

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

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2013-0305-PR
)	DEPARTMENT B
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
OSCAR LINWOOD GILBERT IV,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF MARICOPA COUNTY

Cause No. CR2007144174001DT

Honorable Margaret R. Mahoney, Judge

REVIEW GRANTED; RELIEF DENIED

Oscar Gilbert

Florence
In Propria Persona

ESPINOSA, Judge.

¶1 Pursuant to a plea agreement, petitioner Oscar Gilbert was convicted of two counts of attempted sexual exploitation of a minor in 2008 and given a mitigated seven-year prison term to be followed by lifetime probation. In 2009, Gilbert filed a petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., which the trial court summarily dismissed. This court denied his petition for review from the court's dismissal

of that petition. Gilbert now seeks review from the court’s dismissal of his second petition for post-conviction relief, filed in 2012. “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 Gilbert argues that he was sentenced improperly under A.R.S. § 13-604.01 (dangerous crimes against children statute),¹ and that another statute under which he was sentenced, A.R.S. § 13-3553(A)(2) (sexual exploitation of a minor), is vague and overly broad. He asks that he be resentenced. In a ruling dated May 15, 2012, the trial court dismissed Gilbert’s petition pursuant to Rule 32.4(a), finding he could not “raise claims of this nature in an untimely or successive notice of post-conviction relief.” Although the court did not expressly state that Gilbert’s claims were precluded because he could have raised them in his first petition for post-conviction relief, we can infer it dismissed his petition based on preclusion. *See* Ariz. R. Crim. P. 32.2(a)(3) (precluding claims based on any ground “[t]hat has been waived . . . in any previous collateral proceeding”).²

¶3 Additionally, Gilbert relies on various superior court rulings interpreting A.R.S. § 13-3553, and urges us to adopt them. However, as the trial court correctly

¹Renumbered as A.R.S. § 13-705. *See* 2008 Ariz. Sess. Laws, ch. 301, §17.

²Gilbert also raises what appears to be a new claim based on double jeopardy in his petition for review; however, because he did not make this same argument in his petition below, we do not address it. *See* Ariz. R. Crim. P. 32.9(c) (party may petition appellate court “for review of the actions of the trial court”; petition for review must include “issues which were decided by the trial court and which the defendant wishes to present to the appellate court for review”).

concluded, to the extent Gilbert intended to raise this claim as one based on a significant change in the law pursuant to Rule 32.1(g), an exception to preclusion under Rule 32.2(b), he did not successfully establish such a claim. As the court correctly stated:

It also appears that the defendant may be claiming pursuant to Ariz. R. Crim. P. 32.1(g) that there has been a significant change in the law, which if applied to the defendant's case would alter the outcome of the defendant's convictions or sentences. The defendant refers to a criminal matter arising out of the Superior Court in Cochise County. The defendant alleges that in that matter, a defendant who had been charged with multiple counts of Sexual Exploitation of a Minor challenged the convictions and the charges were reduced to misdemeanors. The Court cannot determine from the defendant's petition how this reduction was possible. Regardless, decisions made in other Superior Court cases have no binding authority over this Court's decision in the present case, nor can the Court substantiate anything alleged by the defendant.

¶4 Therefore, although Gilbert's petition for review is granted, relief is denied.

/s/ Philip G. Espinosa

PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Virginia C. Kelly

VIRGINIA C. KELLY, Presiding Judge

/s/ Peter J. Eckerstrom

PETER J. ECKERSTROM, Judge