

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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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.

THOMAS BAUMGARTNER, *Petitioner*.

No. 1 CA-CR 16-0715 PRPC
FILED 11-14-2017

Petition for Review from the Superior Court in Maricopa County
No. CR 2001-090156
The Honorable Charles Donofrio, III, Judge *Pro Tempore* (Retired)

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Maricopa County Attorney's Office, Phoenix
By Adena J. Astrowsky
Counsel for Respondent

Robert J. Campos Associates PLC, Phoenix
By Robert J. Campos
Counsel for Petitioner

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MEMORANDUM DECISION

Chief Judge Samuel A. Thumma delivered the decision of the Court, in which Judge Michael J. Brown and Judge Jennifer B. Campbell joined.

T H U M M A, Chief Judge:

¶1 Petitioner Thomas Baumgartner seeks review of the superior court's order dismissing his timely, "of right" petition for post-conviction relief, filed pursuant to Arizona Rule of Criminal Procedure 32.1 (2017).¹ 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). Because Baumgartner has shown no such error, this court grants review of his petition but denies relief.

¶2 In September 2001, Baumgartner pled guilty to three counts of attempted sexual conduct with a minor, each Class 3 felonies and Dangerous Crimes Against Children in the second degree, committed between September 30, 2000 and January 3, 2001. Baumgartner was sentenced to eight years in prison on one conviction and placed on lifetime probation for the other two convictions upon his absolute discharge from prison.

¶3 Baumgartner completed his prison sentence, was released on probation, was found to have violated probation twice and was reinstated on probation both times. When charged with violating probation a third time, he admitted a violation, his probation was revoked and he was sentenced to ten years in prison on one conviction and reinstated on lifetime probation for the remaining conviction upon his absolute discharge from prison.

¶4 Baumgartner then filed a notice of post-conviction relief, and after appointed counsel filed a notice of completion, filed a pro se petition for post-conviction relief. Baumgartner's petition alleges his waiver of his constitutional rights was not knowing, voluntary and intelligent; his plea/admission counsel was ineffective for trying to get his intensive

¹ Absent material revisions after the relevant dates, statutes and rules cited refer to the current version unless otherwise indicated.

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probation status reduced to standard probation; counsel was ineffective for failing to present mitigation evidence; he was denied due process when the superior court considered evidence of the dismissed violations in its disposition; he was entitled to concurrent lifetime probation grants and his post-conviction relief counsel was ineffective. The superior court summarily dismissed the petition. This timely petition for review followed.

¶5 Baumgartner's petition for review reiterates the arguments he asserted in the superior court as well as asserting new issues in a supplemental petition for review. Issues not presented to the superior court may not be raised in a petition for review. Ariz. R. Crim. P. 32.9(c)(1); *State v. Ramirez*, 126 Ariz. 464, 468 (App. 1980). Accordingly, this court declines to address the issues raised for the first time in the supplemental petition for review.

¶6 The record shows Baumgartner's admission was knowing, voluntary and intelligent. He was advised of the consequences of admitting his violation, was advised of the rights he was giving up, chose to admit a violation and provided a factual basis for the violation. A court only need find one violation of probation to "revoke, modify or continue probation." Ariz. R. Crim. P. 27.8(b)(4), (c)(2). Baumgartner's suggestion that a court cannot consider a probationer's whole performance on probation without proof of every instance of non-compliance is without merit. *See generally State v. Elmore*, 174 Ariz. 480 (App. 1992). "The revocation of probation is not subject to the limitations of a formal trial." *State v. Sanchez*, 19 Ariz. App. 253, 254 (App. 1973). There is no specific requirement that the court (after an admission) take formal sworn testimony instead of relying on reports. *Id.* Accordingly, Baumgartner has shown no due process denial.

¶7 Baumgartner also has not shown his counsel was ineffective during the colloquy. To show ineffective assistance of counsel, Baumgartner must show both deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A failure to make a sufficient showing on either prong obviates the need to determine whether the other prong was satisfied. *State v. Salazar*, 146 Ariz. 540, 541 (1985).

¶8 As applied, Baumgartner does not explain facts sufficient to show his counsel failed to fully explain the constitutional ramifications of his admission during the colloquy. Baumgartner also cannot show either deficient performance or prejudice in relation to his status conference, discussions regarding intensive probation or the presentation of mitigation at his disposition. This was his third admitted probation violation and the superior court noted Baumgartner had exhausted what the probation

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department had provided him and still had not made the changes necessary to be successful on probation. His attorneys clearly advocated his position in open court, arguing for reinstatement and pointing out the positive aspects of his performance on probation and in the community. Counsel also filed a disposition memorandum with the court, noting he was employed and presented documents showing he was admitted to a program to improve his skills.

¶9 Turning to his sentencing claim, preclusion applies to untimely claims regarding the legality of a sentence. *State v. Shrum*, 220 Ariz. 115, 117-120 ¶¶ 3-23 (2009). Baumgartner's claim arises under Rule 32.2(c), and as a challenge to the original sentence, is precluded. Moreover, Baumgartner was originally placed on two terms of lifetime probation to begin upon completion of his original prison sentence. There was nothing indicating the probation grants were consecutive, and *State v. Bowsher*, cited by Baumgartner runs contrary to his argument, as it upheld consecutive probation terms. 225 Ariz. 586, 590 (2010). He has one remaining lifetime probation grant. Baumgartner argues against consecutive terms of lifetime probation, but now argues that he should have been revoked and had his sentences run concurrently. To the extent this argument was presented to the superior court, it lacks merit on this record; to the extent the argument was not presented to the superior court, it will not be addressed here.

¶10 Finally, Baumgartner's claim regarding his post-conviction relief counsel is premature and will not be addressed here. Such a claim is reserved for a second notice if timely filed after the issuance of the final order or mandate in this case. Ariz. R. Crim. P. 32.4(a) 2000 amendment comment; *State v. Pruett*, 185 Ariz. 128 (App. 1995).

¶11 For these reasons, this court grants review but denies relief.



AMY M. WOOD • Clerk of the Court
FILED: AA