

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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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

CLARENCE MICHAEL RHEA, *Petitioner*.

No. 1 CA-CR 16-0787 PRPC
FILED 10-26-2017

Petition for Review from the Superior Court in Maricopa County

No. CR2014-005417-001

CR2015-111925-001

The Honorable Sherry K. Stephens, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Maricopa County Attorney's Office, Phoenix

By Gerald R. Grant

Counsel for Respondent

Clarence Michael Rhea, Florence

Petitioner

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MEMORANDUM DECISION

Presiding Judge Paul J. McMurdie delivered the decision of the Court, in which Judge Peter B. Swann and Judge Samuel A. Thumma joined.

M c M U R D I E, Judge:

¶1 Petitioner Clarence Michael Rhea petitions this court for review from the dismissal of his petition for post-conviction relief of-right (“PCR”). We have considered the petition for review and, for the reasons stated, grant review but deny relief.

¶2 In Maricopa County cause CR2014-005417 (“2014 case”), Rhea was charged with failure to register as a sex offender, a Class 4 felony. Later, in Maricopa County cause CR2015-111925 (“2015 case”), Rhea was charged with two counts of aggravated driving or actual physical control while under the influence (“DUI”), Class 4 felonies. The State filed allegations of multiple prior felony convictions in each case.

¶3 Rhea resolved both cases by plea agreement. In the 2014 case, Rhea agreed to plead guilty to failure to register as a sex offender with one prior historical felony conviction. The parties stipulated to a slightly mitigated term of 3.5 years’ imprisonment and the State agreed to dismiss the allegation of the remaining four prior historical felony convictions.

¶4 In the 2015 case, Rhea agreed to plead guilty to one count of aggravated DUI with one prior historical felony conviction. The parties stipulated to a slightly aggravated sentence of 5 years’ imprisonment. At the consolidated change of plea proceeding, Rhea acknowledged that upon acceptance of the plea agreements, he would be sentenced to 3.5 years’ imprisonment in the 2014 case and 5 years’ imprisonment in the 2015 case.

¶5 The superior court accepted Rhea’s pleas and sentenced him according to the stipulations. The court found Rhea’s substance abuse issues, acceptance of responsibility, and his social circumstances as mitigating factors, and Rhea’s five prior felony convictions as an aggravating factor when it imposed the sentences.

¶6 Rhea timely commenced PCR proceedings and counsel was appointed. Counsel notified the court that after reviewing the record, counsel had found no arguable claims for relief. Rhea then filed a *pro se*

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petition and claimed that his sentences were unlawfully imposed, were illegal sentences, and that his counsel was ineffective (“IAC”) for failing to object.

¶7 Specifically, Rhea claimed that the prior historical felony used to enhance his sentences was more than five years old, and thus was not a valid prior historical felony. He next claimed the trial court violated the plea agreement when it used Rhea’s prior convictions as an aggravating factor because the State had dismissed the allegation of the remaining prior convictions. He also claimed that at sentencing the court had imposed a sentence of less than 3.5 years. The State filed a response and Rhea replied. The superior court reviewed the pleadings and summarily dismissed. This petition for review followed.

¶8 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). It is the petitioner’s burden to show that the superior court abused its discretion by denying the petition for post-conviction relief. *See State v. Poblete*, 227 Ariz. 537, 538, ¶ 1 (App. 2011) (petitioner has burden of establishing abuse of discretion on review).

¶9 On review, Rhea first argues that it was improper for the superior court to consider his other prior felonies as an aggravating factor because the State dismissed the allegation of these priors, thus taking these priors “off the table.”¹ However, no provision in the plea agreement barred the use of Rhea’s priors as an aggravating circumstance pursuant to Arizona Revised Statutes (“A.R.S.”) section 13-701(D). *See State v. Jackson*, 130 Ariz. 195, 197 (App. 1981) (fact that allegation of prior conviction was dismissed pursuant to a plea agreement did not preclude sentencing judge from considering prior conviction as an aggravating circumstance).

¶10 Rhea next contends that the prior historical felony used for enhancement was improperly used because it was more than five years old. Relying again on the dismissal of the other four priors, Rhea argues that the remaining felony cannot be a “third or more felony” as it was the only prior

¹ In his petition for review, Rhea suggests for the first time that his plea was involuntary because the State deliberately misled him when it agreed to dismiss the allegations of prior felony convictions. We do not address this issue because a petition for review may not raise issues other than those presented to the trial court. Ariz. R. Crim. P. 32.9(c)(1)(ii); *State v. Bortz*, 169 Ariz. 575, 577-78 (App. 1991); *State v. Wagstaff*, 161 Ariz. 66, 71 (App. 1988); *State v. Ramirez*, 126 Ariz. 464, 468 (App. 1980).

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felony left “on the table.” However, no provision in the plea agreement barred the use of Rhea’s priors to establish a “third or more prior felony,” and no reasonable understanding of the plea agreement and its terms would lead to that conclusion. The prior conviction used as the prior historical felony was a “third or more prior felony conviction” pursuant to A.R.S. § 13-105(22)(d), and was properly used to enhance the sentencing range.

¶11 Because it was not error for the superior court to use Rhea’s prior convictions as an aggravating circumstance, and because the prior historical felony was a “third or more prior felony,” Rhea’s sentence was neither unlawful nor unlawfully imposed, and counsel was therefore not ineffective for failing to object. The superior court ruled on Rhea’s claims in a thorough, well-reasoned manner that will allow any future court to understand the court’s ruling. Under these circumstances, no further analysis is needed. *See State v. Whipple*, 177 Ariz. 272, 274 (App. 1993). Therefore, we adopt the trial court’s ruling and deny relief.



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