

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

JUL 17 2013

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

| | | |
|--------------------------|---|----------------------------|
| THE STATE OF ARIZONA, |) | 2 CA-CR 2013-0179-PR |
| |) | DEPARTMENT B |
| Respondent, |) | |
| |) | <u>MEMORANDUM DECISION</u> |
| v. |) | Not for Publication |
| |) | Rule 111, Rules of |
| NICHOLAS LEW BLACKWATER, |) | the Supreme Court |
| |) | |
| Petitioner. |) | |
| _____ |) | |

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF MARICOPA COUNTY

Cause No. CR2005010907001DT

Honorable Lisa Daniel Flores, Judge

REVIEW GRANTED; RELIEF DENIED

Nicholas Blackwater

Florence
In Propria Persona

ECKERSTROM, Judge.

¶1 Nicholas Blackwater petitions this court for review of the trial court's order dismissing his successive petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that ruling unless the court clearly has abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Blackwater has not sustained his burden of establishing such abuse here.

¶2 In 2006, Blackwater pled guilty to three counts of sexual assault and one count each of sexual abuse, kidnapping, and attempted sexual assault. For the sexual assault and kidnapping convictions, the trial court sentenced him to consecutive, aggravated prison terms totaling 54.5 years. The court imposed lifetime probation for Blackwater’s convictions of sexual abuse and attempted sexual assault.

¶3 Blackwater first filed a notice of post-conviction relief in April 2007, arguing pursuant to Rule 32.1(f) that his failure to timely file it was without fault on his part. The trial court summarily dismissed that notice, determining that Blackwater had adequate notice he was required to file a notice of post-conviction relief within ninety days of his sentencing. Blackwater did not seek review of that ruling.

¶4 Blackwater filed a second notice of post-conviction relief in November 2010, stating he intended to raise a claim based on newly discovered evidence and arguing in his notice that the trial court had erred in imposing a consecutive sentence for kidnapping and in imposing an aggravated term on the sexual conduct counts on the basis that the victims were under the age of fifteen. He additionally contended his trial counsel had been ineffective in failing to investigate relevant sentencing factors. The court summarily dismissed that notice, concluding Blackwater had “fail[ed] to support” his claims and, in any event, the court was permitted to impose consecutive sentences. Blackwater again did not seek review of the court’s ruling.

¶5 In March 2012, Blackwater filed a petition for post-conviction relief claiming his aggravated sentences were imposed in violation of *Blakely v. Washington*, 542 U.S 296 (2004), because the trial court “arbitrarily” imposed aggravated sentences relying solely on “alleged facts stated by the prosecutor” and because the court made no express finding of aggravating factors. He asserted the claim was not precluded

“pursuant to . . . Rule 32.1(g),” which permits relief on the basis of a significant change in the law, and argued that an “illegal sentence is an issue of subject matter jurisdiction which can be raised at any time.” The court summarily denied relief, determining that *Blakely* did not constitute a significant change in the law with respect to Blackwater because it had been decided in 2004—two years before his plea—and that his claim of sentencing error thus was precluded.

¶6 On review, Blackwater repeats his *Blakely* claim and again suggests the claim is not precluded because his illegal sentence “is an issue of subject matter jurisdiction which can be raised at any time.”¹ But Blackwater is incorrect that sentencing error involves subject matter jurisdiction. He relies on *State v. Vargas-Burgos*, in which this court stated “that a sentence that is outside the parameters of the applicable statutes . . . raises a question of subject matter jurisdiction” that therefore can “be raised at any time.” 162 Ariz. 325, 327, 783 P.2d 264, 266 (App. 1989). But we concluded in *State v. Bryant* that, “we [had] used the word ‘jurisdiction’ imprecisely” in *Vargas-Burgos* and thus, a final judgment “remains binding and enforceable” even if erroneous. 219 Ariz. 514, ¶¶ 15-17, 200 P.3d 1011, 1015 (App. 2008); *see also State v. Maldonado*, 223 Ariz. 309, ¶ 15, 223 P.3d 653, 655 (2010) (“[C]oncluding that a court cannot enter a valid judgment because of a procedural error does not mean that the court lacks subject matter jurisdiction.”). In any event, *Vargas-Burgos* did not address whether Rule 32.2, Ariz. R. Crim. P. can preclude a defendant from challenging a sentence on the grounds of illegality and fundamental error in a successive petition for post-conviction relief. In *Vargas-Burgos*, we simply refused to find waived, for purposes of the

¹Blackwater does not repeat his claim that *Blakely* constitutes a significant change in the law pursuant to Rule 32.1(g).

defendant's direct appeal, a claim of sentencing error that we characterized as fundamental on the ground that the defendant had failed to object in the trial court. *See* 162 Ariz. at 327, 783 P.2d at 266. Preclusion under Rule 32.2 clearly was not implicated in that case.

¶7 Moreover, although sentencing error is subject to fundamental error review in some circumstances, it nonetheless is subject to preclusion. *See State v. Shrum*, 220 Ariz. 115, ¶¶ 6-7, 23, 203 P.3d 1175, 1177, 1180 (2009) (holding illegal sentence claim precluded); *Swoopes*, 216 Ariz. 390, ¶ 42, 166 P.3d at 958 (fundamental error not excepted from preclusion). Accordingly, even assuming that Blackwater is correct that his sentences were imposed in violation of *Blakely*, that claim is precluded because he had the opportunity to raise it in his prior post-conviction proceedings and did not do so. *See* Ariz. R. Crim. P. 32.2(a)(3).

¶8 Although review is granted, relief is denied.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge

CONCURRING:

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

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