

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

JAMES T. MONTGOMERY,
Petitioner/Appellant,

v.

DAVID SHINN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS,
Respondent/Appellee.

No. 2 CA-HC 2020-0008
Filed January 22, 2021

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NOT FOR PUBLICATION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. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pinal County
No. S1100CV202001109
The Honorable Barbara A. Hazel, Judge Pro Tempore

AFFIRMED

James T. Montgomery, Florence
In Propria Persona

MONTGOMERY v. SHINN
Decision of the Court

MEMORANDUM DECISION

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

BREARCLIFFE, Judge:

¶1 Appellant James Montgomery challenges the trial court’s order denying his petition for a writ of habeas corpus. We affirm.

¶2 Montgomery, an inmate with the Arizona Department of Corrections, filed a petition for a writ of habeas corpus in August 2020. He argued that he was “illegally confined and restrained of his liberty” because his indictment had stated he was “charged with being ‘in violation of A.R.S. § 13-604.01,’” which had been “recognized as unconstitutional” and “repealed in 2008.” Montgomery reasoned that “if a statute under which [he] was indicted [is] repugnant to the constitution,” the proceeding against him is “void for want of jurisdiction” and “a nullity.” In an August 6, 2020 order, the trial court denied the petition, explaining that it had found “no legal basis . . . to grant the requested relief.” This appeal followed.¹

¶3 On appeal, Montgomery reasserts his claim. He contends that, because his indictment referred to § 13-604.01, an “unconstitutional” statute, the trial court exceeded its jurisdiction and his confinement is illegal. He also points out that, in its order, the court “did not dispute the fact that . . . § 13-604.01 was recognized as unconstitutional and repealed.”

¹ Montgomery’s notice of appeal was not file stamped until September 22, 2020. *See* Ariz. R. Civ. App. P. 9(a) (notice of appeal must be filed no later than thirty days after judgment). However, he attempted to file it earlier – in a timely fashion – but the clerk of the court returned it to him for failing to pay a filing fee. *See State v. Goracke*, 210 Ariz. 20, ¶ 5 (App. 2005) (under prisoner mailbox rule, pro se prisoner deemed to have filed notice of appeal when properly addressed and delivered to proper prison authorities for mailing); *see also Tahtinen v. Superior Court*, 130 Ariz. 513, 515 (1981) (“Filing fees must be waived when an indigent prisoner seeks to file . . . an appeal from . . . a habeas corpus petition concerning the reason for incarceration.”).

MONTGOMERY v. SHINN

Decision of the Court

¶4 Generally, “[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 (1964). Even assuming Montgomery is correct that his indictment was flawed, however, a deficient charging instrument does not deprive a court of subject-matter jurisdiction. *See State v. Maldonado*, 223 Ariz. 309, ¶ 13 (2010). The trial court therefore did not err in concluding Montgomery was not entitled to relief. *See State v. Cowles*, 207 Ariz. 8, ¶ 3 (App. 2004) (appellate court reviews denial of petition for writ of habeas corpus for abuse of discretion).

¶5 Accordingly, we affirm the order denying Montgomery’s petition for writ of habeas corpus.