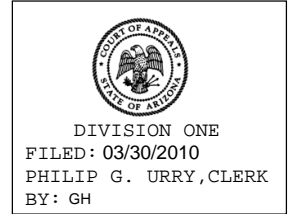


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE
COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



STATE OF ARIZONA,) 1 CA-CR 08-0805 PRPC
)
Petitioner,) DEPARTMENT A
)
v.) Maricopa County
) Superior Court
ROBERT WILLIAM MARSHALL,) No. CR 1996-090796
)
Respondent.)
) **DECISION ORDER**
)
_____)

The State petitions this court to review the post-conviction relief granted to respondent Robert William Marshall. Presiding Judge Maurice Portley, and Judges Lawrence F. Winthrop and Margaret H. Downie, have considered the petition for review and for the reasons stated, grant review, grant relief, and remand this matter to the trial court for further proceedings.

Facts and Procedural History

We discuss only the facts necessary to our disposition of this matter. Marshall pled guilty to attempted sexual conduct with a minor committed in March 1996, and child molestation committed in the summer of 1995. He stipulated to a term of lifetime probation for the offense of attempted sexual conduct with a minor, with the understanding that he would have

to serve time in prison for the child molestation offense. His plea was accepted and he was subsequently sentenced to ten years in prison and lifetime probation.

Marshall filed a petition for post-conviction relief but did not challenge his lifetime probation. He successfully challenged the voluntariness of his plea, and his convictions and sentences were vacated.¹ After the charges were reinstated, the case was reassigned to a different judge, and Marshall entered into a plea agreement that was identical to his earlier agreement. Marshall's plea was again accepted and he was then sentenced to thirteen years in prison and lifetime probation.

Marshall filed his first petition for post-conviction relief from his new sentence in 2001. His appointed lawyer could not, however, find any claims, and Marshall did not file a *pro se* petition. As a result, the petition was dismissed. His second petition was filed in July 2005, and he claimed that he was entitled to relief pursuant to *Blakely v. Washington*, 542 U.S. 296 (2004). The trial court summarily dismissed the petition after finding that *Blakely* was inapplicable because

¹ He also raised a claim of ineffective assistance of counsel regarding a failure to suppress his confession and a failure to obtain by interview a recantation from the victim.

Marshall had received a mitigated sentence and lifetime probation.

Marshall's third petition was filed in February 2006, and he asserted that his sentence was grossly disproportionate to the crime pursuant to *State v. Davis*, 206 Ariz. 377, 79 P.3d 64 (2003). The petition was dismissed after Marshall moved to withdraw the proceeding. His fourth petition was filed in June 2007. His fifth petition was filed in July 2007. The trial court found that his claims were precluded and summarily dismissed the petitions.

The sixth petition was filed in March 2008, and Marshall raised several claims, including one that argued that his lifetime probation sentence was illegal. He argued that Arizona Revised Statutes ("A.R.S.") section 13-902 (periods of probation) did not provide for the imposition of lifetime probation for preparatory offenses in 1996. He argued that the then-maximum term of probation available for attempted sexual conduct with a minor, a class 3 felony, was five years. See A.R.S. § 13-902(A)(2) (1995). The State argued that all claims were precluded pursuant to Arizona Rule of Criminal Procedure 32.2(a)(3).

After considering the pleadings, the trial court ruled:

Except as discussed below, the Court finds that Petitioner's claims under *Blakely* and those attacking the constitutionality of his sentence have been waived. Rule 32.2 Ariz. R. Crim. Pro. Furthermore, *Gonzales* is inapplicable here since it did not involve the statute in effect at the time of Petitioner's offenses.

Defendant also claims he was improperly placed on lifetime probation for attempted sexual conduct with a minor. Generally, this claim would be precluded for failure to timely raise it. Ariz. R. Crim. P. 32.4(a). However, the Court lacks jurisdiction to impose an illegal sentence and jurisdiction can be raised at any time. See, e.g., *State v. Vargas-Burgos*, 162 Ariz. 325, 783 P.2d 264 (App. 1989) (failure to raise illegal sentence does not result in waiver; illegal sentence is an issue of subject matter jurisdiction, which can be raised at any time). The court only has the authority to impose probationary terms as authorized by statute, and it is fundamental error to prescribe a probationary term that exceeds the permissible statutory period. *Jackson v. Schneider ex rel. County of Maricopa*, 207 Ariz. 325, 327-28, ¶ 10, 86 P.3d 381, 383-84 (App. 2004). A Defendant must be sentenced according to the law in effect at the time the offense was committed. *State v. Jensen*, 193 Ariz. 105, 107-08, ¶ 16, 970 P.2d 937, 939-40 (App. 1998).

. . . .

The State essentially concedes that lifetime probation was not available in

1996. Under these circumstances, the Court finds that resentencing on the Attempted Sexual Conduct with a Minor offense is required.

IT IS THEREFORE ORDERED setting aside Petitioner's lifetime probation sentence on the Attempted Sexual Conduct with a Minor Count.

The State timely petitioned this court for review.² Marshall filed a motion to dismiss the State's petition and argued that the Arizona Supreme Court's recent opinion in *State v. Peek*, 219 Ariz. 182, 195 P.3d 641 (2008), effectively resolved the matter in his favor. Marshall then filed a motion for appointment of counsel to assist him and the motion was granted. The State then filed an amended petition for review, and continued to maintain that Marshall's claim was precluded under *Peek* and *State v. Shrum*, 220 Ariz. 115, 203 P.3d 1175 (2009).

