IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

BRUCE WARREN LAFORGE,
Petitioner.

No. 2 CA-CR 2016-0033-PR
Filed April 18, 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NOT FOR PUBLICATION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 Yavapai County
No. P1300CR201201051
The Honorable Cele Hancock, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

White Law Offices, PLLC, Flagstaff
By Wendy F. White
Counsel for Petitioner

Sheila Sullivan Polk, Yavapai County Attorney
By Kevin D. Schiff, Deputy County Attorney, Prescott
Counsel for Respondent

MEMORANDUM DECISION

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

E S P I N O S A, Judge:

¶1 Bruce LaForge seeks review of the trial court's order summarily dismissing his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P., and the subsequent denial of his motion for rehearing. We will not disturb those rulings unless the court abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We find no such abuse here.

¶2 In 2013, LaForge pled guilty to sexual conduct with a minor and child abuse for offenses that occurred in 1997 involving his then-fifteen-year old son. The trial court found as aggravating factors that the victim suffered emotional, physical and financial harm, and his family, including his child, also suffered; LaForge had prior misdemeanor convictions; the crime was committed in the presence of a child; LaForge is a risk to the community; and although it is not clear, the court may have treated as an aggravating factor its finding that LaForge re-victimized the victim during a 2012 confrontation call. The court found as mitigating factors that LaForge had a difficult childhood, he did not have prior felony convictions, and he had "serve[d] his country in the Navy." The court then sentenced him to an aggravated, 12.5-year prison term pursuant to former A.R.S. § 13-702.01(A), to be followed by lifetime probation.[1] After the sentence was announced, defense counsel

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[1]In this decision, we refer to the sentencing statutes in effect at the time of LaForge's offenses. 1996 Ariz. Sess. Laws, ch. 343 § 1 (former A.R.S. § 13-702), 1993 Ariz. Sess. Laws, ch. 255, § 12 (former § 13-702.01). We also note that § 13-702.01 has been repealed, 2008 Ariz. Sess. Laws, ch. 301, § 25, and that its substantive provisions were modified and moved to become part of A.R.S. §§ 13-702 and

objected to the court's finding of the following aggravating factors: (1) the victim's child suffered as a result of LaForge's conduct; (2) the victim was re-victimized by the 2012 confrontation call with LaForge; and, (3) the offenses were committed in the presence of a child. LaForge also objected to the court's failure to find as a mitigating factor that his capacity had been impaired at the time of the incident.

¶3 LaForge sought post-conviction relief, claiming: (1) the court had improperly found as an aggravating factor that the offense was committed in the presence of a child; (2) 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 court had failed to find two aggravating factors specifically enumerated in A.R.S. § 13-702(C); (3) aside from harm caused to the victim, there was insufficient evidence to support the other aggravating factors the court had found; and, (4) the court had failed to consider certain mitigating circumstances and properly weigh the mitigating and aggravating factors.

¶4 The trial court agreed with LaForge that the presence of a child was not an enumerated aggravating factor in 1997, and concluded it had erred in considering it as such, but nonetheless determined "[t]here is ample proof of two enumerated factors[:] 1) Emotional, Physical and Financial Harm to the Victim[;] and 2) Emotional[,] Physical and Financial Harm to the victim's family." Noting it had considered all of the aggravating and mitigating evidence presented, and despite its erroneous treatment of the presence of a child as an aggravating factor, the court concluded "the immeasurable harm caused to the victim and his family is of such severity that the mitigating factors . . . do not outweigh the aggravating circumstances." The court thus summarily dismissed the petition and LaForge's motion for rehearing. This petition for review followed.

13-703. *See* 2008 Ariz. Sess. Laws, ch. 301, §§ 24, 28. We further note that the aggravating and mitigating circumstances were later moved to A.R.S. § 13-701. *See* 2008 Ariz. Sess. Laws, ch. 301, § 23.

¶5 On review, LaForge asserts the trial court erred in rejecting his claim that the aggravated sentence was improper pursuant to *Perrin*, maintaining the court abused its discretion by "finding that harm to the victim's family, where the victim had not died, was an enumerated aggravating factor justifying the imposition of the super maximum sentence of 12.5 years." *See* 1996 Ariz. Sess. Laws, ch. 343 § 1 (enumerated aggravating factor of "physical, emotional and financial harm caused to the victim or, if the victim has died as a result of the conduct of the defendant, the emotional and financial harm caused to the victim's immediate family."). LaForge also contends that, because the victim was fifteen years old when the offenses occurred in 1997, any asserted harm to his future wife and child, who were not his "family" in 1997, was "too attenuated" to be considered as an aggravating factor and maintains there was insufficient evidence to support this finding. He further argues that, with the exception of harm to the victim, there was insufficient evidence to establish the other aggravating factors, including that the victim was "re-victimized" by the 2012 confrontation call with LaForge and that LaForge poses a risk to the community. He asks that his sentence be vacated, that we remand for a new hearing on the aggravating factors, and that he be resentenced to a term not to exceed ten years.

