

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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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

DAVID LUIS MARTINEZ, *Petitioner*.

No. 1 CA-CR 18-0414 PRPC
FILED 11-20-18

Petition for Review from the Superior Court in Maricopa County
No. CR2015-132643-001
The Honorable Barbara L. Spencer, Judge *Pro Tempore*

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Maricopa County Attorney's Office, Phoenix
By Gerald R. Grant
Counsel for Respondent

David Luis Martinez, Florence
Petitioner

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MEMORANDUM DECISION

Judge Peter B. Swann delivered the decision of the court, in which Presiding Judge Randall M. Howe and Judge Jennifer M. Perkins joined.

S W A N N, Judge:

¶1 David Luis Martinez petitions this court for review from the dismissal of his petition for post-conviction relief of-right. We have considered the petition for review and, for reasons that follow, we grant review but deny relief.

¶2 Martinez pled guilty to three counts of attempted sexual exploitation of a minor, all dangerous crimes against children. As charged in this case, a person commits sexual exploitation of a minor if the person knowingly distributes, transports, exhibits, receives, sells, purchases, electronically transmits, possesses or exchanges “any visual depiction in which a minor is engaged in exploitive exhibition or other sexual conduct.” A.R.S. § 13-3553(A)(2). When Martinez pled guilty, he admitted that he received and possessed visual depictions of “children” engaged in “sexual conduct.”

¶3 The superior court sentenced Martinez to nine years’ imprisonment for one count and placed him on lifetime probation for the other two counts. Martinez filed a timely petition for post-conviction relief of-right in which he challenged the validity of his convictions on several grounds – all based on the premise that A.R.S. § 13-3553 is unconstitutional. The superior court summarily dismissed the petition and Martinez now seeks review.

¶4 In his petition for review, Martinez argues that the federal district court case of *May v. Ryan*, 245 F. Supp. 3d 1145 (D. Ariz. 2017), is a significant change in the law that rendered A.R.S. § 13-3553 unconstitutional. He further contends A.R.S. § 13-3553 is unconstitutional even absent the *May* decision because it does not require the state to prove the person depicted was a minor or that the defendant knew the person depicted was a minor. Finally, Martinez argues his counsel was ineffective for failing to challenge the constitutionality of A.R.S. § 13-3553; the superior court had no jurisdiction because A.R.S. § 13-3553 is unconstitutional; and

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his pleas were not knowing, intelligent or voluntary because he was not aware A.R.S. § 13-3553 is unconstitutional.

¶5 We deny relief. Regarding the claim that *May* was a significant change in the law that rendered A.R.S. § 13-3553 unconstitutional, *May* was not a significant change in the law and has no application to this case. *May* addressed molestation of a child as defined in A.R.S. § 13-1410 and the affirmative defense to molestation contained in A.R.S. § 13-1407(E). 245 F. Supp. 3d at 1150–51. The district court held it was a violation of due process to shift the burden to the defendant to prove that he or she was not motivated by a sexual interest as an affirmative defense. *Id.* at 1162. Here, there is no affirmative defense to a charge of sexual exploitation of a minor, let alone an affirmative defense that shifts any burden of proof to the defendant, and the statutes at issue in *May* are not otherwise analogous to any statute at issue in this case. *May* also has no application because our supreme court has rejected the district court’s position. In *State v. Holle*, 240 Ariz. 300 (2016), the supreme court held that lack of sexual motivation is an affirmative defense the defendant must prove and is not an element the state must prove beyond a reasonable doubt. *Id.* at 301, ¶ 1. The court also held such a statutory scheme does not violate due process. *Id.* at 308, ¶ 40; *see also Holle v. Arizona*, __U.S.__, 137 S.Ct. 1446 (2017) (cert. denied).

¶6 Regarding the claim that A.R.S. § 13-3553 is unconstitutional even absent the application of *May*, Martinez waived this claim when he pled guilty. A plea agreement waives all non-jurisdictional defenses, errors and defects which occurred prior to the plea. *State v. Moreno*, 134 Ariz. 199, 200 (App. 1982), *disapproved on other grounds by State ex rel. Dean v. Dolny*, 161 Ariz. 297 (1989). The waiver of non-jurisdictional defects includes deprivations of constitutional rights. *Tollett v. Henderson*, 411 U.S. 258, 267 (1973) (“A guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to deprivation of constitutional rights that occurred prior to the entry of the guilty plea.”). We also deny relief because A.R.S. § 13-3553 is not otherwise unconstitutional. The statute does not, as Martinez argues, shift the burden to the defendant to prove the person depicted was not a minor nor does it shift the burden to the defendant to prove he or she did not know the person depicted was a minor. As charged in this case, the language of A.R.S. § 13-3553(A)(2) requires the state to prove beyond a reasonable doubt not only that the person depicted was a minor, but that the defendant knew the person was a minor. Because A.R.S. § 13-3553 is

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not unconstitutional, we also deny relief on Martinez's claims that his counsel was ineffective, the court lacked jurisdiction and his pleas were not knowing, intelligent and involuntary, all of which Martinez based on the statute's alleged unconstitutionality.

¶7 In his petition for review, Martinez also presents eight new claims he did not raise below. These are (1) A.R.S. § 13-3553 is unconstitutional because it does not require the state to prove the defendant acted with sexual intent; (2) A.R.S. § 13-3553 is unconstitutionally vague; (3) the indictment was legally insufficient; (4) the offenses were not dangerous crimes against children; (5) his sentences were grossly disproportionate to the offenses; (6) his sentences constitute cruel and unusual punishment; (7) the court gave inadequate consideration to mitigating circumstances for sentencing purposes; and (8) Martinez's counsel was ineffective when he failed to adequately present and argue mitigating circumstances. We deny relief on these issues because a petition for review may not present issues not first presented to the superior court. *Ariz. R. Crim. P. 32.9(c)(4)(B)*; *State v. Bortz*, 169 Ariz. 575, 577-78 (App. 1991); *State v. Ramirez*, 126 Ariz. 464, 468 (App. 1980); *see State v. Smith*, 184 Ariz. 456, 459 (1996) (holding there is no review for fundamental error in a post-conviction relief proceeding).

¶8 For the foregoing reasons, we grant review but deny relief.



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