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 15 2013
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,

Respondent,

v.

TWISDEN ROBERT GOLDSMITH,

Petitioner.

2 CA-CR 2013-0228-PR
DEPARTMENT A

MEMORANDUM DECISION
Not for Publication
Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF MARICOPA COUNTY

Cause No. CR2001006378001DT

Honorable Christine E. Mulleneaux, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

William G. Montgomery, Maricopa County Attorney
By Lisa Marie Martin — Phoenix
Attorneys for Respondent

Law Office of Corwin A. Townsend
By Corwin A. Townsend — Phoenix
Attorney for Petitioner

V Á S Q U E Z, Presiding Judge.

¶1 Petitioner Twisden Goldsmith 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). Goldsmith has not sustained his burden of establishing such abuse here.

¶2 Pursuant to a plea agreement in December 2001, Goldsmith was convicted of attempted sexual conduct with a minor, a dangerous crime against children. He had arranged over the internet to pay $50 for oral sex with someone he believed to be a thirteen-year-old girl and had gone to meet her, but the person was an undercover police officer, and he was arrested. The trial court suspended the imposition of sentence and placed Goldsmith on lifetime probation.

¶3 In May 2011, Goldsmith admitted having violated the conditions of his probation and his probation was revoked. The trial court imposed a mitigated, six-year sentence. Goldsmith thereafter initiated his first proceeding for post-conviction relief, arguing in his petition that he had received ineffective assistance of counsel because counsel had advised him "to enter into an illegal plea." He claimed his plea agreement was illegal "because the sex offender statutes preclude application of the dangerous crime against children (DCAC) sentencing enhancement when . . . the victim is not under the age of fifteen." He argued he should not have been charged with attempted sexual conduct, but with luring a minor for sexual exploitation under A.R.S. § 13-3554. He contends that, had he been convicted of the charge of luring, a DCAC enhancement would not be available because the victim in his case was not actually a child. The trial court summarily denied relief.

¶4 On review, Goldsmith essentially repeats the arguments made below and contends the trial court abused its discretion in rejecting them. We disagree. Goldsmith

did not seek post-conviction relief after he was originally placed on probation in 2002. Thus, to the extent Goldsmith's current petition for post-conviction relief challenges his plea agreement or counsel's performance in relation thereto, it is untimely, and he has not established that his claims are "pursuant to Rule 32.1(d), (e), (f), (g) or (h)." Ariz. R. Crim. P. 32.4(a). The court therefore did not abuse its discretion in denying relief, because it could have denied relief solely on that basis. Any challenge to Goldsmith's conviction should have been raised in a timely proceeding pursuant to Rule 32, Ariz. R. Crim. P., and cannot be raised here. *See State v. Herrera*, 121 Ariz. 12, 14, 588 P.2d 305, 307 (1978).

¶5 To the extent Goldsmith's claims could be read to challenge the validity of the six-year sentence now imposed, *see State v. McClarity*, 27 Ariz. App. 571, 573, 557 P.2d 170, 172 (1976) (claim not barred when "attack[on] the prison sentence after revocation . . . involves the legality of the previous judgment and sentence"), we agree with the trial court that he has failed to state a colorable claim. As the court noted, Goldsmith failed to support his claims with any "[a]ffidavits, records[,] or other evidence." Although he has submitted an affidavit to this court on review, we will not consider materials not first considered by the trial court. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980). He also failed to provide any evidence suggesting counsel's advice to plead guilty fell below prevailing professional norms. His bald assertions that counsel erred are insufficient to sustain his burden of demonstrating the first requirement of the *Strickland* test. *See Strickland v. Washington,* 466 U.S. 668, 687 (1984) (To present colorable claim of ineffective assistance of counsel defendant

must show counsel's performance was deficient and deficient performance prejudiced defense); *State v. Donald*, 198 Ariz. 406, ¶ 21, 10 P.3d 1193, 1201 (App. 2000) (to warrant evidentiary hearing, Rule 32 claim "must consist of more than conclusory assertions").

¶6 Furthermore, we agree with the trial court's conclusion that "[t]he absence of an actual victim under the age of fifteen does not preclude an attempted crime from being a dangerous crime against children." *See State v. Carlisle*, 198 Ariz. 203, ¶ 17, 8 P.3d 391, 395 (App. 2000). Although Goldsmith argues that the state should have charged him with luring instead of attempted sexual conduct, he does not suggest the evidence was insufficient to convict him of the latter offense. His argument in support of a requirement that he be charged with luring consists mainly of assertions in his reply below and on review that charging him with attempted sexual conduct violated his equal protection rights. The trial court was not required to consider that argument because it was raised for the first time in Goldsmith's reply, *see State v. Lopez*, 223 Ariz. 238, ¶ 7, 221 P.3d 1052, 1054 (App. 2009), and it was not adequately developed there or on review, *cf. State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) ("Failure to argue a claim on appeal constitutes waiver of that claim.").

¶7 In any event, "[w]hen conduct can be prosecuted under two or more statutes, the prosecutor has discretion to determine which statute to apply." *State v. Lopez*, 174 Ariz. 131, 143, 847 P.2d 1078, 1090 (1992). And this court rejected a nearly identical equal protection argument in *State v. Patton*, 136 Ariz. 243, 246, 665 P.2d 587, 590 (App. 1983). Because his claim of an illegal plea is without merit, counsel was not

ineffective for failing to raise it. Therefore, for all these reasons, although we grant the petition for review, we deny relief.

/s/ Garye L. Vásquez

GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

/s/ Michael Miller

MICHAEL MILLER, Judge