¶6 We first address LaForge's arguments that his sentence was improper under *Perrin*,[2] that the trial court's finding as an

[2]We note that Rule 32 counsel did not assert in this of-right Rule 32 proceeding that trial counsel had been ineffective in failing to raise the *Perrin* claim at sentencing, and further note that LaForge is not precluded from raising a claim of ineffective assistance of current Rule 32 counsel in a second petition. *See State v. Petty*, 225 Ariz. 369, ¶ 9, 238 P.3d 637, 640 (App. 2010) (pleading defendant constitutionally entitled to effective assistance of counsel in first, of-right Rule 32 proceeding, and may challenge that counsel's performance in timely filed second Rule 32 proceeding); *see also* Ariz. R. Crim. P. 32.1 (defining Rule 32 of-right proceeding); Ariz. R. Crim. P. 32.4 2000 amend. cmt. (rule amended "to allow the pleading defendant thirty days within which to file a second notice

aggravating factor that the victim's wife suffered harm was too attenuated, and that there was no evidence to support a finding of harm to the victim's wife or that LaForge poses a risk to the community. Because these three claims are based on sentencing error under Rule 32.1(c), LaForge waived them by failing to raise them at sentencing. *See* Ariz. R. Crim. P. 32.2(a)(3), (b). And, although the "[i]mposition of an illegal sentence constitutes fundamental error," *State v. Thues*, 203 Ariz. 339, ¶ 4, 54 P.3d 368, 369 (App. 2002), a claim like this one, that a sentence is "not in accordance with the sentence authorized by law" under Rule 32.1(c), is not exempt from preclusion, *see State v. Shrum*, 220 Ariz. 115, ¶¶ 6-7, 23, 203 P.3d 1175, 1177, 1180 (2009) (holding illegal sentence claim precluded by waiver); *Swoopes,* 216 Ariz. 390, ¶ 42, 166 P.3d at 958 (fundamental error not excepted from preclusion). Accordingly, although the court was not required to address these otherwise precluded claims, it nonetheless correctly denied relief on them. *Cf. State v. Oakley*, 180 Ariz. 34, 36, 881 P.2d 366, 368 (App. 1994) (appellate court "will affirm the trial court when it reaches the correct result even though it does so for the wrong reasons").

¶7 We do, however, address on the merits LaForge's claims, raised at sentencing, that the trial court improperly treated as an aggravating factor harm suffered by the victim's child and the re-victimization of the victim by the confrontation call. "Whether a trial court may employ a given factor to aggravate a sentence presents a question of law we review de novo." S*tate v. Alvarez*, 205 Ariz. 110, ¶ 6, 67 P.3d 706, 709 (App. 2003).

¶8 At the change-of-plea hearing, LaForge acknowledged that during the confrontation call he had admitted having sexual intercourse with his then fifteen-year old son and that he "had [the victim] masturbate" him. Additionally, the presentence report, which the court noted it had considered, reported the victim had stated LaForge's conduct cost him his job, caused him "severe anxiety attacks," prompted him to consider suicide, made a "big"

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if the defendant seeks to challenge counsel's effectiveness in the [first] Rule 32 of-right proceeding").

impact on his marriage, and "took [his] adulthood away." In its ruling dismissing LaForge's Rule 32 petition, the trial court noted that during the confrontation call[3] the victim had "detail[ed] the problems he has struggled with due to [LaForge's] actions, including losing jobs, struggling with addiction and being estranged from the family," and that the victim had informed the court he had been hospitalized "numerous times" for suicide attempts.

¶9 The trial court further noted it found "most disturbing" that during the confrontation call LaForge had stated "at least five or six times that . . . he want[ed] to be assured that the [victim was] not going to turn him in," and the court further "note[d] for the record that this is a further re[-]victimization of [the victim]." In its ruling dismissing the petition below, the court concluded:

> The confrontation call, the verbal statements from the victim and the statement made by the victim to the [Yavapai County Adult Probation Department] all indicate without question that [the victim] suffered severe physical, emotional and financial harm. It is readily apparent that the victim's family, his wife and child suffered emotional and financial harm as well. The victim spoke time and again about his struggles keeping a job and the struggles with his marriage, his family's concerns about his mental health, his

[3]Although the transcript and recording of the confrontation call is not part of the record on review, LaForge does not challenge the trial court's reliance on its contents or the accuracy of the court's factual findings based on those contents. *See State v. Rodriguez*, 205 Ariz. 392, ¶ 18, 71 P.3d 919, 924 (App. 2003) (we defer to trial court's findings of fact unless unsupported by the record); *cf. State v. Fritz*, 157 Ariz. 139, 141, 755 P.2d 444, 446 (App. 1988) (trial court sole arbiter of credibility of witnesses in Rule 32 evidentiary hearing).

> consideration of suicide, all of which were a result of the damage done by [LaForge].

¶10 We conclude the undisputed harm the victim suffered as a direct result of LaForge's conduct, which included difficulty maintaining employment, suicide attempts, and a strained marriage, to name a few, necessarily negatively impacted every aspect of the victim's life, including his relationship with his own child. We thus conclude the trial court correctly found that individuals close to the victim, like his child, also suffered as a result of the victim's suffering, and we thus reject LaForge's suggestion that such a finding lacked "[]sufficient nexus" to his conduct. For the same reasons we reject LaForge's assertion on review that "[a]ny emotional harm to the victim's family was caused by the harm to the victim and the victim's emotional response to the crime, not directly by [LaForge's] conduct." In addition, in light of the significant impact of the underlying offenses on the victim's life, the court did not err by finding the victim was harmed anew when he had to relive the trauma of these events during the confrontation call fifteen years after they had occurred; even defense counsel stated at sentencing that "on the badness meter," this offense is "particularly offensive."

¶11 For all of the foregoing reasons, LaForge's petition for review is granted but relief is denied.