

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Respondent*,

v.

DONNELL WAYNE, *Petitioner*.

No. 1 CA-CR 15-0088 PRPC
FILED 4-6-2017

Petition for Review from the Superior Court in Maricopa County
No. CR2012-134986-001DT
The Honorable J. Justin McGuire, Judge *Pro Tempore*

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Maricopa County Attorney's Office, Phoenix
By Diane Meloche
Counsel for Respondent

Donnell Wayne, Tucson
Petitioner

MEMORANDUM DECISION

Presiding Judge Peter B. Swann delivered the decision of the court, in which
Judge Kent E. Cattani and Judge Donn Kessler joined.

STATE v. WAYNE
Decision of the Court

S W A N N, Judge:

¶1 Petitioner Donnell Wayne petitions this court for review from the summary dismissal of his petition for post-conviction relief. We grant review but deny relief.

¶2 Wayne pled guilty to aggravated assault, and the superior court placed him on probation. When the court later found that Wayne had violated the terms of his probation for a second time, the court revoked probation and sentenced him to a presumptive term of 3.5 years of imprisonment.

¶3 Wayne contends that the presumptive sentence is too harsh because the mitigating circumstances outweighed the aggravating circumstances. The court imposed the presumptive sentence because it found that “the aggravators and mitigators balance out.” The balancing of sentencing factors is left to the court’s discretion. *State v. Harvey*, 193 Ariz. 472, 477, ¶ 24 (App. 1998). We also reject Wayne’s contention that the sentence violated double jeopardy. The revocation of probation and imposition of a prison sentence does not violate double jeopardy. *United States v. DiFrancesco*, 449 U.S. 117, 137 (1980); *State v. Fuentes*, 26 Ariz. App. 444, 449–50 (1976).

¶4 Wayne further contends that he did not knowingly violate the terms of his probation because of purported confusion about whether he could or could not have contact with the victim. The record, however, demonstrates no grounds for confusion. At the August 16, 2013, disposition hearing for Wayne’s first probation violation, the superior court reminded Wayne that under Term 19 of his probation, he could have no contact with the victim absent written approval from the probation department. And at the September 12, 2013, disposition hearing for Wayne’s second probation violation, Wayne admitted that he violated Term 19 when he had unapproved contact with the victim between August 16, 2013, and August 29, 2013.

¶5 Wayne next contends that he was denied the right to appear in “veterans court.”¹ Wayne has failed to present a colorable claim for relief because he does not explain how he would be eligible to appear in a veterans court, what sort of benefit or relief appearing in a veterans court

¹ The presiding judge of the superior court in each county may establish a “veterans court” to adjudicate cases filed in justice court or a municipal court in the county. A.R.S. § 22-601(A).

STATE v. WAYNE
Decision of the Court

could have afforded him, or how the failure to appear in a veterans court otherwise prejudiced him.

¶6 Wayne further contends that his trial counsel was ineffective because she provided an untrue factual basis for Wayne's admission that he violated Term 19. But Wayne told the superior court that everything his attorney said was true and accurate.

¶7 Wayne also contends that his trial counsel was ineffective because she failed to investigate and provide evidence of mitigating circumstances for sentencing purposes. The alleged mitigating circumstances are that the violation never actually occurred, that Wayne served in the military, and that Wayne had not previously violated the terms of his probation. But, again, Wayne admitted in the superior-court proceedings that he had violated the terms of his probation. Further, this was his second admitted violation in the same case. Finally, the record reveals that the court was aware of Wayne's military service.

¶8 Wayne finally contends that the state and his counsel coerced him into admitting the violation; that the superior court could not consider his prior felony conviction for sentencing purposes; and that he has been held past the expiration of his sentence. We do not consider those issues because Wayne did not raise them below. A petition for review may not present issues not first presented to the trial court. *See* Ariz. R. Crim. P. 32.9(c)(1)(ii); *State v. Bortz*, 169 Ariz. 575, 577-78 (App. 1991); *State v. Wagstaff*, 161 Ariz. 66, 71 (App. 1988); *State v. Ramirez*, 126 Ariz. 464, 468 (App. 1980). *See also State v. Smith*, 184 Ariz. 456, 459 (1996) (holding that there is no requirement for fundamental-error review in a post-conviction-relief proceeding).

¶9 For the reasons set forth above, we deny relief.



AMY M. WOOD • Clerk of the Court
FILED: AA