

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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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

ERIC NATHANIEL SWANDER, *Petitioner*.

No. 1 CA-CR 16-0060 PRPC
FILED 5-2-2017

Petition for Review from the Superior Court in Maricopa County
No. CR2011-101904-001
The Honorable Kristin C. Hoffman, Judge *Retired*

REVIEW GRANTED; RELIEF DENIED

COUNSEL

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

Eric Nathaniel Swander, Florence
Petitioner

STATE v. SWANDER
Decision of the Court

MEMORANDUM DECISION

Judge Jon W. Thompson delivered the decision of the Court, in which Presiding Judge Kent E. Cattani and Judge Paul J. McMurdie joined.

T H O M P S O N, Judge:

¶1 Petitioner Eric Nathaniel Swander seeks review of the trial court's order denying relief in this proceeding for post-conviction relief, pursuant to Rule 32, Ariz. R. Crim. P. We review for abuse of discretion the superior court's denial of post-conviction relief. *State v. Bennett*, 213 Ariz. 562, 566, ¶ 17, 146 P.3d 63, 67 (2006). Swander has not sustained his burden of establishing such abuse here.

¶2 Swander entered a plea agreement and pled guilty to the following dangerous crimes against children: (1) one count of sexual exploitation of a minor, a class 2 felony, and (2) two counts of attempted sexual exploitation of a minor, both class 3 felonies. The trial judge accepted the plea, entered judgments of guilt, and imposed a 15-year sentence for the sexual exploitation offense, and two concurrent terms of lifetime probation for the attempted sexual exploitation offenses, commencing upon absolute discharge from prison.

¶3 Months later, Swander filed an untimely notice of post-conviction relief. Noting its untimeliness and the lack of specific claims with sufficient facts and arguments, the superior court summarily dismissed the proceeding. *See* Ariz. R. Crim. P. 32.2(b) and Ariz. R. Crim. P. 32.4(a). Swander did not seek review.

¶4 Approximately three years later, Swander filed a successive post-conviction relief proceeding. He claimed that the terms of lifetime probation were illegal. Relying on a much earlier version of Ariz. Rev. Stat. ("A.R.S.") § 13-902 and cases which had interpreted that statute, Swander claimed that lifetime probation violated A.R.S. § 13-902 because "[t]he maximum term of probation for a class 3 felony is 5 years."

¶5 The superior court correctly found that the claim was precluded. *See* Ariz. R. Crim. P. 32.2(a)(3). The superior court correctly noted that even if not precluded:

STATE v. SWANDER
Decision of the Court

[T]he defendant's claim fails on the merits. According to Defendant, the Court violated A.R.S. § 13-902 in imposing lifetime terms of probation because "[t]he maximum term of probation for a class 3 felony is 5 years." (Notice at 2) The Court disagrees. Pursuant to A.R.S. § 13-902(E), [in effect when Swander committed his crimes] "[a]fter conviction of a felony offense or an attempt to commit any offense that is included in chapter 14 or 35.1 of this title or § 13-2308.01, 13-2923 or 13-3623, if probation is available, probation may continue for a term of not less than the term that is specified in subsection A of this section *up to and including life* and that the court believes is appropriate for the ends of justice." (Emphasis added) Because Defendant's attempted sexual exploitation of a minor offenses arose under Chapter 35.1, see A.R.S. § 13-3553, A.R.S. § 13-902(E) applies. By its terms, A.R.S. § 13-902(E) applies notwithstanding the general A.R.S. § 13-902(A)(2) provision on class 3 felonies.

¶6 On review, Swander maintains that lifetime probation is an illegal sentence, and that he is not precluded from raising this claim because lifetime probation is illegal.

¶7 A trial court is authorized to summarily dismiss a Rule 32 proceeding based on preclusion. Ariz. R. Crim. P. 32.2(a), 32.6(c). A claim is precluded when it "has been waived at trial, on appeal or in any previous collateral proceeding." Ariz. R. Crim. P. 32.2(a)(3). A petitioner like Swander, who files a successive notice of post-conviction relief, may only assert claims that fall within Rule 32.1(d), (e), (f), (g), or (h), and must state in the notice "meritorious reasons . . . substantiating the claim and indicating why the claim was not stated in the previous petition or in a timely manner." Ariz. R. Crim. P. 32.2(b). Because Swander's claim was pursuant to Rule 32.1(c) (illegal sentence), it was properly subject to preclusion. Ariz. R. Crim. P. 32.2(a); *see also State v. Peek*, 219 Ariz. 182, 183, ¶ 4, 195 P.3d 641, 642 (2008) (claim of illegal sentence must be timely presented).

STATE v. SWANDER
Decision of the Court

¶8

We grant review and deny relief.



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