Some three months after it was appointed to represent Marshall, the Maricopa County Public Defender filed a motion to determine counsel. That office indicated that Marshall believed a conflict of interest existed. Finding no conflict, we allowed Marshall to either proceed with appointed counsel or to proceed

² The trial court stayed further proceedings pending the outcome of this matter.

in propria persona. We denied Marshall's motion to reconsider. We, however, extended the time to file a response, and stated that no further extensions to respond would be granted. No response has been timely filed.

Discussion

Marshall correctly argues that lifetime probation was not authorized for attempted sexual conduct with a minor in 1996. *Peek*, 219 Ariz. at 184-85, ¶¶ 10, 20, 195 P.3d at 643-44. Therefore, there was no statutory authority to place him on lifetime probation for attempted sexual conduct with a minor.

His claim is, however, as argued by the State, precluded. Rule 32.2(a) states in part that a defendant "shall be precluded from relief" based upon any ground that has been waived in any previous collateral proceeding.

The finding that the claim was not precluded because the court could not, as a matter of subject matter jurisdiction, impose an illegal sentence is not supported by case law. While it is true that a subject matter jurisdiction claim cannot be waived, *State v. Flores*, 218 Ariz. 407, 409-10, ¶ 6, 188 P.3d 706, 708-09 (App. 2008), the imposition of an illegal sentence is not a subject matter jurisdiction error. After the court accepted Marshall's pleas of guilt and entered judgments of

convictions, the court had subject matter jurisdiction to impose sentence. See *State v. Bryant*, 219 Ariz. 514, 517-18, ¶¶ 14-17, 200 P.3d 1011, 1014-15 (App. 2008) (an illegal sentence is not a lack of subject matter jurisdiction error).

Although an illegal sentence is fundamental error, *State v. Thues*, 203 Ariz. 339, 340, ¶ 4, 54 P.3d 368, 369 (App. 2002), and subject to review in an appeal or petition for post-conviction relief "of-right," *State v. Smith*, 219 Ariz. 132, 135, ¶ 18, 194 P.3d 399, 402 (2008), the claim is waived unless presented in a *timely* appeal or petition for post-conviction relief. Rule 32.1(c) specifically provides that relief can be granted for a sentence that is "not in accordance with the sentence authorized by law" but claims under subsection (c) are not exempt from preclusion. Rule 32.2(a), (b).

Moreover, the fact that an error is fundamental does not mean it cannot be waived. If the supreme court "had intended that fundamental error be an exception to preclusion under Rule 32.2, the court presumably would have expressly said so in the rule itself." *State v. Swoopes*, 216 Ariz. 390, 403, ¶ 42, 166 P.3d 945, 958 (App. 2007); see *State v. Smith*, 184 Ariz. 456, 459, 910 P.2d 1, 4 (1996) (there is no review for fundamental error in a post-conviction relief proceeding).

While it appears Marshall's sentence is illegal pursuant to *Peek*, our supreme court has made it clear that the failure to timely present such a claim constitutes a waiver and any relief is precluded. In *Peek*, the court held that if a defendant was improperly placed on lifetime probation when A.R.S. § 13-902(E) did not provide for lifetime probation for attempted sexual offenses and the issue was not raised in the first, or the "of-right," petition for post-conviction relief, the issue is precluded as untimely. *Peek*, 219 Ariz. at 183, ¶ 4, 195 P.3d at 642; see also Ariz. R. Crim. P. 32.2(a) (any claim that could have been raised in an earlier post-conviction relief proceeding is precluded). The court agreed to decide the issue because both the State and *Peek* requested that the court address it, and the State expressly waived preclusion. *Peek*, 219 Ariz. at 183, ¶ 4, 195 P.3d at 642.

In *Shrum*, which was decided after *Peek*, our supreme court made it clear that the rule of preclusion includes untimely claims regarding the legality of a sentence. In that case, the court held that any issue regarding the legality of a sentence was precluded as untimely even though there was no lawful authority for the sentence imposed. *Shrum*, 220 Ariz. at 117-20, ¶¶ 3-24, 203 P.3d at 1177-80. There, the defendant had

been sentenced to an enhanced sentence pursuant to A.R.S. § 13-604.01 because the offense had been designated a dangerous crime against children. *Id.* at 117, ¶ 6, 203 P.3d at 1177. Even though the parties later acknowledged the offense was not a dangerous crime against children, thereby rendering A.R.S. § 13-604.01 wholly inapplicable, the supreme court held the issue was precluded as untimely. *Id.* at 120, ¶ 24, 203 P.3d at 1180. Further, the court did not merely deny relief, but also ordered the dismissal of the post-conviction relief proceedings. *Id.*

Conclusion

Marshall should have challenged the imposition of lifetime probation in a timely of-right petition for post-conviction relief. Because he failed to do so, any challenge to the imposition of lifetime probation is precluded. Therefore, we grant review and grant relief by vacating the order of the trial court dated November 24, 2008, which granted post-conviction relief. Further, we remand this matter to the superior court for dismissal of the post-conviction relief proceeding.

/s/

MAURICE PORTLEY, Presiding Judge