IN THE
# ARIZONA COURT OF APPEALS
DIVISION TWO

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THE STATE OF ARIZONA,
*Appellee,*

*v.*

LISA ANN COSTE,
*Appellant*.

No. 2 CA-CR 2015-0119
Filed November 9, 2015

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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NOT FOR PUBLICATION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.

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Appeal from the Superior Court in Cochise County
No. S0200CR201200412
The Honorable Wallace R. Hoggatt, Judge

**APPEAL DISMISSED**

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COUNSEL

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**MEMORANDUM DECISION**

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Miller and Judge Espinosa concurred.

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E C K E R S T R O M, Chief Judge:

**¶1** Appellant Lisa Coste challenges the trial court's order denying her petition to designate her criminal conviction a class one misdemeanor. We dismiss the appeal for the reasons that follow.

**Factual and Procedural Background**

**¶2** In 2013, Coste pleaded guilty to a single count of unlawfully discharging a firearm within a municipality. As a condition of her plea, the state agreed to remove the allegation that the crime was a dangerous offense. The plea agreement further stipulated that "the offense shall be designated a felony at the time of sentencing." At the change-of-plea-hearing, Coste acknowledged that "the offense will be designated a felony at the time of sentencing, which would make [her] not eligible for a[n] undesignated offense." At the sentencing hearing that followed, the court imposed a term of probation and stated, with respect to the conviction, "It's a class 6 felony. And under the terms of the plea agreement it is a designated felony. It's not being left open-ended."

**¶3** Having complied with the terms of her probation, Coste then filed a petition in 2015 to terminate her probation, set aside her felony conviction, and designate it a class one misdemeanor. The trial court granted relief except the request to reclassify the felony offense. The court denied this relief because the offense previously had been designated a felony in accordance with the plea agreement accepted by the court. The court noted, however, that if it had the discretion to do so, it would have treated the matter as an undesignated offense and designated it a class one misdemeanor. This appeal followed.

**Jurisdiction**

**¶4** The state asserts we lack jurisdiction to consider Coste's appeal. Our jurisdiction is provided and limited by law, *Campbell v. Arnold*, 121 Ariz. 370, 371, 590 P.2d 909, 910 (1979), and we have an independent duty to confirm whether we have jurisdiction over the case before us. *State v. Mohajerin*, 226 Ariz. 103, ¶ 6, 244 P.3d 107, 110 (App. 2010). Coste essentially raises two arguments on appeal; however, we lack jurisdiction to consider either of the claims presented.

**¶5** She first contends the trial court's disposition in 2013, which designated her offense a class six felony and placed her on probation at the same time, was unlawful because it violated A.R.S. §§ 13-604(A) and 13-3107(B). As the state points out, a pleading defendant has no right of direct appeal and can challenge a conviction or disposition entered pursuant to a plea agreement only under Rule 32, Ariz. R. Crim. P. *See* A.R.S. § 13-4033(B); Ariz. R. Crim. P. 17.1(e); *see also State v. Smith*, 184 Ariz. 456, 458, 910 P.2d 1, 3 (1996) (noting Rule 32 provides pleading defendants with appellate review guaranteed by state constitution). Coste's argument concerning the legality of her conviction and disposition was available in 2013 and subject to a timely Rule 32 notice filed within ninety days of the judgment and disposition. *See* Ariz. R. Crim. P. 32.4(a). Coste took no action within that period of time. The claim, therefore, is not subject to appeal.

**¶6** In her second, alternative argument, Coste suggests her plea agreement was ambiguous and misinterpreted by the trial court. Under this view, filing a petition to designate her offense a class one misdemeanor when probation terminated, in 2015, was both consistent with the plea agreement and appropriate under § 13-604(A). Coste therefore characterizes the challenged ruling as "[a]n order made after judgment affecting the substantial rights of the party," which is subject to appeal under § 13-4033(A)(3). To the extent an appellate court could ever reach such an argument, the record here forecloses this possibility.

**¶7** A trial court may, at times, act as a fact-finding body to assist the court of appeals in determining its appellate jurisdiction.

*Todd v. Todd*, 137 Ariz. 404, 407, 670 P.2d 1228, 1231 (App. 1983). Here, the trial court noted that the plea agreement's meaning always was unambiguous and clear to Coste. The court stated:

> [T]he stipulation in the plea agreement said that she's going to be sentenced for a felony; in other words, that the crime will be designated. . . . So while my sympathies are all with . . . Coste on this one, and I wish that provision had not been included in the plea agreement, I can't go against that. It was clearly stated. We're not talking about a situation where . . . sometimes these things are left unclear. . . . [I]n those cases, on occasion, I've read back into the court's orders . . . an intention to leave the matter undesignated. But I can't do that here. I'm sorry.

The record amply supports these findings. Accordingly, we will not exercise our appellate jurisdiction based on an alleged ambiguity or interpretation of the record that the trial court expressly has rejected.

**¶8** Nor can we properly exercise our special action jurisdiction, as Coste requests. Because the special action has replaced "writs of certiorari, mandamus, or prohibition in the trial or appellate courts," Ariz. R. P. Spec. Actions 1(a), case law concerning those writs guides our exercise of special action jurisdiction pursuant to A.R.S. § 12-120.21(A)(4). In *Hurst v. Bisbee Unified School District No. Two*, we explained that the writ of mandamus "does not lie to correct errors in an appealable judgment and cannot be used as a substitute for the ordinary channels of appeal." 125 Ariz. 72, 75, 607 P.2d 391, 394 (App. 1979). When a statutory right of appeal is provided but not timely exercised by a party, the decision becomes res judicata; "[t]he only method of attack available . . . is by the appeal provided by statute." *Id.* This reasoning applies with equal force to Rule 32 proceedings.

> [T]he party asserting a valid reason for non-compliance with the time

> requirements has a heavy burden in showing the court why the non-compliance should be excused. Mere inadvertence or neglect on the part of a party will not be considered a valid reason for allowing a party to avoid the strict time limits of Rule 32.

*State v. Pope*, 130 Ariz. 253, 255-56, 635 P.2d 846, 848-49 (1981). Special action relief is not available where, as here, a party has failed to seek timely relief through the ordinary channels.

**Disposition**

**¶9** Because we lack appellate jurisdiction, we dismiss the appeal and decline to exercise special action jurisdiction.