

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

OCT 31 2013

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

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| THE STATE OF ARIZONA, |) | 2 CA-CR 2013-0240-PR |
| |) | DEPARTMENT A |
| Respondent, |) | |
| |) | <u>MEMORANDUM DECISION</u> |
| v. |) | Not for Publication |
| |) | Rule 111, Rules of |
| DANELL McALISTER, |) | the Supreme Court |
| |) | |
| Petitioner. |) | |
| _____ |) | |

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR035163

Honorable Richard D. Nichols, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
Attorneys for Respondent

Danell M. McAlister

Florence
In Propria Persona

HOWARD, Chief Judge.

¶1 Petitioner Danell McAlister seeks review of the trial court's order denying his successive 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). McAlister has not sustained his burden of establishing such abuse here.

¶2 McAlister was convicted in 1992 of three counts of sexual conduct with a minor under fifteen, all dangerous crimes against children, and one count of sexual conduct with a minor under eighteen. He was sentenced to a total of eighty-six years’ imprisonment. We affirmed his convictions and sentences on appeal. *State v. McAlister*, No. 2 CA-CR 92-0878 (memorandum decision filed Sept. 6, 1994). He subsequently filed at least five petitions for post-conviction relief, all of which were denied, as well as four petitions for review, which also were denied. *State v. McAlister*, No. 2 CA-CR 2010-0408-PR (memorandum decision filed Mar. 24, 2011); *State v. McAlister*, No. 2 CA-CR 2009-0054-PR (memorandum decision filed Jun. 25, 2009); *State v. McAlister*, No. 2 CA-CR 2006-0159-PR (memorandum decision filed Jan. 26, 2007); *State v. McAlister*, No. 2 CA-CR 95-0007-PR (memorandum decision filed May 31, 1995).

¶3 In 2013, McAlister filed another notice and petition for post-conviction relief, relying on this court’s decision in *State v. Brown*, 191 Ariz. 102, 952 P.2d 746 (App. 1997), and claiming the trial court had “commit[ed] fundamental error by improperly enhancing [his] sentence” pursuant to *State v. Hannah*, 126 Ariz. 575, 617 P.2d 527 (1980). He asserted he was entitled to relief pursuant to Rule 32.1(e), (f), (g), and (h). The trial court summarily denied relief, concluding McAlister’s claim was precluded and did not fall into any of the exceptions to preclusion. The court also denied McAlister’s subsequent motion for reconsideration.

¶4 On review, McAlister claims the trial court abused its discretion in concluding his claims were precluded and not subject to any exception. And he contends, as he did briefly in his motion for reconsideration, that his sentence violated his due process and equal protection rights.

¶5 We do not address McAlister’s due process and equal protection arguments because they were not raised timely. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (appellate court will not address issues raised for first time on review); *cf. State v. Lopez*, 223 Ariz. 238, ¶ 7, 221 P.3d 1052, 1054 (App. 2009) (trial court need not consider claims of ineffective assistance of counsel first raised in petitioner’s reply). And we agree with the trial court that McAlister’s claim is precluded based on his failure to raise it on appeal or in any of his post-conviction proceedings. *See Ariz. R. Crim. P. 32.2(a)(3)*.

¶6 We likewise agree with the trial court that McAlister has not established that his claim falls into any of the exceptions to preclusion. Rule 32.1(f) does not apply here because McAlister’s 2013 petition was not an “of-right” petition. And even if *Brown* could be considered “a significant change in the law,” Ariz. R. Crim. P. 32.1(g), which McAlister has not established, this court issued its decision in that case in 1997 and McAlister therefore could have raised a claim based on that ruling in at least three of his previous post-conviction relief proceedings. *See Ariz. R. Crim. P. 32.2(a)(3)*.

¶7 Furthermore, nothing in McAlister’s argument relates to his actual innocence of the underlying offense—it is based solely on an alleged sentencing error. Thus the claim is not exempt from preclusion under Rule 32.1(h). Nor does Rule 32.1(e)

apply, as a legal decision is not a fact within the meaning of that subsection. *Compare* Ariz. R. Crim. P. 32.1(e), *with* Ariz. R. Crim. P. 32.1(g).

¶8 In any event, as the trial court also correctly pointed out, McAlister failed to “set forth the substance of the specific exception, and the reasons for failing to raise this claim in any of his five previous Petitions,” as required by Rule 32.2(b). The court therefore could have dismissed McAlister’s combined notice and petition solely on that basis. *See* Ariz. R. Crim. P. 32.2(b). For all these reasons, although we grant the petition for review, relief is denied.

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Garye L. Vásquez

GARYE L. VÁSQUEZ, Presiding 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 Administrative Order No. 2012-101 filed December 12, 2012.