

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Respondent*,

v.

JOHNNY RAY KING, *Petitioner*.

No. 1 CA-CR 16-0511 PRPC

Petition for Review from the Superior Court in Maricopa County
No. CR1991-000543
The Honorable Danielle J. Viola, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Maricopa County Attorney's Office, Phoenix
By Diane Meloche
Counsel for Respondent

Johnny Ray King, Winslow
Petitioner

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MEMORANDUM DECISION

Presiding Judge Jon W. Thompson delivered the decision of the Court, in which Judge Maria Elena Cruz and Judge Peter B. Swann joined.

T H O M P S O N, Judge:

¶1 Johnny Ray King petitions this court for review from the dismissal of his successive petition for post-conviction relief (PCR). We have considered the petition for review and, for the reasons stated, grant review and deny relief.

¶2 A jury convicted King of aggravated assault, endangerment, and theft. King had two prior felonies and was on probation when he committed his crimes. The superior court sentenced King to a mandatory term of life imprisonment without possibility of parole for twenty-five years on the aggravated assault conviction, a presumptive term of eleven and one-quarter years on the theft conviction, and time served on the endangerment conviction. This court affirmed the convictions and sentences on appeal. *State v. King*, 1 CA-CR 92-0993 (Ariz. App. Apr. 28, 1994) (mem. decision).

¶3 Since that time, King has litigated numerous post-conviction motions, including PCR proceedings pursuant to Rule 32, Arizona Rules of Criminal Procedure. Recently, on January 5, 2016, King filed a motion to vacate illegal sentence. The superior court treated the motion as a PCR and noted that it was King's sixth PCR. King again challenged the legality of his life sentence, but presented the claim in terms of newly discovered evidence and significant change in the law. On March 10, 2016, the superior court rejected the claims and summarily dismissed. King filed a motion for rehearing, and other pleadings including one seeking "Brady" material and other documents which, according to King, would prove his claim that his sentence was based on false evidence presented by the state. The superior court denied the motions. This petition for review followed.

¶4 Absent an abuse of discretion or error of law, this court will not disturb a superior court's ruling on a petition for post-conviction relief. *State v. Gutierrez*, 229 Ariz. 573, 577, ¶ 19 (2012). King has not shown any abuse of discretion or error of law.

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¶5 Understandably, King has challenged his life sentence on numerous occasions. His sentence is undoubtedly harsh. At sentencing, the court noted “I do not agree that this man ought to be in prison for life under the circumstances of this case.” However, as found by the superior court, King was on probation at the time he committed the crimes, and contrary to King’s claim that his two prior offenses were “open ended,” he had two prior felony convictions. King’s former probation officer testified that these offenses had been designated felonies. Based on the law in effect when King committed his crimes, Arizona Revised Statutes (A.R.S) § 13-604.02 (2010) mandated a life sentence without possibility of parole.

¶6 On review, King claims that his life sentence is illegal. However, an untimely petition for post-conviction may only raise claims pursuant to Arizona Rule of Criminal Procedure 32.1(d), (e), (f), (g) or (h); see also *State v. Shrum*, 220 Ariz. 115, 118, ¶ 13 (2009) (noting “few exceptions” to “general rule of preclusion” for claims in untimely or successive petitions). Claims of illegal sentence do not fall within Rule 32.1(d), (e), (f), (g) or (h) because they are encompassed within Rule 32.1(c). *State v. Cazares*, 205 Ariz. 425, 426, ¶ 4 (App. 2003). Thus, this claim is precluded.

¶7 King also argues that the superior court had no jurisdiction to impose an illegal sentence and that subject matter jurisdiction may be raised at any time. It is true that a claim of subject matter jurisdiction can be raised at any time. *State v. Flores*, 218 Ariz. 407, 410, ¶ 6 (App. 2008). However, the imposition of an illegal sentence is not a subject matter jurisdiction error. *State v. Bryant*, 219 Ariz. 514, 518, ¶¶ 14-17 (App. 2008).

¶8 King next argues that his probation officer perjured herself and that the state is withholding evidence that would prove his prior offenses were “open-ended” offenses when he committed his crimes. He offers no support for these allegations. Nor does any exist. This court has reviewed the records in both Maricopa County cause numbers CR1988-008551 and CR1989-008136. The records reflect that in each case King plead guilty to and was sentenced for a class 6 designated felony offense.

¶9 King also argues that his sentences were imposed unlawfully in light of *Blakely v. Washington*, 542 U.S. 296 (2004) (any aggravating factor which increases punishment must be admitted by defendant or found by jury), a significant change in the law. King’s sentences were not aggravated. Furthermore, *Blakely* is not retroactive, *State v. Febles*, 210 Ariz. 589, 592, ¶ 7 (App. 2005). King’s case was final when this court issued the mandate on December 27, 1994.

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¶10 Finally, King claims that because counsel in his first PCR filed a notice “akin to and [sic] Anders brief,” this proceeding “is the petitioner [sic] first Rule 32 (PCR) Notice.” King relies on Ariz. R. Crim. P. 16.1(c). This issue was not presented to the superior court and therefore we do not address it. Issues not first presented to the trial court may not be presented in the petition for review. *State v. Bortz*, 169 Ariz. 575, 576 (App. 1991); Ariz. R. Crim. P. 32.9(c)(1)(ii).

¶11 We grant review and deny relief.