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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. VERNON MICHAEL LANGLOSS, Petitioner.	2 CA-CR 2011-0038-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR41697

Honorable Richard D. Nichols, Judge

REVIEW GRANTED; RELIEF DENIED

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H O W A R D, Chief Judge.

¶1 Petitioner Vernon Langloss seeks review of the trial court's partial denial of his second petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. After a 1993 jury trial, Langloss was convicted of two counts of sexual conduct with a minor under fourteen, two counts of child molestation, and one count of attempted sexual

conduct with a minor under fourteen, all dangerous crimes against children involving the same victim, alleged to have occurred "on or about the month of April 1993." The trial court treated three of the convictions as predicate offenses and sentenced Langloss to presumptive, consecutive terms of imprisonment—two terms of twenty-eight years for the child molestation counts, one term of twenty years, one ten-year term, and life imprisonment without possibility of release for thirty-five years. After consolidating Langloss's appeal and his first Rule 32 petition for review, we affirmed his convictions and sentences and denied post-conviction relief. *State v. Langloss*, Nos. 2 CA-CR 94-0027, 2 CA-CR 95-0635-PR (consolidated) (memorandum decision filed Oct. 31, 1996).

¶2 Langloss filed a successive petition for post-conviction relief in May 2009 and, in his petition and supporting memoranda, claimed there had been significant changes in the law that, if determined to apply to his case, would likely have changed his convictions or sentences. *See* Ariz. R. Crim. P. 32.1(g). Based on the indictment and the trial court's sentencing minute entry, Langloss correctly summarized his convictions as follows:

> Count 4, Sexual Conduct with a Minor under 14, inserting his penis into the victim's vulva, nonrepetitive and a dangerous crime against children
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> Count 5, Molestation of a Child, Victim under 14, touching victim's genitals with his hand, a predicate felony and repetitive under A.R.S. § 13-604.0l to Count 4
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> Count 6, Attempted Sexual Conduct with a Minor under 14, attempting to put his penis in the victim's mouth, nonrepetitive and a dangerous crime against children

> Count 7, Molestation of a Child, Victim under 14, making the victim touch his penis, a predicate felony and repetitive under A.R.S. § 13-604.01 to Count 6
>
> Count 8, Sexual Conduct with a Minor under 14, kissing the victim's vulva, a predicate felony and repetitive under A.R.S. § 13-604.01 to Counts 6 and 7

¶3 The state agreed with Langloss that, pursuant to this court's decision in *State v. Brown*, 191 Ariz. 102, 952 P.2d 746 (App. 1997), his convictions for counts four, six, and seven of the indictment should not have been treated as predicate felonies and, therefore, that his sentences for counts five, seven, and eight had been enhanced in error. The trial court granted relief on this claim and resentenced Langloss to seventeen years for counts five and seven (reduced from twenty-eight years) and twenty years for count eight (reduced from life imprisonment).[1] The court denied Langloss's other claims for relief. This petition for review followed.

¶4 On review, Langloss presents the same arguments he raised below. He suggests the trial court abused its discretion in failing to address all of his arguments and

[1]The trial court's grant of relief on this claim is not before us on review. Neither is the legality of the sentence the court imposed at resentencing, notwithstanding Langloss's styling his petition, "Petition for Review re Resentencing Pursuant to Petition for Post-Conviction Relief." The court's resentencing order is subject to review by direct appeal. *See* A.R.S. § 13-4033(A)(4) (defendant may appeal "sentence on the grounds that it is illegal or excessive"); *see also State v. Rosales*, 205 Ariz. 86, ¶ 8, 66 P.3d 1263, 1266 (App. 2003) (post-conviction claims alleging ineffective assistance of counsel at resentencing must "be litigated in a different Rule 32 proceeding initiated by filing a separate notice of post-conviction relief within ninety days of the resentencing or, if petitioner has appealed from his resentencing, within thirty days of our mandate following the disposition of any such appeal"); *see also* Ariz. R. Crim. P. 32.1(f) (permitting relief of delayed appeal where "defendant's failure to file a . . . notice of appeal within the prescribed time was without fault on the defendant's part"). Our review here is limited to the court's denial of Langloss's claims for post-conviction relief from his original convictions and sentences.

in basing its ruling on legally erroneous conclusions of law. We review a court's summary denial of post-conviction relief for an abuse of discretion. *State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006). We find no abuse of discretion in the court's denial of relief.

