

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

ROBERT LYNN WINKLE,
Petitioner.

No. 2 CA-CR 2014-0426-PR
Filed January 22, 2015

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Maricopa County

No. CR2010142527001DT

The Honorable Warren J. Granville, Judge

REVIEW GRANTED; RELIEF DENIED

Robert Lynn Winkle, Florence
In Propria Persona

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MEMORANDUM DECISION

Presiding Judge Kelly authored the decision of the Court, in which Judge Howard and Judge Vásquez concurred.

K E L L Y, Presiding Judge:

¶1 Robert Winkle 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 that ruling unless the court clearly has abused its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Winkle has not met his burden of demonstrating such abuse here.

¶2 Winkle pled guilty to possession of narcotic drugs for sale and admitted having one prior felony conviction. In March 2011, the trial court sentenced him to a 9.25-year prison term. Over two years later, Winkle filed a notice and petition for post-conviction relief, arguing in his petition that his sentence was improper because, as we understand his claim, his plea agreement did not list A.R.S. § 13-703, which governs sentences for repetitive offenders like Winkle. He argued he instead was entitled to be sentenced to a five-year prison term as a first-time offender pursuant to A.R.S. § 13-702(D). In his notice and petition, Winkle characterized his claim as one of newly discovered evidence pursuant to Rule 32.1(e).

¶3 The trial court summarily dismissed Winkle's petition. It concluded Winkle's claim was properly characterized as arising under Rule 32.1(c), not Rule 32.1(e), and thus could not be raised in an untimely proceeding like this one. This petition for review followed.

¶4 On review, Winkle again claims his sentence was not permitted by his plea agreement. He further argues he is permitted to raise this claim because this is his first Rule 32 proceeding, and thus preclusion pursuant to Rule 32.2(a) does not apply, and because

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an illegal sentence is void for lack of jurisdiction. But Winkle does not dispute that his proceeding is untimely. Ariz. R. Crim. P. 32.4(a). Thus, he is entitled to raise claims only pursuant to Rule 32.1(d), (e), (f), (g), or (h), irrespective of whether he has had a previous proceeding. Ariz. R. Crim. P. 32.4(a). And he does not argue the trial court erred in characterizing his claim as arising pursuant to Rule 32.1(c) instead of Rule 32.1(e). Finally, even if Winkle is correct that his sentence is illegal, that does not create a jurisdictional defect that may be raised in an untimely proceeding. *See State v. Bryant*, 219 Ariz. 514, ¶ 17, 200 P.3d 1011, 1015 (App. 2008); *see also State v. Shrum*, 220 Ariz. 115, ¶¶ 6-7, 23, 203 P.3d 1175, 1177, 1180 (2009) (claim of illegal sentence subject to preclusion pursuant to Rule 32.2(a)(3)). Thus, the court did not err in summarily dismissing Winkle's petition.

¶5 Although we grant review, we deny relief.