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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. PETER WILLIAM ROSS, III, Petitioner.	2 CA-CR 2010-0205-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause Nos. CR32080, CR33197, CR41642

Honorable Howard Hantman, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines
Tucson
Attorneys for Respondent

Peter William Ross, III
Buckeye
In Propria Persona

K E L L Y, Judge.

¶1 Peter Ross petitions this court for review of the trial court's May 13, 2010, denial of his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb this ruling unless the court clearly has abused its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 In 1991, Ross was convicted of endangerment and attempted flight from a law enforcement vehicle in Pima County cause numbers CR32080 and CR33197. The trial court placed him on concurrent, three-year terms of probation. In June 1992, the court revoked Ross's probation and sentenced him to concurrent, presumptive, 1.5-year prison terms for each offense. We affirmed the revocation and sentences on appeal, and denied relief on his petition for review of the trial court's denial of his petition for post-conviction relief. *State v. Ross*, No. 2 CA-CR 92-0545, 92-0546, 92-0980-PR (consolidated) (memorandum decision filed Aug. 12, 1993).

¶3 In 1994, in Pima County cause number CR41642, Ross was convicted after a jury trial of aggravated assault with a deadly weapon and aggravated assault causing serious physical injury in connection with a June 1992 stabbing that had occurred just before his probation was revoked in CR32080 and CR33917. The trial court sentenced him to concurrent, presumptive life sentences without the possibility of parole for twenty-five years. Again, we affirmed his convictions and sentences on appeal and denied relief on his petition for review of the trial court's denial of his petition for post-conviction relief. *State v. Ross*, No. 2 CA-CR 94-0077, 96-0597-PR, 96-0598-PR (memorandum decision filed Jul. 23, 1998).

¶4 In January 2010, Ross filed a petition for post-conviction relief in CR32080, CR33197, and CR41642, arguing his sentence in CR41462 violated *Apprendi v. New Jersey*, 530 U.S. 466 (2000), because the state did not prove to the jury beyond a reasonable doubt that he had committed those offenses while on probation. Ross additionally contended his guilty plea in CR32080 and CR33197 was involuntary

because he was not competent and because he was induced to enter the plea by the state's offer to withdraw the allegation he had committed those offenses while on parole—an allegation he asserts he later discovered to be false. In a related argument, Ross asserted that, because his plea in that case was improperly induced, his convictions—and subsequent probation—for those crimes could not be used to enhance his sentence in CR41642 under former A.R.S. § 13-604.02. *See* 1987 Ariz. Sess. Laws, ch. 307, § 5. Finally, he asserted his trial counsel in each case had been ineffective for failing to raise these issues, and that his appellate counsel in CR41642 had been ineffective for failing "to argue the application of *Apprendi*."

¶5 The trial court denied Ross's petition, concluding that his argument based on *Apprendi* was untimely, that Ross had "offer[ed] no 'meritorious reason' for not filing his petition in a timely manner," and that, in any event, the rule announced in *Apprendi* did not apply because Ross had admitted he had been on probation. The court concluded Ross's additional arguments were precluded because Ross "could have raised these issues on appeal or in a prior post-conviction petition."

¶6 On review, Ross does not address the trial court's finding that his claim based on *Apprendi* was untimely and that Ross had not adequately explained "why the claim was not stated in the previous petition or in a timely matter." Ariz. R. Crim. P. 32.2(b); *see also* Ariz. R. Crim. P. 32.4(a). He therefore has not demonstrated the court abused its discretion in rejecting this claim. And, in any event, *Apprendi* does not apply because Ross's convictions were final before *Apprendi* was decided on June 26, 2000. *See State v. Sepulveda*, 201 Ariz. 158, ¶ 4, 32 P.3d 1085, 1086 (App. 2001) ("*Apprendi*

does not apply retroactively to persons . . . whose convictions have become final."). "A conviction becomes final upon the issuance of the mandate affirming the conviction on direct appeal and the expiration of the time for seeking certiorari in the United States Supreme Court." *Id.* n.2. The Arizona Supreme Court denied Ross's petition for review of our decision, and our mandate subsequently issued on April 21, 1999. His time for seeking certiorari from the United States Supreme Court expired ninety days later. U.S. Sup. Ct. R. 13(1). Consequently, any assertion appellate counsel was ineffective in failing to raise that claim is not only untimely, it fails because Ross cannot demonstrate prejudice. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984) (to establish claim of ineffective assistance of counsel warranting relief, defendant must show counsel's performance was deficient and prejudicial).

¶7 The trial court determined Ross's remaining claims were precluded because he could have raised them either on appeal or in a previous petition for post-conviction relief. *See* Ariz. R. Crim. P. 32.2(a)(1), (3). Ross does not argue the court erred in finding precluded his claims of ineffective assistance of trial counsel and his claim of an involuntary plea agreement in CR32080 and CR33197.

¶8 He does assert, however, that his claim regarding the 1991 plea agreement should not be precluded because "no reasonable fact-finder would have found [him] guilty of being on parole." Ross apparently refers to Rule 32.1(h), a ground for relief excepted from preclusion. *See* Ariz. R. Crim. P. 32.2(b). But Ross did not raise this argument below, asserting instead that because the plea was involuntary, the convictions stemming from the plea could not be used to enhance his sentences in CR41642. This

court will not consider for the first time on review issues that have neither been presented to nor ruled on by the trial court. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980); *see also* Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review shall contain "[t]he issues which were decided by the trial court . . . which the defendant wishes to present" for review).

¶9 For the reasons stated, although we grant Ross's petition for review, we deny relief.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge