

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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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.

KEVAN COLE MITTON, *Petitioner*.

No. 1 CA-CR 15-0701 PRPC
FILED 5-9-2017

Petition for Review from the Superior Court in Maricopa County
No. CR2012-143187-001
The Honorable Sherry K. Stephens, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

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

Kevan Cole Mitton, Kingman
Petitioner

MEMORANDUM DECISION

Presiding Judge Samuel A. Thumma delivered the decision of the Court, in
which Judge Lawrence F. Winthrop and Judge James P. Beene joined.

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T H U M M A, Judge:

¶1 Petitioner Kevan Cole Mitton seeks review of the superior court’s order denying his petition for post-conviction relief, filed pursuant to Arizona Rule of Criminal Procedure 32.1 (2017).¹ Absent an abuse of discretion or error of law, this court will not disturb a superior court’s ruling on a petition for post-conviction relief. *State v. Gutierrez*, 229 Ariz. 573, 577 ¶ 19 (2012). Finding no such error, this court grants review but denies relief.

¶2 Mitton pled guilty to one count of molestation of a child, a Class 2 felony and dangerous crime against children (Count 1); one amended count of attempted molestation of a child, a Class 3 felony and dangerous crime against children; and one amended count of luring a minor, a Class 3 felony and dangerous crime against children. For Count 1, the court sentenced Mitton to the presumptive prison term of 17 years; for the other counts, the court suspended sentence and imposed concurrent lifetime probation grants.

¶3 Mitton filed a timely notice of Rule 32 relief, and after reviewing the record, assigned PCR counsel was unable to find any claims for relief. Mitton subsequently filed a timely pro se petition for Rule 32 relief, challenging the propriety of the court’s reliance on aggravating factors in imposing sentence for Count 1. In his addendum to the petition, Mitton argued the court erred at sentencing because it did not consider mitigating factors contained in a 178-page transcript of from a *Simpson v. Owens*, 207 Ariz. 261 (App. 2004) hearing held before a different judge, and he raised a claim of ineffective assistance of PCR counsel based on counsel’s failure to file a petition raising this sentencing issue. The superior court summarily dismissed the petition and the addendum, and this timely petition for review followed.

¶4 Mitton contends the superior court (1) violated his due process rights by “taking only ten (10) minutes to review a 178-page *Simpson* hearing transcript” and (2) improperly failed to address his claim of ineffective assistance of PCR counsel. This court will uphold the superior court’s decision if it is legally correct for any reason. *State v. Perez*, 141 Ariz. 459, 464 (1984); *State v. Cantu*, 116 Ariz. 356, 358 (1977).

¹ Absent material revisions after the relevant dates, statutes and rules cited refer to the current version unless otherwise indicated.

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¶5 As a factual matter, nothing in the record indicates the time the superior court spent to review the *Simpson* hearing transcript. The sentencing transcript and minute entry reveal that the court received the *Simpson* hearing transcript at the sentencing and reviewed it during a recess, specifically noting before imposing sentence it had the transcript “as requested by defense counsel.” The court then found several mitigating factors and determined they did not warrant a sentence less than the presumptive. In dismissing Mitton’s Rule 32 claim based on this purported failure to thoroughly review the *Simpson* hearing transcript, the superior court repeated that it reviewed the transcript, and, based on prior discussions with defense counsel and the prosecutor, it was also otherwise aware of the issues raised at the *Simpson* hearing.

¶6 Although the superior court did not specifically address Mitton’s claim of ineffective assistance of PCR counsel when it dismissed the Rule 32 proceedings, the court implicitly found counsel’s failure to raise the issue regarding review of the *Simpson* hearing transcript at sentencing did not fall below objectively reasonable standards. *See Strickland v. Washington*, 466 U.S. 668 (1984) (colorable claim of ineffective assistance of counsel requires showing counsel’s performance fell below objectively reasonable standards resulting in prejudice to defendant). As noted, the court rejected Mitton’s alleged factual foundation for this sentencing-based claim.

¶7 The superior court did not abuse its discretion in dismissing Mitton’s amended petition for Rule 32 relief. Accordingly, this court grants review but denies relief.



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