

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

OCT 18 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2012-0176-PR
)	DEPARTMENT A
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
CLYDE RAYMOND GABEL,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF GILA COUNTY

Cause No. CR20070034

Honorable Peter J. Cahill, Judge

REVIEW GRANTED; RELIEF DENIED

Clyde Raymond Gabel

Florence
In Propria Persona

H O W A R D, Chief Judge.

¶1 Petitioner Clyde Gabel seeks review of the trial court's summary denial of his of-right petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. We grant review and, for the following reasons, we deny relief.

Background

¶2 In 2007, Gabel pled guilty to one count each of driving under the extreme influence of intoxicating liquor (Extreme DUI), aggravated assault, and unlawful flight

from a pursuing law enforcement vehicle. Pursuant to stipulated terms in his plea agreement, the trial court placed Gabel on five-year terms of probation for the Extreme DUI and aggravated assault convictions, a three-year probation term for the unlawful flight conviction, and ordered him incarcerated for 180 days. In August 2010, Gabel pled guilty to a charge of aggravated driving under the influence of intoxicating liquor (Aggravated DUI) committed in March 2010, while he was still on probation. The court informed Gabel at his 2010 change of plea hearing that his admission to the Aggravated DUI charge would result in a violation of his probation and could subject him to resentencing in the 2007 case. *See* Ariz. R. Crim. P. 27.8(e) (no violation hearing required for probationer found guilty of criminal offense). After accepting Gabel's plea, the court scheduled a combined hearing on the probation violation disposition and sentencing for the 2010 offense. *See id.*

¶3 Consistent with Gabel's 2010 plea agreement, the trial court placed him on a five-year term of probation for the Aggravated DUI charge and ordered him to serve a six-month term of incarceration in the county jail. The court also revoked Gabel's probation for his 2007 convictions for aggravated assault and unlawful flight and sentenced him to presumptive, consecutive prison terms of 3.5 and 1.5 years, respectively.¹

¶4 Gabel then filed a notice of post-conviction relief. After appointed counsel notified the trial court she had reviewed the record and found no viable legal issues to

¹Gabel's probation for the Extreme DUI conviction was "terminated as unsuccessful."

raise in a Rule 32 petition, Gabel filed a pro se petition for post-conviction relief in which he alleged he had been illegally sentenced to consecutive terms of imprisonment for his 2007 convictions. The court summarily denied relief, concluding the aggravated assault and unlawful flight had been separate offenses warranting consecutive sentences. The court explained,

The Aggravated Assault charge relates to the family who was run off the road. The Unlawful Flight charge relates to [Gabel]'s subsequent conduct when he was located by a DPS² officer who attempted to stop him but [Gabel] refused to stop and continued to drive northbound into southbound traffic placing the officer in danger.

This petition for review followed.

¶5 On review, Gabel requests that he be resentenced to concurrent terms. He asserts that his 2007 convictions for aggravated assault and unlawful flight “stem from one set of continuous facts, and one act of driving”; that “no one incident could have occurred without the other”; and that “the incident did not end until [he] stopped for DPS.” “We review for abuse of discretion the superior court’s denial of post-conviction relief based on lack of a colorable claim.” *State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006). We find no abuse of discretion here.

¶6 Section 13-116, A.R.S., precludes the imposition of consecutive sentences for “[a]n act or omission which is made punishable in different ways by different sections of the laws.” Thus, “[i]f a defendant’s conduct constitutes a ‘single act,’ the court may not impose consecutive sentences.” *State v. Stock*, 220 Ariz. 507, ¶ 11, 207 P.3d 760,

²Department of Public Safety.

762 (App. 2009), *quoting State v. Gordon*, 161 Ariz. 308, 315, 778 P.2d 1204, 1211 (1989). In *Stock*, this court rejected the defendant's argument that consecutive sentences were impermissible because his offenses of unlawful flight and resisting arrest were committed on the same occasion and should be treated as a single transaction. *Id.* ¶¶ 7-18. The same analysis applies here.

¶7 As the trial court correctly observed, Gabel's convictions for aggravated assault and unlawful flight were based on separate and distinct acts. He clearly could have committed the aggravated assault by running another vehicle off the road, without later fleeing unlawfully from a DPS officer. These separate acts created different risks of harm to different individuals. Under Arizona law, consecutive sentences therefore were permissible. *See id.* ¶¶ 11, 15-18.

¶8 Because Gabel failed to state a colorable claim, the trial court did not abuse its discretion in denying relief summarily. *See Ariz. R. Crim. P. 32.6(c)*. Accordingly, we grant review, but we deny relief.

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Peter J. Eckerstrom

PETER J. ECKERSTROM, Presiding Judge

/s/ Garye L. Vásquez

GARYE L. VÁSQUEZ, Judge