

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

NOV 20 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

| | | |
|---------------------------|---|----------------------------|
| THE STATE OF ARIZONA, |) | 2 CA-CR 2012-0317-PR |
| |) | DEPARTMENT B |
| Respondent, |) | |
| |) | <u>MEMORANDUM DECISION</u> |
| v. |) | Not for Publication |
| |) | Rule 111, Rules of |
| ROBERT BURRELL RICO, JR., |) | the Supreme Court |
| |) | |
| Petitioner. |) | |
| _____ |) | |

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20034097

Honorable Christopher C. Browning, Judge

REVIEW GRANTED; RELIEF DENIED

Robert Burrell Rico, Jr.

Florence
In Propria Persona

V Á S Q U E Z, Presiding Judge.

¶1 Pursuant to a plea agreement, petitioner Robert Rico, Jr. was convicted in 2004 of one count of sexual assault and one count of aggravated assault in exchange for the dismissal of twelve other counts. The trial court sentenced Rico to consecutive, aggravated prison terms totaling twenty-nine years. We denied relief on two petitions for review of the court's denial of his petitions for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. *State v. Rico*, No. 2 CA-CR 2011-0142-PR (memorandum

decision filed July 29, 2011); *State v. Rico*, No. 2 CA-CR 2009-0230-PR (memorandum decision filed Jan. 11, 2010).

¶2 In April 2012, Rico filed a petition for post-conviction relief claiming his aggravated sentences were improper under *State v. Schmidt*, 220 Ariz. 563, 208 P.3d 214 (2009), and *State v. Perrin*, 222 Ariz. 375, 214 P.3d 1016 (App. 2009). The trial court summarily denied his petition, concluding it properly had aggravated Rico’s sentences. Rico then filed a notice of post-conviction relief claiming the court had erred in imposing consecutive sentences. The court, however, treated Rico’s new notice as a motion for rehearing filed pursuant to Rule 32.9(a) and denied it, concluding the “motion merely re-argue[d] the previous Petition for Post-Conviction Relief, but assert[ed] no new factual or legal basis for relief” and identified no error in the court’s denial of his petition. After the court denied Rico’s motion for reconsideration of that ruling, this petition for review followed. We will not disturb a court’s ruling on post-conviction relief unless the court clearly has abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶3 Although Rico does not discuss the trial court’s decision to designate his notice as a motion for rehearing—instead repeating his claim that the court erred in imposing consecutive sentences—we conclude that the court erred in so designating the notice. The notice did not, as required by Rule 32.9(a), argue the court had erred in rejecting his previous claim that aggravated sentences had been imposed erroneously. It instead raised a new sentencing claim unrelated to that argument. Thus, the court should

have treated Rico’s filing as a successive notice of post-conviction relief filed pursuant to Rule 32.4(a).

¶4 We nonetheless deny relief. Rico’s notice of post-conviction relief was successive and untimely. Accordingly, the sentencing claim raised therein is subject to preclusion pursuant to Rule 32.2(a). Although “the state has the burden to plead and prove grounds of preclusion, any court on review of the record may determine and hold that an issue is precluded regardless of whether the state raises preclusion.” Ariz. R. Crim. P. 32.2(c). And we reject Rico’s suggestion in his petition for review that, because “a fundamental error of a[n] illegal sentence[] can be appeal[ed] at any time,” the claim is not precluded. To the contrary, this court determined in *Swoopes* that a claim of fundamental error is subject to preclusion pursuant to Rule 32.2(a). 216 Ariz. 390, ¶¶ 41-42, 166 P.3d at 958.

¶5 For the reasons stated, although review is granted, relief is denied.

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

CONCURRING:

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

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