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

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. MATTHEW ALAN CLACK, Petitioner.	2 CA-CR 2011-0236-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. S1100CR200800583

Honorable Robert C. Brown, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

Matthew A. Clack
Florence
In Propria Persona

E C K E R S T R O M, Presiding Judge.

¶1 Pursuant to a plea agreement, in July 2009 petitioner Matthew Clack was convicted of kidnapping, a class two felony, and attempted molestation of a child, a class three felony, both dangerous crimes against children. Represented by new counsel, Clack then filed a motion to withdraw the plea based on manifest injustice, *see* Ariz. R. Crim. P. 17.5, asserting his attorney had pressured him to plead guilty and asking that the matter be set for trial. The trial court[1] conducted an extensive evidentiary hearing on Clack's motion in January 2010, at which Clack and his former attorney, Craig Gillespie, testified. At that hearing, the court also admitted the transcript of a recorded telephone conversation between Clack and his parents that had occurred on the day Clack entered his guilty plea. The court denied Clack's motion to withdraw the plea and, pursuant to the stipulated sentence in the plea agreement, sentenced Clack in February 2010 to a presumptive, seventeen-year term of imprisonment followed by lifetime probation.

¶2 In May 2010, Clack filed a pro se notice of post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., and a new attorney was appointed to represent him. Unable to find any colorable post-conviction claim to raise, counsel filed a notice of review pursuant to Rule 32.4(c)(2). The court allowed Clack to file a pro se petition, which it dismissed without conducting an evidentiary hearing. However, in its ruling denying post-conviction relief, the court not only relied on Judge Johnson's ruling from the evidentiary hearing on the motion to withdraw from the plea agreement, but on the

[1]Judge Boyd T. Johnson conducted all of the proceedings up to and including sentencing, while Judge Robert C. Brown presided over the proceeding under Rule 32, Ariz. R. Crim. P.

transcript of that hearing. This petition for review followed. "We will not disturb a trial court's ruling on a petition for post-conviction relief absent a clear abuse of discretion." *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We find no such abuse here.

¶3 On review, Clack asks that we vacate his sentence and remand for resentencing. He first contends Gillespie was ineffective, asserting he should have argued Clack was delusional when he committed the offenses and was not able to assist his attorney at trial.[2] The record, including the transcripts from the change-of-plea hearing and the evidentiary hearing on the motion to withdraw from the plea agreement, supports Judge Johnson's finding, which Judge Brown incorporated in his ruling denying post-conviction relief. In his ruling, Judge Johnson found that Clack had "knowingly, intelligently and voluntarily entered the plea agreement," and that Gillespie had "fully, timely and properly advised" Clack "of the terms of the plea agreement and the sentences therein."

¶4 Moreover, in Clack's telephone conversation with his parents which took place on the day he pled guilty, the transcript of which Judges Johnson and Brown also

[2]We do not address Clack's additional assertions that his attorney failed to present mitigating evidence at sentencing and that a violation of *State v. Donald*, 198 Ariz. 406, 10 P.3d 1193 (App. 2000), occurred in relation to counsel's urging Clack to accept the plea offered. Other than mentioning these claims in the list of "Issues Presented for Review by the Court of Appeals," Clack does not discuss them further. Additionally, to the extent Clack also asserts, "Was Defendant counsel of Appellate ineffective assistance of counsel for failure to raise the issue of ineffective assistance of counsel on Appellant Appeal in this case," we do not address this claim. It appears Clack did not present this otherwise incomprehensible claim in the trial court. *See* Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review to contain issues "decided by the trial court . . . which the defendant wishes to present to the appellate court for review").

considered, Clack asked his father to "talk to . . . other attorneys . . . [and] just get their opinion on [his sentence]," and explained that he was considering rejecting the plea agreement because he believed "17 years, it's just not fair." Based on this record, we conclude the court properly found Clack had not raised a colorable claim that Gillespie should have raised an issue related to Clack's mental competency.

¶5 In addition, in his ruling denying post-conviction relief, Judge Brown relied upon and summarized the ruling Judge Johnson had made after the evidentiary hearing on Clack's motion to withdraw from the plea agreement, a ruling fully supported by the transcript of the evidentiary hearing. Judge Brown stated:

> On January 29, 2010, Judge Johnson denied the motion to withdraw the plea finding that: (1) the Petitioner was fully, timely and properly advised of the terms of the plea agreement and the sentences to be imposed; (2) that the sentences stipulated to in the plea agreement were fair and reasonable in view of the potential length of sentence if the Petitioner were to proceed to trial and lose; (3) that the Petitioner intelligently and voluntarily entered the plea agreement and that a factual basis existed for the finding of guilt; and (4) the Petitioner failed to establish "manifest injustice" and that there was no credible proof presented that trial counsel performed in anything other than an effective and professional manner.

¶6 Clack further argues he was improperly charged with kidnapping, and that the state failed to prove the elements of this offense. The trial court correctly noted, however, that Clack waived any such claim by pleading guilty. Moreover, a defendant cannot challenge the sufficiency of a charging document for the first time in a Rule 32 petition. *See* Ariz. R. Crim. P. 13.5(e) (defects in charging document must be raised in accordance with Rule 16 pretrial motion procedure); Ariz. R. Crim. P. 16.1(a) (Rule 16

governs pretrial motions); *State v. Fullem*, 185 Ariz. 134, 136, 912 P.2d 1363, 1365 (App. 1995) (defendant waived challenge to indictment by failing to object in trial court).

¶7 Clack also asserts imposition of probation following his prison sentence constitutes double punishment for the same offense, and the sentencing statute is unconstitutional; the trial court found these claims to be without merit. Clack stipulated to the sentence set forth in the plea agreement, the same sentence he received. At the change-of-plea hearing and at sentencing, Clack and his attorney acknowledged their agreement with the stipulated sentence, the very sentence he now challenges. As such, he has waived the opportunity to challenge that sentence now. *See State v. Crocker*, 163 Ariz. 516, 517, 789 P.2d 186, 187 (App. 1990) (entry of guilty plea waives all nonjurisdictional defenses, including challenge to constitutionality of statute). In addition, to the extent Clack argues he was sentenced improperly under A.R.S. § 13-705,[3] the sentencing statute for persons like him who commit dangerous crimes against children, we do not address this argument, which he raises for the first time in his petition for review. *See* Ariz. R. Crim. P. 32.9(c)(1)(ii).

¶8 Finally, we conclude the trial court properly found Clack had failed to assert any colorable claims meriting post-conviction relief. Accordingly, we reject Clack's claim that he was entitled to an evidentiary hearing. *See State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993) (evidentiary hearing required only when petitioner states colorable claim).

[3]Previously A.R.S. § 13-604.01. *See* 2008 Ariz. Sess. Laws, ch. 301, §§ 17, 29.

¶9 For all of these reasons, we find the trial court did not abuse its discretion by denying post-conviction relief. Therefore, we grant the petition for review but deny relief.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge