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MAY 25 2012
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

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| THE STATE OF ARIZONA,<br><br>Respondent,<br><br>v.<br><br>MICHAEL PERRY ROBERTSON,<br><br>Petitioner. | 2 CA-CR 2012-0047-PR<br>DEPARTMENT B<br><br>MEMORANDUM DECISION<br>Not for Publication<br>Rule 111, Rules of<br>the Supreme Court |

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20102762001

Honorable Clark W. Munger, Judge

REVIEW GRANTED; RELIEF DENIED

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Law Office of Ronald Zack
By Ronald Zack

Tucson
Attorney for Petitioner

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K E L L Y, Judge.

**¶1** Petitioner Michael Robertson seeks review of the trial court's order denying and dismissing his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. "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). Robertson has not sustained his burden of establishing an abuse of discretion here.

**¶2** After entering a plea agreement, Robertson was convicted of two counts of attempted sexual conduct with a minor. The trial court sentenced him to a partially aggravated, five-year prison term, to be followed by a life term of sex-offender probation. Robertson filed a timely notice of post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., and, in the petition that followed, he argued (1) the court erred in imposing an aggravated sentence; (2) the imposition of life-long, sex-offender probation "places an undue burden on [his] ability to freely exercise his religion" and is "grossly disproportionate" to his offense, in violation of his First and Eighth Amendment rights; and (3) trial counsel rendered ineffective assistance by failing to file a sentencing memorandum and failing to argue at sentencing that placing Robertson, a Native American of Sioux ancestry, on sex-offender probation "would impact his ability to participate in cultural and religious ceremonies," in violation of the First Amendment.

The trial court summarily dismissed Robertson's petition, finding he had failed to state a colorable claim "within the scope of Rule 32.1" and "no purpose would be served by any further proceedings."

**Victim's Consent as Mitigating Circumstance**

**¶3** In his petition for review, Robertson first argues the trial court abused its discretion in concluding it had not been required to find the victim's consent to his conduct a mitigating circumstance to be weighed at sentencing. According to Robertson, the victim's consent "would have impaired his capacity to appreciate the wrongfulness of his conduct or conform his conduct to the requirements of [the] law," and the court was therefore required to consider her consent in mitigation pursuant to A.R.S. § 13-701(E)(2).[1] The court rejected this argument, finding "no connection" between the victim's consent and any alleged impairment of Robertson's capacity. We find no abuse of discretion in the court's ruling.

**¶4** As we have stated in construing the provisions of § 13-701(E), "a sentencing court is not required to find that mitigating circumstances exist merely because mitigating evidence is presented; the court is only required to give the evidence due consideration." *State v. Cazares*, 205 Ariz. 425, ¶ 8, 72 P.3d 355, 357 (App. 2003) (construing identical language in former A.R.S. § 13-702(D), 2002 Ariz. Sess. Laws ch. 267, § 3; although statute "required the trial court to consider petitioner's age in mitigation, the court was not obligated to find petitioner's age mitigating").

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[1]Section 13-701(E)(2) provides as follows:

> For the purpose of determining the sentence . . . the court shall consider the following mitigating circumstances: . . . . 2. The defendant's capacity to appreciate the wrongfulness of the defendant's conduct or to conform the defendant's conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution.

**¶5** At sentencing, Robertson urged the court to find the victim's consent to be a mitigating circumstance and, after consideration, the court declined that request, stating, "[T]here is a reason we say 16- and 17-year-olds can't consent to things, particularly when they're dealing with [a] full-grown adult." "Provided the trial court fully considers the factors relevant to imposing sentence, we will generally find no abuse of discretion." *Id.* ¶ 6. Such is the case here.[2]

**Challenge to Probation Conditions**

**¶6** As he did below, Robertson argues certain conditions of his probation "will substantially burden [his] freedom of religion, [by] interfering with his ability to participate in Native American cultural and religious activities" such as sweat lodges and ceremonial peyote use. Specifically, he challenges requirements that he (1) "wear appropriate clothing, including undergarments, in the home or places where others might see [him]"; (2) submit a written, weekly schedule that lists times he will be away from his residence and where he will be on those occasions; (3) refrain from "initiat[ing], establish[ing], or maintain[ing] contact . . . with any person under the age of 18 except under circumstances approved in advance and in writing by the probation officer"; and (4) refrain from possessing or using illegal drugs or controlled substances. On review, Robertson maintains the trial court abused its discretion in finding trial counsel had not been ineffective, notwithstanding his failure to raise this issue. He also disputes the

[2]We find no merit to Robertson's argument that the trial court also should have found the victim's consent a mitigating circumstance under the "catch-all" provision in § 13-701(E)(6). He cites no authority suggesting that the court abused its discretion by declining to enter such a finding.

court's conclusion that his First Amendment challenge to probation conditions "is not yet ripe for review" because he "is not yet on probation, nor has he requested permission from the court and his probation officer."

**¶7** We agree the trial court was mistaken in concluding that Robertson's challenge to probation conditions was not ripe for review. Any failure to challenge the constitutionality of a disposition in a first, timely Rule 32 proceeding would result in preclusion of the claim. Ariz. R. Crim. P. 32.1(a), 32.2(a)(3); *see also State v. Jimenez*, 188 Ariz. 342, 343, 935 P.2d 920, 921 (App. 1996) (pleading defendant has no right to appeal denial of motion to modify conditions of probation). Nonetheless, we find no abuse of discretion in the court's summary dismissal of this claim.

**¶8** Robertson failed to present a colorable claim entitling him to an evidentiary hearing because he did not comply with the requirements of Rule 32.5. That rule requires a petitioner to provide the trial court with "[a]ffidavits, records, or other evidence currently available to [him] supporting the allegations of the petition," including "[f]acts within [his] personal knowledge [which] shall be noted separately from other allegations of fact and shall be under oath." Ariz. R. Crim. P. 32.5. Here, Robertson cited no evidence in the record to support his allegations about his religious beliefs and practices, which are the basis for his ineffective assistance and First Amendment claims, and he failed to attach any affidavit, record, or other evidence tending to establish the truth of his assertions. An unsubstantiated argument does not take the place of an affidavit or other sworn statement required to establish a colorable post-conviction claim warranting an evidentiary hearing. *See State v. Borbon*, 146 Ariz. 392, 399, 706 P.2d 718, 725 (1985)

(unsubstantiated claim witness would give favorable testimony does not compel evidentiary hearing); *State v. Donald*, 198 Ariz. 406, ¶ 17, 10 P.3d 1193, 1200 (App. 2000) (to obtain post-conviction evidentiary hearing, defendant should support allegations with sworn statements). And a bare allegation of prejudice, without supporting evidence, is insufficient to create a colorable claim. *See Donald*, 198 Ariz. 406, ¶ 21, 10 P.3d at 1201.

**Eighth Amendment Claim**

**¶9** Robertson points out that the trial court did not specifically address his allegation that the lifelong term of sex-offender probation was "grossly disproportionate" to his offense, in violation of the Eighth Amendment to the United States Constitution. As applied to non-capital cases, the Eighth Amendment "'does not require strict proportionality between crime and sentence' but instead forbids only extreme sentences that are 'grossly disproportionate to the crime.'" *State v. Berger*, 212 Ariz. 473, ¶ 13, 134 P.3d 378, 381 (2006), *quoting Ewing v. California*, 538 U.S. 11, 23, (2003) (O'Connor, J., plurality opinion).

**¶10** Robertson has cited no Arizona authority, and we are aware of none, suggesting that a term of probation constitutes "punishment" as contemplated by the Eighth Amendment. *Compare In re J.G.*, 196 Ariz. 91, ¶ 13, 993 P.2d 1055, 1058 (App. 1999) ("[p]robation is not punishment" for purposes of double jeopardy analysis), *with State v. Mendivil*, 121 Ariz. 600, 602, 592 P.2d 1256, 1258 (1979) ("probation may . . . constitute a penalty" for purposes of prohibition against ex post facto laws). Assuming

that such a claim is cognizable, however, the trial court correctly concluded that Robertson failed to state a colorable claim for relief.

**¶11** In support of his Eighth Amendment claim, Robertson argues he "was 54 years old" when he began having sexual relations with the sixteen-year-old girl for whom he had been appointed legal guardian "and had never behaved inappropriately toward[] a minor before." Quoting *United States v. Moriarty*, 429 F.3d 1012, 1025 (11th Cir. 2005), he thus asserts he "[c]learly . . . does not have 'deep-seated aberrant sexual disorders' which require lifelong monitoring" and, therefore, "a lifelong sex offender probation sentence is grossly disproportionate." *See Moriarty*, 429 F.3d at 1025 (authorization for lifelong supervised relief under 18 U.S.C. § 3583(k) "responds to the long-standing concerns of Federal judges and prosecutors regarding the inadequacy of the existing supervision periods for sex offenders, particularly for the perpetrators of child sexual abuse crimes, whose criminal conduct may reflect deep-seated aberrant sexual disorders that are not likely to disappear within a few years of release from prison"). Again, Robertson has failed to submit any evidence, as required by Rule 32.5, in support of his conclusory allegations. Indeed, the existing record appears to contain contrary evidence, such as the finding in Robertson's presentence report that he fell within the "medium-high" range of a validated "Risk/Needs Classification" tool used by probation officers across the state.

**Disposition**

**¶12** The trial court did not abuse its discretion in summarily dismissing Robertson's petition for post-conviction relief. Accordingly, although we grant the petition for review, relief is denied.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge