

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

FILED BY CLERK

JUN 17 2013

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2013-0162-PR
)	DEPARTMENT A
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
GERALD EATON,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF MARICOPA COUNTY

Cause No. CR1996091636

Honorable Daniel G. Martin, Judge

REVIEW GRANTED; RELIEF DENIED

William G. Montgomery, Maricopa County Attorney
By Andrea L. Kever

Phoenix
Attorneys for Respondent

Gerald Eaton

Florence
In Propria Persona

MILLER, Judge.

¶1 Petitioner Gerald Eaton seeks review of the trial court's order denying his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. "We will not disturb a trial court's ruling on a petition for post-conviction relief absent a clear

abuse of discretion.” *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Eaton has not sustained his burden of establishing such abuse here.

¶2 Pursuant to a plea agreement, Eaton was convicted of attempted sexual conduct with a minor in 1996. The trial court suspended the imposition of sentence and placed Eaton on a lifetime term of probation. In 2000, Eaton sexually assaulted a woman in Illinois, thereby violating the terms of his probation. The court revoked Eaton’s probation and sentenced him to a presumptive, ten-year term of imprisonment. In 2003, Eaton initiated a post-conviction relief proceeding, but the trial court dismissed his notice as untimely.

¶3 Eaton filed a second notice of post-conviction relief in 2010, relying on our supreme court’s decision in *State v. Peek*, 219 Ariz. 182, 195 P.3d 641 (2008), and claiming in his petition that his plea had not been knowing, intelligent, and voluntary because “the charge did not exist in the Arizona state Statutes when the offense was committed in 1996” and that he was “currently serving an illegal sentence.” Concluding that Eaton’s claim was precluded, the trial court summarily denied relief. Eaton filed a “motion for rehearing/reconsideration,” which the court denied as well.

¶4 On review, Eaton again argues that, like the defendant in *Peek*, he should not have been placed on lifetime probation because, as the *Peek* court concluded, a lifetime term was not available for his offense at the time he committed it. *See Peek*, 219 Ariz. 182, ¶¶ 12, 20, 195 P.3d at 643, 644. He also asserts his claim falls within the “exceptions to any preclusion pursuant to Rule 32.1(g),(e), and (d).” *See Ariz. R. Crim. P. 32.2(b)*. But, elsewhere in his petition he affirmatively states that *Peek* does not represent a significant change in the law, thereby admitting his claim is not exempt from preclusion under Rule 32.1(g).

¶5 We agree with the trial court that Eaton’s claim is precluded. In an untimely or successive petition for post-conviction relief, a petitioner may only assert claims pursuant to Rule 32.1(d),(e),(f),(g), or (h). Ariz. R. Crim. P. 32.2(b), 32.4(a). Although Eaton asserts his claim is based on newly discovered material facts, he points only to the “fact” of his discovery of the *Peek* decision. That Eaton himself recently became aware of the case does not establish an exception for newly discovered facts under Rule 32.1(e). *See e.g. State v. Saenz*, 197 Ariz. 487, ¶ 7, 4 P.3d 1030, 1032 (App. 2000) (to qualify as newly discovered fact, evidence must have existed at time of trial). Likewise, because Eaton was properly sentenced to a presumptive ten-year term after he violated the terms of his probation, and violated his probation within the first five years of his probationary term, he has not shown he is being held in custody after his sentence expired. *See* Ariz. R. Crim. P. 32.1(d). Eaton therefore has failed to establish that his claim falls within any of the exemptions to the rule of preclusion, and the court did not abuse its discretion in denying his claim as precluded. Thus, although we grant the petition for review, relief is denied.

/s/ Michael Miller

MICHAEL MILLER, Judge

CONCURRING:

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

/s/ J. William Brammer, Jr.

J. WILLIAM BRAMMER, JR., Judge*

*A retired judge of the Arizona Court of Appeals authorized and assigned to sit as a judge on the Court of Appeals, Division Two, pursuant to Arizona Supreme Court Order filed December 12, 2012.