

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

RALPH VER HAGE,
Petitioner.

No. 2 CA-CR 2015-0331-PR
Filed January 14, 2016

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Pima County
No. CR024667
The Honorable Richard E. Gordon, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Barbara LaWall, Pima County Attorney
By Jacob R. Lines, Deputy County Attorney, Tucson
Counsel for Respondent

Ralph Ver Hage, Florence
In Propria Persona

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MEMORANDUM DECISION

Judge Staring authored the decision of the Court, in which Presiding Judge Howard and Judge Espinosa concurred.

STARING, Judge:

¶1 Ralph Ver Hage seeks review of the trial court’s order summarily denying his “Exigent Motion: Clarification of Sentence Requested,” which the trial court treated as a petition for post-conviction relief brought pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that order unless the court clearly abused its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Ver Hage has not met his burden of demonstrating such abuse here.

¶2 Ver Hage was convicted in 1989 of child molestation and four counts of sexual conduct with a minor under the age of fifteen and was sentenced to concurrent and consecutive prison terms totaling forty-two years. We affirmed his conviction and sentences on appeal. *State v. Ver Hage*, No. 2 CA-CR 89-0226 (memorandum decision filed Nov. 7, 1989). Ver Hage has since unsuccessfully sought post-conviction relief on at least two occasions, raising claims related to his sentence. *State v. Ver Hage*, No. 2 CA-CR 2014-0004-PR (memorandum decision filed Apr. 28, 2014); *State v. Ver Hage*, No. 2 CA-CR 00-0213-PR (memorandum decision filed Oct. 5, 2000).

¶3 Following our most-recent memorandum decision, Ver Hage filed a motion seeking to “clarify the true term” of his sentence, asserting he was incorrectly sentenced as a repetitive offender and his sentence was excessive. Treating the motion as a petition for post-conviction relief, the court found his claims precluded. This petition for review followed.

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¶4 On review, Ver Hage repeats his sentencing arguments and claims they are not subject to preclusion. He first argues his sentence constitutes fundamental error that can be raised at any time. But a claim of sentencing error cannot be raised in an untimely post-conviction proceeding, even if any error might constitute fundamental error. Ariz. R. Crim. P. 32.1(c), 32.4(a); *see also State v. Shrum*, 220 Ariz. 115, ¶¶ 6-7, 23, 203 P.3d 1175, 1177, 1180 (2009) (illegal sentence claim precluded); *Swoopes*, 216 Ariz. 390, ¶ 42, 166 P.3d at 958 (fundamental error not excepted from preclusion). And, despite Ver Hage's contrary suggestion, an illegal sentence does not implicate the trial court's subject matter jurisdiction. *See State v. Bryant*, 219 Ariz. 514, ¶¶ 16-17, 200 P.3d 1011, 1015 (App. 2008).

¶5 Ver Hage also argues he is entitled to raise his sentencing arguments because they are of sufficient constitutional magnitude to require a knowing, voluntary, and intelligent waiver, citing *Stewart v. Smith*, 202 Ariz. 446, 46 P.3d 1067 (2002). Pursuant to *Stewart*, certain claims may be raised in a successive post-conviction proceeding without being subject to preclusion on waiver grounds pursuant to Rule 32.2(a)(3). *See Stewart*, 202 Ariz. 446, ¶ 12, 46 P.3d at 1071. But *Stewart* does not apply to claims raised in an untimely proceeding like this one, and Ver Hage's sentencing claims are barred irrespective of waiver. *See State v. Lopez*, 234 Ariz. 513, ¶¶ 6-8, 323 P.3d 1164, 1166 (App. 2014).

¶6 Although we grant review, we deny relief.