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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STATE OF ARIZONA, Respondent, v. MELVIN A. SLINGER, Petitioner.	2 CA-CR 2012-0255-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20031423

Honorable Christopher Browning, Judge

REVIEW GRANTED; RELIEF DENIED

The Ferragut Law Firm, P.C.
By Ulises A. Ferragut Jr. Phoenix
Attorney for Petitioner

K E L L Y, Judge.

¶1 Pursuant to a plea agreement, petitioner Melvin Slinger was convicted in 2003 of two counts of sexual exploitation of a minor under the age of eighteen. The trial court imposed a substantially aggravated prison term of 12.5 years on one conviction, to be followed by lifetime probation on the other.[1] In 2004, Slinger filed a petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P. We denied relief on the petition for review of the court's denial of relief on that petition. *State v. Slinger*, No. 2 CA-CR 2005-0141-PR (decision order filed Feb. 16, 2006). More than five years later, Slinger filed his second petition for post-conviction relief, arguing *Blakely v. Washington*, 542 U.S. 296 (2004), was a significant change in the law that entitled him to relief. *See* Ariz. R. Crim. P. 32.1(g). The court deemed Slinger's argument precluded, and 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.

¶2 Slinger claims that, because the trial court aggravated his sentence based on factors not found to be true beyond a reasonable doubt by either a judge or a jury, and because he had not admitted such factors, his sentence violated *Blakely's* mandate and he was entitled to be resentenced. Finding that Slinger's present *Blakely* claim could have been raised in his first petition for post-conviction relief, the court deemed his claim precluded under Rule 32.2(a)(3) (claims precluded if waived at trial, on appeal, or in

[1]The trial court found as aggravating factors "the profound negative consequences and effect [of Slinger's actions on] the victim, and the tremendous betrayal of trust" caused by Slinger's conduct.

previous collateral proceeding). Slinger asserts the court abused its discretion by incorrectly finding *Blakely* does not apply to him; concluding he had waived his claim by not raising it in his first post-conviction petition; and, deeming his claim precluded based on an exception to preclusion, to wit, a significant change in the law.

¶3 To the extent Slinger argues the trial court did not find *Blakely* applicable to him, he has misread the court's ruling. To the contrary, the court correctly found "[Slinger's] present *Blakely* claim could have been properly raised in the previous petition." *See State v. Cleere*, 213 Ariz. 54, n.2, 138 P.3d 1181, 1184 n.2 (App. 2006) ("*Blakely* applies to cases pending on direct review when *Blakely* was decided."). A conviction is final when "'the availability of appeal [is] exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied.'" *State v. Towery*, 204 Ariz. 386, ¶ 8, 64 P.3d 828, 832 (2003), *quoting Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987). Although Slinger was convicted in 2003, his conviction was not final when *Blakely* was decided in 2004, and it thus applies to his case.

¶4 However, the trial court stated that, because Slinger's notice of post-conviction relief (and by inference, his petition), "failed to provide either a specific, applicable[2] exception to Rule 32.2(a), or, provide any meritorious reason to substantiate the failure to include [the *Blakely*] claim in his previous petition," Slinger had waived his

[2]Because Slinger provided an arguably "applicable" exception to preclusion by couching his claim as a significant change in the law under Rule 32.1(g), we presume the trial court meant that the proffered exception to the rule of preclusion did not apply because Slinger had failed to either present his claim in his first Rule 32 petition or provide a meritorious reason for not having done so.

claim.[3] As Rule 32.2(b) provides, "[w]hen a claim under Rules 32.1(d), (e), (f), (g) and (h) is to be raised in a successive or untimely post-conviction relief proceeding, the notice . . . must set forth the substance of the specific exception and the reasons for not raising the claim in the previous petition or in a timely manner." Other than asserting he "was unaware that he had a Blakely-type claim for post[-]conviction relief at the time of his prior post[-]conviction relief action," Slinger failed to provide any explanation why he did not raise this issue in his first petition. And, although Slinger was represented by counsel when he filed his first post-conviction petition in November 2004, he has not asserted that his attorney was ineffective for having failed to raise a *Blakely* claim on his behalf in that proceeding.

¶5 Although claims based on a significant change in the law are potentially exempt from preclusion under Rule 32.2(b), this exception does not extend to a defendant like Slinger who had the opportunity to raise the claim in a prior proceeding. Accordingly, because Slinger could have raised a claim based on *Blakely* in his first Rule 32 petition but did not, the trial court did not abuse its discretion by finding his claim precluded.

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[3]Based on the facts in this case, we find unpersuasive Slinger's argument that, in the absence of a knowing, voluntary and intelligent waiver, the trial court abused its discretion by finding his claim waived and therefore precluded under Rule 32.2(a)(3). Nor are we persuaded by his assertion that, because his first post-conviction proceeding was "the functional equivalent of a direct appeal," *see State v. Ward*, 211 Ariz. 158, ¶ 9, 118 P.3d 1122, 1126 (App. 2005), the rule of preclusion somehow does not apply to a claim he could have, but did not raise in that proceeding. The "waiver" the court referred to here was not Slinger's waiver of the right to a jury trial, as Slinger seems to suggest, rather, it was his waiver of the right to raise this claim in his first post-conviction proceeding.

¶6 We therefore grant review but deny relief.

/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