

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

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MAY -3 2013

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2013-0025-PR
)	DEPARTMENT B
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
PATRICK STEVEN RIESGO,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause Nos. CR20102901001 and CR20102902002

Honorable Clark W. Munger, Judge

REVIEW GRANTED; RELIEF DENIED

Jill E. Thorpe

Tucson
Attorney for Petitioner

ESPINOSA, Judge.

¶1 Petitioner Patrick Riesgo seeks review of the trial court’s summary dismissal of his of-right petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. As a result of plea agreements, Riesgo was convicted of second-degree burglary and failure to comply with sex-offender registration requirements. At a consolidated sentencing and probation violation disposition hearing, the court first revoked Riesgo’s probation, imposed after his conviction in another cause number of “sexual conduct with a minor in the second degree, a preparatory dangerous crime against children,”¹ and sentenced him to a presumptive, ten-year prison term. With respect to the convictions and sentences at issue here, the court found Riesgo’s criminal history was an aggravating circumstance and sentenced him to consecutive, maximum prison terms of seven years for the burglary and three years for the registration violation.

¶2 Riesgo challenged his sentences in a petition for post-conviction relief filed under all three cause numbers. He maintained that his probation revocation sentence, for the preparatory sexual conduct conviction in Pima County No. CR20073516, was illegal under this court’s decision in *State v. Gonzalez*, 216 Ariz. 11, ¶¶ 8-10, 162 P.3d 650, 652-53 (App. 2007). Riesgo also argued his attorney had rendered ineffective assistance by failing to show him the presentence investigation report before he was sentenced, thereby preventing him from objecting to the investigating probation officer’s claim that

¹Pima County Cause No. CR20073516. This identification of the offense appears to be a misnomer clarified, by reference to the statutes cited, as a preparatory offense incident to sexual conduct with a minor, a second-degree dangerous crime against children. *See* former A.R.S. § 13-604.01(M)(1), 2006 Ariz. Sess. Laws, ch. 295, § 2 (“A dangerous crime against children is in the first degree if it is a completed offense and is in the second degree if it is a preparatory offense,”); A.R.S. § 13-1405, 1997 Ariz. Sess. Laws, ch. 217, § 1.

“[Riesgo] stated he absconded from probation because he felt that his new probation officer did not ‘respect’ him,” a statement the court referenced at the sentencing hearing.

¶3 The state conceded Riesgo’s sentence in Pima County No. CR20073516 had been illegal, and the trial court granted relief on Riesgo’s claim in that case, ordering that he be resentenced for that conviction. With respect to Riesgo’s other convictions and sentences, the court found Riesgo had failed to state a colorable claim that counsel had performed deficiently at sentencing or that Riesgo had been prejudiced by his counsel’s performance. Specifically, the court wrote,

[Riesgo] cannot show prejudice. The simple fact is that this court did not consider [Riesgo]’s statements about lack of respect from the probation officer as aggravating factors. They were noted by the court, but only after sentence was imposed, and were not part of the weighing of aggravating and mitigating factors.

The court summarily denied post-conviction relief for the two cases at issue here, and this petition for review followed.

¶4 On review, Riesgo repeats the arguments he raised below. He also notes that his conviction in Pima County No. CR20073516 “was used as an aggravating factor” to impose maximum sentences in the cases under review. Although his argument is somewhat unclear, he appears to suggest aggravation of his sentences in the instant cases was improper because the court granted post-conviction resentencing relief for his conviction in the 2007 case.

¶5 We review a summary denial of post-conviction relief for an abuse of discretion. *State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006). We find none

here. “To state a colorable claim of ineffective assistance of counsel, a defendant must show both that counsel’s performance fell below objectively reasonable standards and that this deficiency prejudiced the defendant.” *Id.* ¶ 21. To demonstrate prejudice, the defendant must show there is a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

¶6 Riesgo maintains, as he did below, that he was prejudiced by counsel’s allegedly deficient performance because statements attributed to Riesgo in the presentence report had “obviously” influenced the trial court’s decision to impose maximum prison terms. But the court stated it had not considered those statements as “part of the weighing of aggravating and mitigating factors.” Thus, there was no reasonable probability that Riesgo would have been sentenced differently even had he seen and challenged the presentence report, and the court did not abuse its discretion in finding he had failed to state a colorable claim of ineffective assistance of counsel.

¶7 With respect to Riesgo’s intimation that his resentencing in Pima County No. CR20073516 somehow invalidated the trial court’s finding that this prior conviction was an aggravating circumstance, this claim was not presented below and so is not properly before us. *See* Ariz. R. Crim. P. 32.9(c)(1)(ii) (limiting review to “issues which were decided by the trial court”); *State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (appellate court does not consider issues in petition for review that “have obviously never been presented to the trial court for its consideration”). Additionally, on its face, the claim appears to be without merit. *See* A.R.S. § 13-701(C), (D)(11)

(maximum sentence may be imposed on finding “defendant was previously convicted of a felony within the ten years immediately preceding the date of the offense”).

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

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge