

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

AUG 12 2013

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	2 CA-CR 2013-0219-PR
	)	DEPARTMENT B
Respondent,	)	
	)	<u>MEMORANDUM DECISION</u>
v.	)	Not for Publication
	)	Rule 111, Rules of
DEAN FRANKLYN SOARES,	)	the Supreme Court
	)	
Petitioner.	)	
_____	)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF MARICOPA COUNTY

Cause No. CR2006048402001SE

Honorable David K. Udall, Judge

REVIEW GRANTED; RELIEF DENIED

William G. Montgomery, Maricopa County Attorney  
By Diane Meloche

Phoenix  
Attorneys for Respondent

Dean Franklyn Soares

Florence  
In Propria Persona

ECKERSTROM, Judge.

¶1 Following a jury trial, petitioner Dean Soares was convicted of two counts of sexual exploitation of a minor, both dangerous crimes against children. The trial court imposed consecutive prison terms totaling twenty years. This court affirmed Soares's convictions and sentences on appeal. *State v. Soares*, No. 1 CA-CR 08-0358

(memorandum decision filed Feb. 16, 2010). Appointed counsel then filed a petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P. Soares has filed a pro se petition for review from the court’s summary denial of that petition. 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). We find no such abuse.

¶2 In his petition for post-conviction relief, Soares asserted that A.R.S. § 13-3553 (sexual exploitation of a minor), is “[un]constitutionally overbroad and vague,” and that trial counsel was ineffective for failing to successfully secure the admission of evidence of two disclaimers found on the websites he had visited—one claiming that the material depicted on the site he had viewed was “art and not child pornography” and another claiming that all the persons appearing in the images were under the age of eighteen. On review, Soares again claims that § 13-3553 is unconstitutional, but also asserts for the first time that appellate counsel was ineffective for failing to raise this issue and to challenge trial counsel’s conduct; he also maintains for the first time that he should not have been sentenced under A.R.S. § 13-604.01 (now § 13-705). *See* 2008 Ariz. Sess. Laws, ch. 301, § 17.

¶3 But Soares did not raise a claim of ineffective assistance of appellate counsel or claim that § 13-604.01 did not apply to him in his petition for post-conviction relief.<sup>1</sup> With respect to claims that appear to have been raised for the first time on

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<sup>1</sup>Soares did, however, argue on appeal that his sentence, imposed under A.R.S. § 13-604.01, constituted cruel and unusual punishment.

review, we will not address them.<sup>2</sup> *State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (court of appeals does not address issues raised for first time in petition for review); *see also* Ariz. R. Crim. P. 32.9(c)(1)(ii). In addition, because Soares could have but did not challenge the constitutionality of § 13-3553 on direct appeal, he is precluded from doing so now.<sup>3</sup> *See* Ariz. R. Crim. P. 32.2(a) (3).

¶4 Finally, we conclude the trial court did not abuse its discretion by summarily denying Soares’s claim that trial counsel was ineffective for failing to timely request admission of disclaimers showing he did not “‘knowingly’ possess[] prohibited images.” To establish a claim of ineffective assistance of counsel, a defendant must show both that counsel’s performance fell below prevailing professional norms and also that the outcome of the case would have been different but for the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). To state a colorable claim in post conviction proceedings which would entitle a defendant to an evidentiary hearing, a defendant must present allegations which support both of those elements. *State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.2d 63, 68 (2006). Although Soares’s petition for post-conviction relief cogently asserted a non-trivial claim that trial counsel had performed deficiently by failing to take

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<sup>2</sup>Soares also suggests that we may address for the first time on review his claims of ineffective assistance of trial, appellate and Rule 32 counsel. But Rule 32.9(c) limits our review to “the actions of the trial court.” Thus, we do not address these new claims. Nor will we consider exhibits attached to the petition for review which were not presented to the trial court.

<sup>3</sup>Soares acknowledged in his petition for post-conviction relief that he did not challenge the constitutionality of A.R.S. § 13-3553 on appeal.

the steps necessary to place the disclaimer into evidence, that petition failed to articulate how any alleged deficiency prejudiced the defendant in the context of the overall case. Instead the petition claimed Soares was entitled to an evidentiary hearing to pursue that question. Because Soares therefore failed to present a colorable claim of prejudice entitling him to an evidentiary hearing, the trial court did not err in summarily rejecting his petition.

¶5 For all of these reasons, although we grant the petition for review, 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