

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

SEP 25 2013

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2013-0203-PR
)	DEPARTMENT B
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
KENNETH DALE GANN,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR01007

Honorable Kenneth Lee, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
Attorneys for Respondent

Kenneth Dale Gann

Florence
In Propria Persona

ESPINOSA, Judge.

¶1 Petitioner Kenneth Gann challenges the trial court's denial of his motion to quash sex offender registration, which the trial court correctly considered as a notice of and petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P. We review a

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.

¶2 In 1979, Gann pleaded guilty to attempted molestation of a child and attempted sexual conduct with a minor under the age of fifteen. Although the offenses had been committed about two weeks before his eighteenth birthday, he was prosecuted as an adult offender. The trial court placed him on concurrent, five-year terms of probation, but later revoked his probation and sentenced him to concurrent, six-year prison terms. We affirmed the probation revocation and Gann’s sentences on appeal. *State v. Gann*, Nos. 2 CA-CR 2817, 2 CA-CR 2812-2 (consolidated) (memorandum decision filed Nov. 25, 1983).

¶3 In June 2012, Gann filed a “motion to quash sex offender registration.” According to his motion, Gann was first ordered to register as a sex offender in 1999, when he was released by the Arizona Department of Corrections after serving a sentence on unrelated charges. Noting that offenders convicted of attempted sex offenses were not subject to registration requirements until A.R.S. § 13-3821 was amended in 1995, *see* 1995 Ariz. Sess. Laws, ch. 257, § 3, Gann maintained that requiring him to register as a sex offender violated constitutional prohibitions against ex post facto laws, bills of attainder, laws impairing obligations under a contract, and double jeopardy. Relying on § 13-3821(D), which affords a juvenile court discretion in ordering sex offender registration after an adjudication of delinquency, he also argued he should not have been

required to register because he was a juvenile when he committed the offenses and was not ordered to register when he was sentenced.¹

¶4 The trial court construed Gann’s motion as a notice of post-conviction relief and appointed counsel to represent him. Appointed counsel notified the court she had reviewed the available record and could find no claims for relief cognizable under Rule 32, and Gann then filed a “motion to expand on issues” he had raised, citing additional authorities. The court deemed this filing to be Gann’s petition for post-conviction relief and, after reviewing the petition, the state’s response, and Gann’s reply, the court denied relief.

¶5 In his petition for review, Gann restates the arguments he raised below and asserts the trial court “chose to omit or ignore” the merits of his claim. We disagree. The court correctly concluded Gann’s reliance on § 13-3821(D) was misplaced, because that provision applies only to adjudications of juvenile delinquency, and Gann was convicted as an adult offender. And, as the court recognized in its order, we have previously considered and rejected the same constitutional arguments Gann has raised here. *See State v. Henry*, 224 Ariz. 164, 228 P.3d 900 (App. 2010). In *Henry*, we explained we were “compelled to conclude”—under the “controlling jurisprudence” of *Smith v. Doe*, 538 U.S. 84 (2003), and *State v. Noble*, 171 Ariz. 171, 829 P.2d 1217 (1992)—“that Arizona’s sex offender registration and notification statutes do not constitute

¹Section 13-3821(D) provides, “The court may require a person who has been adjudicated delinquent for an act that would constitute an offense specified in subsection A or C of this section to register pursuant to this section. Any duty to register under this subsection shall terminate when the person reaches twenty-five years of age.”

impermissible ex post facto laws” or violations of double jeopardy when applied to those whose offenses and convictions pre-dated the provisions. *Henry*, 224 Ariz. 164, ¶¶ 22, 24, 27, 228 P.3d at 907-08.

¶6 In its order, the court clearly identified, thoroughly analyzed, and correctly resolved the issues Gann presented below and preserved for review; we adopt its order. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993). Accordingly, although we grant review, we deny relief.

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

CONCURRING:

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

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