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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. LYNDALL DWAIN THOMPSON, Appellant.	2 CA-CR 2008-0236 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20072584

Honorable Howard Fell, Judge Pro Tempore

AFFIRMED

Barton & Storts, P.C.
By Brick P. Storts, III
Tucson
Attorneys for Appellant

E S P I N O S A, Presiding Judge.

¶1 Appellant Lyndall Thompson was charged by indictment with first-degree murder for having killed his brother. In 2008, a jury found Thompson not guilty of the charged offense but guilty of the lesser-included offense of second-degree murder, a class

two felony. The trial court sentenced Thompson to the presumptive prison term of sixteen years, with credit for 383 days served. Counsel has filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999), asserting he has thoroughly reviewed the record and found no arguable issue for appeal. He asks this court to search the record for fundamental error. Thompson has filed two supplemental briefs raising various issues, none of which requires reversal.

¶2 Most of the issues Thompson raises on appeal arise from what he has characterized as the "irreconcilable conflict and friction" he had with his attorney, public defender Paul Skitzki. Just before the four-day jury trial began, Skitzki informed the trial court Thompson had "made mention about his thought of proceeding and representing himself." Thompson explained to the court that he was concerned the detectives who had questioned him on the night of the killing had deceived him about his brother's condition and had misrepresented to him that a gun found at the scene of the killing had been fired, when it had not. However, after the court assured Thompson that Skitzki would be able to cross-examine the detectives about these issues at trial, Thompson agreed that Skitzki could represent him. In fact, Thompson told the court: "Just to clarify, I do feel I have a great lawyer." After the trial had ended, but before Thompson was sentenced, Skitzki requested leave to withdraw based on "irreconcilable" problems in his relationship with Thompson, a request Thompson apparently supported. The court ultimately permitted Skitzki to withdraw and appointed a different public defender to represent Thompson at sentencing.

¶3 To the extent we understand the claims Thompson raises on appeal, they can be summarized as follows: (1) the trial court should have appointed another attorney when Thompson requested new counsel before trial; (2) Skitzki's representation, which was deficient, prevented Thompson from presenting mitigating evidence to the jury; (3) the state engaged in prosecutorial misconduct in presenting facts at trial that were prejudicial to Thompson; (4) "officers of the honorable court" did not "insure or represent a profound attitude of fairness" or due process; and (5) Thompson was entitled to a preliminary hearing.

¶4 Initially, we note that most of the arguments Thompson has attempted to assert in his first supplemental brief appear to have been copied from the pleadings of other defendants. As such, they are generally unclear and unsupported by the record on appeal. For example, Thompson refers to the actions of public defender Garrett Simpson and pleadings Simpson filed on his behalf; however, no such pleadings or any reference to Simpson appear in the record before us. In addition, relying on *State v. Moody*, 192 Ariz. 505, 968 P.2d 578 (1998),[1] Thompson argues the trial court should have appointed new counsel to represent him. But he relies on irrelevant events and documents from other cases. For example, he refers to counsel's failure to investigate the value of "stolen items," a nonissue in this matter; Judge Galati's ruling, a judge who had nothing to do with this case; and to a 2004 hearing on "Appellant's motion for alternate counsel" that occurred years

[1]Thompson refers to our supreme court's earlier decision in *Moody*, rather than its more recent ruling, *State v. Moody*, 208 Ariz. 424, 94 P.3d 1119 (2004).

before Thompson committed the underlying offense. He also asserts arguments on behalf of a defendant named "Creamer," rather than himself. These claims do not comply with the requirements of Rule 31.13(c), Ariz. R. Crim. P., and we do not address them. *See State v. Bocharski*, 218 Ariz. 476, n.9, 189 P.3d 403, 413 n.9 (2008) (appellate court need not consider argument not in compliance with Rule 31.13(c)).

¶5 To the extent Thompson intended to challenge Skitzki's conduct at trial, his arguments constitute claims of ineffective assistance of counsel, which we cannot consider on appeal. Our supreme court has clearly held that "ineffective assistance of counsel claims are to be brought in Rule 32[, Ariz. R. Crim. P.,] proceedings. Any such claims improvidently raised in a direct appeal . . . will not be addressed by appellate courts regardless of merit." *State v. Spreitz*, 202 Ariz. 1, ¶ 9, 39 P.3d 525, 527 (2002); *see also State ex rel. Thomas v. Rayes*, 214 Ariz. 411, ¶ 20, 153 P.3d 1040, 1044 (2007) ("We therefore hold, consistent with *Spreitz*, that a defendant may bring ineffective assistance of counsel claims *only* in a Rule 32 post-conviction proceeding—not before trial, at trial, or on direct review."). In addition, Thompson refers to "this" court's memorandum decision in the context of his claims regarding Skitzki's conduct. However, because the record on appeal does not contain any such decision, nor has Thompson directed us to such a document, as he is required to do, we reject his argument. *See* Ariz. R. Crim. P. 31.13(c)(vi) (argument in appellate brief shall contain "citations to . . . parts of the record relied on").

¶6 Finally, we reject Thompson's argument that his due process rights were violated because he was charged by indictment following a grand jury proceeding rather than by information following a preliminary hearing. Thompson contends counsel and "officer[s] of the court[]" failed to inform him of his right to a preliminary hearing, a right he claims he did not waive. To the extent Thompson is claiming Skitzki was ineffective for having failed to inform him about the preliminary hearing process, as previously noted, Thompson may not raise that claim on appeal. *See Spreitz*, 202 Ariz. 1, ¶ 9, 39 P.3d at 527. Even assuming Thompson did not intend to present this claim as one of ineffective assistance of counsel, we nonetheless reject it. In Arizona, a defendant may be charged by indictment, issued by a grand jury upon its finding that probable cause exists to believe the defendant committed the alleged offense, or by information, filed after a finding of probable cause is made by the court. Ariz. Const. art. II, § 30; *see also* Ariz. R. Crim. P. 5.1, 13.1(c). Although a defendant has certain rights at a preliminary hearing that a defendant charged by indictment does not have, including the right to counsel, the right to challenge the state's evidence, and the right to present evidence, a defendant's equal protection rights are not violated by having been charged by indictment. *See State v. Bojorquez*, 111 Ariz. 549, 553, 535 P.2d 6, 10 (1975). The use of either procedure satisfies the requirements of due process. *See State v. Neese*, 126 Ariz. 499, 502-03, 616 P.2d 959, 962-63 (App. 1980) (purpose of both preliminary hearing and grand jury proceeding is to determine whether there is probable cause to believe the individual committed an offense).

¶7 Finally, Thompson has requested that we direct advisory counsel to submit a brief on the issues he has raised in his supplemental briefs. But counsel already stated in his brief filed pursuant to *Anders*, that he had found no arguably meritorious issues to raise on appeal. *Cf. State v. Herrera*, 183 Ariz. 642, 647, 905 P.2d 1377, 1382 (App. 1995) (appellate counsel determines what issues to raise on appeal). Pursuant to our obligation under *Anders*, we have searched the record for fundamental, reversible error and have found none. We affirm the conviction and sentence imposed.

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PHILIP G. ESPINOSA, Presiding Judge

CONCURRING:

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JOSEPH W. HOWARD, Chief Judge

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PETER J. ECKERSTROM, Judge