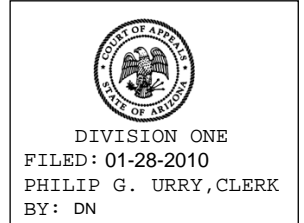


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE
COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



STATE OF ARIZONA,) 1 CA-CR 08-1113 PRPC
)
Petitioner,) DEPARTMENT A
)
v.) Yavapai County
) Superior Court
SHAWN PHILIP HARVEY,) No. V-1300-CR-9990010
)
Respondent.)
) **DECISION ORDER**
)
)
_____)

The State petitions this court to review the superior court's grant of post-conviction relief to respondent Shawn Philip Harvey. Presiding Judge Maurice Portley, and Judges Lawrence F. Winthrop and Margaret H. Downie, have considered this petition for review and for the reasons stated, grant review and 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. Harvey pled guilty to attempted sexual conduct with a minor, a class 3 felony and dangerous crime against children, and sexual conduct with a minor, a class 6 felony and

non-dangerous offense. The trial court accepted the plea and sentenced Harvey to an aggravated term of 1.5 years for sexual conduct with a minor, followed by lifetime intensive probation for attempted sexual conduct with a minor.

In September of 2005, Harvey's probation officer filed a petition to revoke. Harvey admitted he violated probation. At the disposition hearing, the trial judge revoked Harvey's probation and imposed a mitigated term of six years imprisonment. Although advised of his right to seek post-conviction relief within ninety days, Harvey did not do so.

Nearly three years later, and one year after *State v. Gonzalez*, 216 Ariz. 11, 162 P.3d 650 (App. 2007), Harvey filed a notice of post-conviction relief.¹ He claimed he was entitled to relief pursuant to *Gonzalez*, which he asserted was a significant change in the law. He argued that according to *Gonzalez*, he was illegally sentenced pursuant to A.R.S. § 13-604.01(I) (2001),²

¹ In *Gonzalez*, the court held that the dangerous crimes against children statute, Arizona Revised Statutes ("A.R.S.") section 13-604.01, did not apply to *attempted* sexual conduct with a minor who is under the age of 12. *Id.* at 14-15, ¶¶ 10-15, 162 P.3d at 654. Harvey's victim was eleven years of age at the time of the offenses.

² This statute was renumbered to A.R.S. § 13-705 pursuant to 2008 Ariz. Sess. Laws, ch. 301, § 120 (2d Reg. Sess.).

and asked to be resentenced pursuant to A.R.S. §§ 13-701 and -702 (2001).

The State filed a response and argued the requested relief was precluded because Harvey had failed to raise it in a timely post-conviction relief proceeding. The State argued that *Gonzalez* was not a significant change in the law, and that no other exception to preclusion applied.

After considering the matter, the trial court granted relief and set the matter for resentencing. The State then filed this petition for review, and the trial court vacated the resentencing hearing pending the outcome of this petition.

Discussion

On review, the State maintains that Harvey's claim is precluded because it was not timely presented. Harvey argues that his sentence is illegal, that an illegal sentence is void for lack of subject matter jurisdiction, and because subject matter jurisdiction can be raised at any time, his claim is not precluded. He also contends that *Gonzalez* is a significant change in the law that applies to his case, and thus the claim is excepted from preclusion by Arizona Rule of Criminal Procedure 32.1(g). Finally, he argues that his earlier post-

conviction relief counsel was ineffective because he failed to raise the claim.

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. Harvey acknowledges that his claim was not timely presented, and thus it is his burden to show an exception to preclusion. Ariz. R. Crim. P. 32.2(b).

Harvey's argument that his claim is not precluded based on subject matter jurisdiction is simply incorrect. 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 Harvey'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).

Harvey's argument that *Gonzalez* is a significant change in the law has been rejected. In *State v. Shrum*, the court specifically held that the *Gonzalez* decision is not a

significant change in the law. 220 Ariz. 115, 120, ¶ 23, 203 P.3d 1175, 1180 (2009).

As to the ineffective assistance of counsel claim, Harvey had thirty days in which to file a post-conviction relief proceeding to challenge counsel's actions in his post-conviction relief of-right proceeding. *State v. Pruett*, 185 Ariz. 128, 131, 912 P.2d 1357, 1360 (App. 1995) (second notice of post-conviction relief for a claim of ineffectiveness of previous PCR "of-right" post-conviction counsel is timely if filed within thirty days of order and mandate affirming denial of first petition for post-conviction relief in the case of a defendant who has pleaded guilty). Harvey waived this claim by failing to timely present it. *State v. Spreitz*, 202 Ariz. 1, 2, ¶ 4, 39 P.3d 525, 526 (2002).

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 PCR "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 PCR.

Rule 32.1(c) specifically provides as a ground for relief a sentence that is "not in accordance with the sentence

authorized by law," and claims under this subsection are not exempt from preclusion. Rule 32.2(a), (b). 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 Harvey's sentence is illegal pursuant to *Gonzalez*, our supreme court has made it clear that the failure to timely present such a claim constitutes a waiver, and any relief is precluded.

When it decided *State v. Peek*, a case in which the defendant claimed his sentence was illegal, our supreme court specifically stated that it would decide the issue, explaining:

Peek's petition for post-conviction relief was untimely; his claim should have been raised in his "of right" petition for post-conviction relief. See Ariz. R. Crim. P. 32.1, 32.4. The State nonetheless joins Peek in asking that we address the legal issue raised. Because the State has waived preclusion and this case presents a recurring legal issue of statewide

importance on which trial courts have rendered conflicting opinions, we will address the merits of the petition.

219 Ariz. 182, 183, ¶ 4, 195 P.3d 641, 642 (2008). See also *Shrum*, 220 Ariz. at 120, ¶¶ 23-24, 203 P.3d at 1180 (claim of illegal sentence not timely presented and not excepted by preclusion remanded for dismissal).

Conclusion

Harvey is precluded from relief because he failed to timely present his claim. Therefore, we vacate the trial court's order of November 24, 2008, which granted post-conviction relief and remand this matter to the superior court for dismissal of the post-conviction relief proceeding.

/s/

MAURICE PORTLEY, Presiding Judge