IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

DELL RAINBOW VANDERSCHUIT,
Petitioner.

No. 2 CA-CR 2016-0008-PR
Filed March 7, 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NOT FOR PUBLICATION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 Maricopa County
No. CR2008009278001DT
The Honorable Steven K. Holding, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

Dell Vanderschuit, Florence
In Propria Persona

MEMORANDUM DECISION

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Vásquez and Judge Miller concurred.

E C K E R S T R O M, Chief Judge:

¶1 Dell Vanderschuit seeks review of the trial court's order summarily dismissing his successive and untimely notice of post-conviction relief filed 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). Vanderschuit has not met his burden of demonstrating such abuse here.

¶2 After a jury trial, Vanderschuit was convicted of attempted child prostitution, which the jury found to be a dangerous crime against children (DCAC), and the trial court sentenced him to a ten-year prison term. Vanderschuit's offense stemmed from his attempt to procure a child for sexual purposes through contact with an undercover police officer who had posed as a caretaker for a fictitious child. Vanderschuit's conviction and sentence were affirmed on appeal. *State v. Vanderschuit*, No. 1 CA-CR 09-0822 (memorandum decision filed July 21, 2011). He sought post-conviction relief, and appointed counsel filed a notice stating he had reviewed the record but had found no colorable claims to raise in a Rule 32 proceeding. Vanderschuit filed a pro se petition, which the trial court summarily denied, and this court denied relief on review. *State v. Vanderschuit*, No. 1 CA-CR 13-0181 PRPC (memorandum decision filed Sept. 18, 2014).

¶3 While his petition for review was pending, Vanderschuit filed a notice of post-conviction relief stating he "intends to raise two claims in a successive PCR petition." First, Vanderschuit claimed he could not be convicted of "a Dangerous Crime Against Children" because there was no minor victim under

the age of fifteen and, therefore, he was entitled to relief pursuant to Rule 32.1(h). Second, Vanderschuit asserted his conviction under the DCAC statute[1] was improper because the victim was not an "actual child under the age of 15." Thus, he reasoned, because the jury had been instructed it "could find [his] 'victim' was under the age of 15 if [it] found that he believed the 'victim' was under the age of fifteen," his "right to [a] jury trial" had been violated. The trial court summarily dismissed the notice. It stated, inter alia, that Vanderschuit had "failed to meet []his burden" under Rule 32.1(h) and that "the undercover officer in this case did not pose as a minor but rather as the caregiver to a minor child." This petition for review followed the court's denial of Vanderschuit's motion for rehearing.

¶4 On review, Vanderschuit identifies a variety of purported errors in the trial court's ruling, including that the court mischaracterized his claim, improperly required him to provide evidence in support of that claim, and misstated "the standard for relief under Rule 32.1(h)." But we need not reach the bulk of Vanderschuit's arguments because his claims cannot be raised in this untimely proceeding. *See* Ariz. R. Crim. P. 32.4(a); *cf. State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984) (appellate court obliged to affirm trial court's ruling if result legally correct for any reason).

¶5 Vanderschuit first claims he is entitled to relief under Rule 32.1(h), which provides that a defendant is entitled to relief if he or she "demonstrates by clear and convincing evidence that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would have found defendant guilty of the underlying offense beyond a reasonable doubt, or that the court would not have imposed the death penalty." However,

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[1]We refer to the statute governing sentence enhancement for a DCAC in effect at the time of Vanderschuit's offenses, A.R.S. § 13-604.01. *See* 2007 Ariz. Sess. Laws, ch. 248, § 2. The statute was renumbered to A.R.S. § 13-705 effective January 2009. 2008 Ariz. Sess. Laws, ch. 301, §§ 17, 29, 120.

Vanderschuit misconstrues the DCAC statute, seeming to suggest a dangerous crime against children is an offense distinct from attempted child prostitution. But the DCAC statute does not create a distinct offense, it instead provides for an enhanced sentence for any of a number of offenses that meet the definition of a dangerous crime against children. *See former* A.R.S. § 13-604.01.

¶6 In view of our supreme court's reference to the "underlying offense" in Rule 32.1(h) and having included in that rule a separate provision for a petitioner to present evidence to show the death penalty would not have been imposed, we cannot say the supreme court intended for the "underlying offense" to encompass sentencing enhancements or aggravators such as the DCAC statute. *See State v. Tillmon*, 222 Ariz. 452, ¶ 8, 216 P.3d 1198, 1200 (App. 2009) (court interprets rules by plain meaning and read in conjunction with one another); *Marlar v. State*, 136 Ariz. 404, 411, 666 P.2d 504, 511 (App. 1983) (statute or regulation construed so no "clause, sentence or word is rendered superfluous . . . or insignificant"). Accordingly, Vanderschuit's claim the DCAC statute should not apply is not cognizable under Rule 32.1(h). The gravamen of his claim—that the DCAC sentence enhancement does not apply in these circumstances—is a claim pursuant to Rule 32.1(c), which cannot be raised in an untimely proceeding like this one. *See* Ariz. R. Crim. P. 32.4(a).

¶7 Vanderschuit's claim that his jury rights were violated is a constitutional claim cognizable under Rule 32.1(a) and, thus, also cannot be raised in this untimely proceeding. Ariz. R. Crim. P. 32.4(a). Vanderschuit contends this claim is not subject to preclusion because it is of sufficient constitutional magnitude to require personal waiver, citing *Stewart v. Smith*, 202 Ariz. 446, 46 P.3d 1067 (2002). But the waiver principles discussed in *Stewart* do not apply here. *See State v. Lopez*, 234 Ariz. 513, ¶¶ 7-8, 323 P.3d 1164, 1166 (App. 2014); *see also* Ariz. R. Crim. P. 32.4(a).

¶8 Because Vanderschuit's successive and untimely notice of post-conviction relief identified no cognizable claim arising under Rule 32.1(d) through (h), the trial court was required to summarily

dismiss it. *See* Ariz. R. Crim. P. 32.2(b), 32.4(a). Accordingly, we grant review but deny relief.