

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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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

DANIEL WILLIAM ORTEGA, *Petitioner*.

No. 1 CA-CR 18-0072 PRPC
FILED 6-14-2018

Petition for Review from the Superior Court in Maricopa County
No. CR2013-451649-001
The Honorable Mark H. Brain, Judge

REVIEW GRANTED; RELIEF DENIED

APPEARANCES

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

Daniel William Ortega, Florence
Petitioner

STATE v. ORTEGA
Decision of the Court

MEMORANDUM DECISION

Judge Jennifer M. Perkins delivered the decision of the Court, in which Presiding Judge Diane M. Johnsen and Judge Kent E. Cattani joined.

P E R K I N S, Judge:

¶1 Daniel William Ortega petitions this Court for review from the dismissal of his petition for post-conviction relief pursuant to Arizona Rule of Criminal Procedure 32. We have considered the petition for review and, for the reasons stated, grant review, but deny relief.

¶2 Ortega pled guilty to three counts of attempted exploitation of a minor, classified as dangerous crimes against children and class three felonies. For count one, the superior court sentenced him to a stipulated term of ten years' imprisonment, the presumptive term. The court also sentenced him to two terms of lifetime probation for the remaining counts.

¶3 In Ortega's *pro se* petition for post-conviction relief before the superior court, he claimed that Arizona Revised Statutes ("A.R.S.") section 13-3553 (2018) is unconstitutional, relying on Rule 32.1(g) and *May v. Ryan*, 245 F. Supp. 3d 1145 (D. Ariz. 2017). In his petition to the superior court, Ortega argued § 13-3553 is unconstitutional because it requires the defendant to prove he did not know the age of the children depicted in the images, impermissibly shifting the burden of proof to the defendant. Ortega further contends the State should be required to prove, beyond a reasonable doubt, he knew the ages of the individuals depicted. Ortega's petition for post-conviction relief asserted that because § 13-3553 is unconstitutional, the superior court was without jurisdiction to accept his guilty plea. Ortega additionally argued that his trial counsel was ineffective for failing to raise these arguments. Finally, in his petition for post-conviction relief, Ortega indicated there were newly discovered material facts pursuant to Rule 32.1(e); however, Ortega never developed this argument before the superior court.

¶4 The superior court summarily dismissed Ortega's petition for post-conviction relief, finding Ortega had failed to present any arguably meritorious claim. Ortega timely petitioned this Court for review.

STATE v. ORTEGA
Decision of the Court

¶5 In his petition for review, Ortega reiterates his belief that A.R.S. § 13-3553 is unconstitutional but now argues the statute is unconstitutionally vague in light of *May* and improperly shifts the burden to the defendant to prove he was not “sexually motivated” in his possession of exploitative materials. Ortega additionally argues his counsel was ineffective for failing to raise these arguments prior to his guilty plea. Finally, Ortega argues the superior court lacked personal and subject matter jurisdiction to accept his guilty plea.

¶6 Ortega did not raise his vagueness or “sexual motivation” arguments before the superior court. Because a petition for review may not present issues not first raised before the superior court in its Rule 32 proceedings, Ortega has waived these arguments. Ariz. R. Crim. P. 32.9(c)(4)(B)(ii).

¶7 Even assuming Ortega has not waived his argument that § 13-3553 is unconstitutional pursuant to *May*, his argument is meritless. The district court in *May* addressed A.R.S. §§ 13-1407 and -1410, sexual molestation of a child and relevant defenses predicated on the defendant proving the conduct occurred under a variety of potentially lawful circumstances. 245 F. Supp. 3d at 1163. Here, Ortega pled guilty to three counts of attempted sexual exploitation of a minor pursuant to § 13-3553. Section 13-1407’s defenses are inapplicable to sexual exploitation of a minor under § 13-3553 and no relevant analogous statute exists. Thus, *May* is inapposite. Also, our supreme court addressed and upheld the constitutionality of the statutes found unconstitutional in *May*. *State v. Holle*, 240 Ariz. 300 (2016). Because decisions of federal district courts neither bind this Court nor provide a basis for declining to follow decisions of our state supreme court, we reject Ortega’s argument predicated on *May*. Because Ortega’s *May* argument lacks merit, competent counsel would not have raised any version of those arguments; thus, Ortega’s claim of ineffective assistance of counsel also fails.

¶8 Finally, as to Ortega’s remaining jurisdictional arguments, the superior court had jurisdiction to accept Ortega’s plea. First, the superior court had subject matter jurisdiction pursuant to Article 6, Section 14(4), of the Arizona Constitution. Second, Ortega waived personal jurisdiction when he appeared and pled guilty.

STATE v. ORTEGA
Decision of the Court

¶9

Accordingly, we grant review, but deny relief.



AMY M. WOOD • Clerk of the Court
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