

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

FILED BY CLERK

FEB 16 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2011-0316-PR
)	DEPARTMENT A
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
RANDY CURTIS GIBBINS,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR064346

Honorable Richard S. Fields, Judge

REVIEW GRANTED; RELIEF DENIED

Isabel G. Garcia, Pima County Legal Defender
By Robb P. Holmes

Tucson
Attorneys for Petitioner

H O W A R D, Chief Judge.

¶1 Petitioner Randy Gibbins challenges the trial court's summary dismissal of his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. We grant review and, for the following reasons, deny relief.

¶2 Pursuant to a plea agreement, Gibbins was convicted of two counts of a preparatory offense involving child molestation, both second-degree, dangerous crimes

against children. The trial court sentenced him to presumptive prison terms of ten years, to be served consecutively.

¶3 In his of-right petition for post-conviction relief, Gibbins argued his counsel had been ineffective in failing to retain an expert to perform a psychosexual evaluation to be offered in mitigation at sentencing. He further argued that, as a result, the trial court had abused its discretion in sentencing him “without all the relevant facts necessary to exercise its discretion.” In support of his petition, Gibbins attached a psychosexual evaluation, performed after sentencing, in which he was found to present a “low risk” to reoffend.

¶4 In finding Gibbins had failed to state a colorable claim, the trial court noted the presentence report had included a similar finding that Gibbins presented a “medium low-risk to re-offend” and trial counsel had “advocated effectively” for a term of lifetime probation for the second count, citing Gibbins’s “age relative to risk to re-offend and the low risk to the community, [his] ‘extreme’ remorse, and his own victimization.” The court further found that, although “the psychosexual report was much more extensive,” the findings in that report, for sentencing purposes, were “basically equivalent” to those in the presentence report the court had reviewed before imposing sentence—Gibbins “has been evaluated at a low risk to re-offend.” But notwithstanding these evaluations, the court stated other factors, including the existence of “other victims” and Gibbins’s “extensive victimization of his stepson and the manipulative means by which he effected that,” had caused the court to consider him a danger to the community at sentencing. The court thus concluded Gibbins had failed to state a colorable claim that it had abused its

discretion at sentencing, that counsel's performance had been deficient, or that he had been prejudiced by counsel's decision to proceed with sentencing without obtaining an expert's evaluation.

¶5 On review, Gibbins argues the trial court abused its discretion by failing to consider "the much more extensive history, testing, and evaluation presented in the psycho-sexual evaluation" in affirming the sentences imposed as "appropriate." He also renews his argument that trial counsel was ineffective, asserting a psychosexual evaluation is a "more specific and reliable resource" than a presentence report "and should have been presented to the court before the sentencing hearing."

¶6 We review the court's summary denial of post-conviction relief for an abuse of discretion. *See State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006). Similarly, if a sentence imposed is within statutory limits, we will not disturb it "unless there is a clear abuse of discretion." *State v. Ward*, 200 Ariz. 387, ¶ 5, 26 P.3d 1158, 1160 (App. 2001).

¶7 To determine whether a Rule 32 petitioner has stated a colorable claim entitling him to an evidentiary hearing, a trial court must consider whether, if the allegations of the petition are true, they "might have changed the outcome" of the proceeding. *State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993). The same judge who sentenced Gibbins performed this assessment after considering the psychosexual evaluation, and implicitly concluded submission of that evaluation before sentencing would not have changed the court's imposition of consecutive sentences.

¶8 We cannot agree with Gibbins that the trial court “totally discounted” the evaluation. Instead, the court’s minute entry reflects its full consideration of that report. In addition, the court clearly identified and correctly resolved the legal issues Gibbins raised, in a manner that will be understood by any court in the future. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993). Because the court’s findings and conclusions are supported by the record before us, and do not reflect any abuse of discretion, we see no purpose in rehashing the court’s order here and, instead, we adopt it. *See id.* Accordingly, although we grant Gibbins’s petition for review, we deny relief.

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

CONCURRING:

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

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