceed pro se. The trial court initially granted that request but later dismissed the proceeding with leave to refile within thirty days after the issuance of the mandate in his appeal. Ziegenfuss refiled his notice in July 2018, again requesting to proceed pro se, and the court granted that request. He filed petitions for post-conviction relief in October and November 2018, but the court struck both because Ziegenfuss had failed to comply with the procedural requirements of Rule 32.

¶4 In January 2019, Ziegenfuss filed the instant petition.<sup>4</sup> He raised several issues related to the state's evidence at trial, including that it was obtained by an unlawful traffic stop, search, seizure, arrest, and identification and through a coerced confession. He also argued that his constitutional rights to due process of law, to equal protection, and against self-incrimination had been violated and that his "constitutional right to

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the outcome of the jury trial on the burglary charge. The court sentenced Ziegenfuss on both offenses on March 17, 2017.

<sup>4</sup> While his petition for post-conviction relief was pending, Ziegenfuss filed numerous motions, objections, and letters with the trial court, including motions to vacate his convictions and for change of judge for cause. He also sought review by this court at least six times, but we dismissed those proceedings. *State v. Ziegenfuss*, No. 1 CA-CR 19-0535 PRPC (Ariz. App. Oct. 10, 2019) (order); *State v. Ziegenfuss*, No. 1 CA-CR 19-0499 PRPC (Ariz. App. Sept. 19, 2019) (order); *State v. Ziegenfuss*, No. 1 CA-CR 19-0395 PRPC (Ariz. App. July 18, 2019) (order); *State v. Ziegenfuss*, No. 1 CA-CR 19-0386 PRPC (Ariz. App. July 17, 2019) (order); *State v. Ziegenfuss*, No. 1 CA-CR 19-0293 PRPC (Ariz. App. May 31, 2019) (order); *State v. Ziegenfuss*, No. 1 CA-CR 19-0275 PRPC (Ariz. App. May 28, 2019) (order).

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representation by a competent lawyer at every stage of the proceeding[s],” including at trial and on appeal, had been denied. The latter appeared, at least in part, to be a claim of ineffective assistance of counsel. Lastly, he challenged the trial court’s jurisdiction to convict and sentence him.

¶5 The trial court summarily dismissed Ziegenfuss’s petition. It first denied Ziegenfuss’s request to strike the state’s response as untimely, noting that he had shown no prejudice. The court next concluded that all of Ziegenfuss’s claims were precluded, observing that none arose under Rule 32.1(d) through (h). It explained:

All of his claims regarding the conduct of his trials are precluded by the fact that his conviction and sentences were upheld on appeal. His claims of ineffective issues of counsel at trial and upon appeal are precluded by the fact that he waived counsel at trial and that he was given an opportunity to file a supplemental brief, after appellate counsel filed [a]n *Anders* Brief, but failed to do so.

The court additionally noted that Ziegenfuss’s petition was “comprised of sweeping allegations of impropriety” by the state’s witnesses, the attorneys, and the court “that are unsupported by specific facts in the record or extrinsic evidence.” And the court observed that none of his “claims of error are supported by citations to relevant portions of the record” and that “[m]ere conclusory allegations do not raise a colorable claim.”

¶6 In his petition for review – portions of which are illegible and difficult to follow – Ziegenfuss contends that he raised claims pursuant Rule 32.1(a) through (h). Specifically, he maintains that his “‘autonomy right’ to self-representation,” as well as his constitutional rights to due process of law and equal protection, were violated. He further asserts the trial court erred in denying a continuance before the second jury trial, in denying his request for an instruction pursuant to *State v. Willits*, 96 Ariz. 184 (1964), and in not requiring the state to produce evidence for independent scientific testing.

¶7 As we understand them, Ziegenfuss’s claims consist of purported constitutional violations and trial error, all of which fall under

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Rule 32.1(a).<sup>5</sup> Because these claims were waived on appeal, they are precluded in this Rule 32 proceeding. *See* Ariz. R. Crim. P. 32.2(a)(3). The trial court therefore did not err in summarily dismissing these claims. *See Kolmann*, 239 Ariz. 157, ¶ 8.

¶8 To the extent Ziegenfuss reasserts a claim of ineffective assistance of trial or appellate counsel, it was properly raised in this proceeding, despite arising under Rule 32.1(a). *See State v. Spreitz*, 202 Ariz. 1, ¶ 9 (2002); *State v. Petty*, 225 Ariz. 369, ¶ 11 (App. 2010). “To state a colorable claim of ineffective assistance of counsel, a defendant must 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 (2006) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). “Failure to satisfy either prong of the *Strickland* test is fatal to an ineffective assistance of counsel claim.” *Id.*

¶9 As the trial court pointed out, Ziegenfuss represented himself at trial and was permitted to file a pro se brief on appeal. He therefore had the opportunity to correct any perceived shortcomings of counsel. And any errors he made while representing himself cannot be attributed to his counsel. Moreover, his claims consist largely of unsupported, conclusory allegations. *See State v. Donald*, 198 Ariz. 406, ¶ 17 (App. 2000) (to prevail on claim of ineffective assistance, defendant must present more than conclusory assertion); *State v. Rosario*, 195 Ariz. 264, ¶ 23 (App. 1999) (“The burden is on the petitioner and the showing must be that of a provable reality, not mere speculation.”).

¶10 In any event, the thrust of Ziegenfuss’s argument appears to be that appellate counsel was deficient because she “usurp[ed] control” of his appeal and “disobeyed [his] direct instructions not to file any *Anders* brief.” But appointed counsel performed her required review of the case

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<sup>5</sup>Ziegenfuss raised a jurisdictional claim below, but his argument was not clear. To the extent it was an issue of subject matter jurisdiction under Rule 32.1(b), such claims are no longer subject to preclusion based on Rule 32.2(a)(3). *See* Ariz. R. Crim. P. 32.2(b); *see also* Ariz. Sup. Ct. Order R-19-0012. On review, he seems to suggest the trial court lacked jurisdiction because a court commissioner presided over his trial. But he overlooks the fact that a commissioner may be appointed as a judge pro tempore with the “judicial powers of a regular elected judge.” Ariz. Const. art. VI, § 31(B). The court had subject matter jurisdiction over this case. *See* Ariz. Const. art. VI, § 14(4); A.R.S. §§ 12-123(A), 13-707(A)(1), 13-1507(B), 13-2907.01(B).

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and submitted a brief to this court indicating that she could not find an arguable question of law. *See* Ariz. R. Crim. P. 32.6(a) (“In a Rule 32 proceeding, counsel must investigate the defendant’s case for any colorable claims.”); Ariz. R. Crim. P. 32.6(c) (“If counsel determines there are no colorable claims, counsel must file a notice advising the court of this determination, and promptly provide a copy of the notice to the defendant.”). Ziegenfuss was given the opportunity to file a supplemental brief, but he did not do so. *See* Ariz. R. Crim. P. 32.6(d) (upon receipt of counsel’s notice, defendant may file own petition). This procedure was proper. *See State v. Clark*, 196 Ariz. 530, ¶ 30 (App. 1999) (*Anders* procedure “permits counsel to perform ethically, while simultaneously ensuring that an indigent defendant’s constitutional rights to due process, equal protection, and effective assistance of counsel are protected”). The trial court thus did not err in summarily dismissing this claim. *See Kolmann*, 239 Ariz. 157, ¶ 8.

¶11           Accordingly, we grant review but deny relief.