DIVISION ONE
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IN THE
COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 09-0036 PRPC
	)	
Respondent,	)	DEPARTMENT A
	)	
v.	)	Maricopa County
	)	Superior Court
DARRELL JAMES DONOHO, JR.,	)	No. CR 1995-092762
	)	
Petitioner.	)	
	)	
	)	**DECISION ORDER**
	)	

Darrell James Donoho, Jr., petitions this court for review from the dismissal of his petition for post-conviction relief. Presiding Judge Maurice Portley, and Judges Lawrence F. Winthrop and Margaret H. Downie, have considered this petition for review and, for the reasons stated, grant review but deny relief.

Donoho pled guilty to two counts of attempted molestation of a child in 1996. The offenses were committed at different times in 1995. He was sentenced to a presumptive prison term of ten years for one count and lifetime probation for the other. He did not challenge the imposition of lifetime

probation in his first petition for post-conviction relief. Donoho successfully completed his prison sentence, but violated a term of his lifetime probation in 2007. His probation was revoked in May 2007, and he was sentenced to a presumptive prison term of ten years.

One year after his probation was revoked, and twelve years after lifetime probation was originally imposed, Donoho filed his second petition for post-conviction relief, and argued that the revocation of his probation and prison sentence should be vacated because the original imposition of lifetime probation in 1996 was illegal. He argued that Arizona Revised Statutes ("A.R.S.") section 13-902 (periods of probation), as it existed in 1995, did not provide for the imposition of lifetime probation for preparatory offenses. He argued the maximum term of probation available in 1995 for attempted molestation of a child, a class 3 felony, was five years. *See* A.R.S. § 13-902(A)(2) (Supp. 1993). The trial court dismissed the petition and Donoho now seeks review.

Donoho correctly maintained that, in 1995, lifetime probation was not authorized for attempted molestation of a child. Effective January 1, 1994, § 13-902 was amended to provide for lifetime probation only for offenses identified in

chapter 14 of the criminal code. *See* 1993 Ariz. Sess. Laws, ch. 225, § 8 (1st Reg. Sess.); *see also State v. Peek*, 219 Ariz. 182, 183-84, ¶¶ 8-10, 195 P.3d 641, 642-43 (2008). At that time, chapter 14 included the offense of molestation of a child, but not the preparatory offense of attempted molestation of a child. *See* A.R.S. §§ 13-1410 (Supp. 1993) and -1001 (1989). Therefore, in 1995, the version of § 13-902 did not provide for the imposition of lifetime probation for the crimes Donoho pled guilty to. *See Peek*, 219 Ariz. at 184, ¶ 12, 195 P.3d at 643; *State v. Van Adams*, 194 Ariz. 408, 420, ¶ 41, 984 P.2d 16, 28 (1999) (stating that the preparatory offense of "attempt" as defined in § 13-1001 is a separate and distinct offense from the substantive offense). The ability to place a defendant on lifetime probation for an *attempted* sexual offense was not reintroduced into the sentencing code until October 1997, when § 13-902 was amended to permit lifetime probation for "an attempt to commit any offense that is included in chapter 14 . . . ." *See* 1997 Ariz. Sess. Laws, ch. 179, § 2 (1st Reg. Sess.); *see also Peek*, 219 Ariz. at 184, ¶ 10, 195 P.3d at 643. Therefore, there was no authority under Arizona law to place a defendant on lifetime probation for attempted molestation of a child

committed in 1995. *See id.* at 184-85, ¶¶ 11-19, 195 P.3d at 643-44.

Although Donoho correctly argues the law, we deny review. While the trial court did not find the issue was precluded, any court on review may find an issue raised in a petition for post-conviction relief is precluded as untimely. Ariz. R. Crim. P. 32.2(c). Although this court has, in the past, granted relief on the same issue, that relief was granted before the Arizona Supreme Court opinions in *Peek* and/or *State v. Shrum*, 220 Ariz. 115, 203 P.3d 1175 (2009).

In *Peek*, our supreme court held that, if a defendant was improperly placed on lifetime probation pursuant to § 13-902, and did not raise the issue in the first, or the "of-right," petition for post-conviction relief, the issue is precluded as untimely. *Peek*, 219 Ariz. at 183, ¶ 4, 195 P.3d at 642; *see also* Ariz. R. Crim. P. 32.2(a) (stating that any claim that could have been raised in an earlier post-conviction relief proceeding is precluded). Our supreme court only addressed the issue because both the State and Peek requested that the court address it, and the State expressly waived preclusion. *See Peek*, 219 Ariz. at 183, ¶ 4, 195 P.3d at 642.

Further, *Peek* was not a significant change in the law which would permit an untimely filing pursuant to Arizona Rule of Criminal Procedure 32.2(b). *Peek* was merely the first case to point out what the applicable version of § 13-902 provided. "An appellate decision is not a significant change in the law simply because it is the first to interpret a statute. Nor is an appellate opinion a change in the law simply because it reverses a trial court judgment[.]" *Shrum*, 220 Ariz. at 120, ¶ 21, 203 P.3d at 1180.

In *Shrum*, decided after *Peek*, our supreme court made it clear that the rule of preclusion includes untimely claims regarding the legality of a sentence. There, the supreme court held that an issue regarding the legality of a sentence was precluded as untimely even though there was no lawful authority for the imposed sentence. *Id.* at 117-20, ¶¶ 3-24, 203 P.3d at 1177-80. In *Shrum*, the defendant had been sentenced within an enhanced range pursuant to A.R.S. § 13-604.01 (Supp. 1998) because the offense had been designated a dangerous crime against children. *Id.* at 116, ¶ 2, 203 P.3d at 1176. Even though the parties later acknowledged that the offense was not a dangerous crime against children, thereby rendering § 13-604.01 wholly inapplicable, the supreme court nevertheless held the

issue was precluded as untimely. *Id.* at 120, ¶ 23, 203 P.3d at 1180. Further, the court did not merely deny relief, but ordered the post-conviction relief petition be dismissed. *Id*. at ¶ 24.

Donoho should have challenged the imposition of lifetime probation in a timely "of-right" petition for post-conviction relief in 1996. Because he failed to do so, any challenge to the imposition of lifetime probation is precluded. Therefore, he cannot challenge the subsequent revocation of that probation for an admitted violation of his probation.

For the reasons stated above, we grant review but deny relief.

/s/
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MAURICE PORTLEY, Presiding Judge