¶5 To the extent Langloss has stated a non-precluded claim challenging his convictions for child molestation, the trial court determined double jeopardy principles were not implicated because he had been convicted for separate and distinct acts charged in each of the five counts of his indictment. *See State v. Ortega*, 220 Ariz. 320, ¶ 9, 206 P.3d 769, 772-73 (App. 2008) (double jeopardy may be implicated where "'same act or transaction constitutes a violation of two distinct statutory provisions'"), *quoting Blockburger v. United States*, 284 U.S. 299, 304 (1932). According to Langloss, the court improperly relied on our similar conclusion on appeal that evidence supported finding the molestation offenses had "occurred at different times" than the other offenses charged. He further implies our conclusion was unreliable because it was based "solely on the victim's testimony." Despite lengthy hypothetical constructs to illustrate how the same conduct might have been charged in separate counts of an indictment, Langloss's petition is devoid of references to any relevant portion of the record or legal authority suggesting the court abused its discretion in denying this claim.

¶6 As he did below, Langloss also maintains our decision in *State v. Gonzalez*, 216 Ariz. 11, 162 P.3d 650 (App. 2007),[2] established that he is entitled to be resentenced

[2]In *Gonzalez*, we concluded former § 13-604.01, as amended by 1997 Ariz. Sess. Laws ch. 179, § 1 and 1998 Ariz. Sess. Laws ch. 281, § 1, did not by its terms apply to

for attempted sexual conduct with a minor. We find no abuse of discretion in the trial court's determination that our holding in *Gonzalez* did not apply to this case. Quite simply, Langloss is mistaken that "[i]n 1993 as well as [in] 1997, A.R.S. § 13-604.01 did not provide a sentence for attempted sexual conduct with a minor." *See* 1987 Ariz. Sess. Laws, ch. 307, § 4.

¶7 In addition, this claim is precluded by Langloss's failure to raise it on appeal or in his first Rule 32 proceeding, and it was properly dismissed for that reason as well. *See* Ariz. R. Crim. P. 32.2(a)(3), (c) (defendant precluded from relief based on any ground that "has been waived at trial, on appeal, or in any previous collateral proceeding" and "any court on review of the record may determine and hold that an issue is precluded . . . "). Addressing arguments similar to those raised by Langloss below, our supreme court has expressly held that this court's decision in *Gonzalez* did not constitute a "'significant change in the law'" that would except a defendant's claim from the general rule of preclusion. *State v. Shrum*, 220 Ariz. 115, ¶¶ 19, 23, 203 P.3d 1175, 1179-80 (2009), *quoting* Ariz. R. Crim. P. 32.1(g); *see also* Ariz. R. Crim. P. 32.2(b) (Rule 32.2(a) preclusion does not apply to claims based on Rule 32.1(d), (e), (f), (g), or (h)).[3]

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sentences imposed for attempted sexual conduct with a child under the age of twelve. 216 Ariz. 11, ¶¶ 7-8, 15, 162 P.3d at 652.

[3]In his petition below, Langloss argued, in the alternative, that this claim was not precluded because it was raised pursuant to Rule 32.1(d), which provides relief when a defendant "is being held in custody after the sentence imposed has expired." Ariz. R. Crim. P. 32.1(d). This contention was contrary to the plain language of Rule 32.1(d), and without merit. Similarly, Langloss was mistaken when he argued below that, because the claim implicated due process, it could not be regarded as waived, for purposes of Rule 32.2(a)(3), by counsel's failure to raise it in previous proceedings. *See State v. Swoopes*,

Accordingly, Langloss's claim of sentencing error, based on our decision in *Gonzalez*, is precluded.[4]

¶8 Because Langloss's claims were either precluded or without legal merit, or both, the trial court did not abuse its discretion in denying them. Accordingly, we grant review but deny relief.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

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

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216 Ariz. 390, ¶ 28, 166 P.3d 945, 954 (App. 2007) ("mere assertion by a defendant that his or her right to a fair trial has been violated is not a claim of sufficient constitutional magnitude" to avoid finding of waiver "for purposes of Rule 32.2").

[4]On review, Langloss also challenges the trial court's determinations that (1) he was not entitled to retroactive application of a 1993 amendment to former § 13-604.01 that permitted the imposition of concurrent sentences for crimes involving a single victim and (2) he was sentenced properly pursuant to that statute for commission of dangerous crimes against children. But these claims were not raised in Langloss's petition for post-conviction relief. Instead, the issues were raised first in a sentencing memorandum prepared after the trial court had ordered resentencing as partial relief for his Rule 32 claims. These claims thus pertain to the sentences imposed at resentencing and, as addressed above, are not before us on review. *See* n.1, *supra*.