

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

KENNETH NELLO BROWN,
Petitioner.

No. 2 CA-CR 2015-0352-PR
Filed November 2, 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NOT FOR PUBLICATION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. CR2003040808001SE
The Honorable David M. Talamante, Judge

REVIEW GRANTED; RELIEF DENIED

Kenneth N. Brown, Eloy
In Propria Persona

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MEMORANDUM DECISION

Presiding Judge Vásquez authored the decision of the Court, in which Judge Howard and Judge Kelly¹ concurred.

V Á S Q U E Z, Presiding Judge:

¶1 Petitioner Kenneth Brown 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). Brown has not sustained his burden of establishing such abuse here.

¶2 Pursuant to a plea agreement entered in 2004, Brown was convicted of sexual conduct with a minor and attempted sexual conduct with a minor, both dangerous crimes against children. The trial court imposed an aggravated twenty-five year term of imprisonment on the sexual conduct count, to be followed by a term of lifetime probation on the attempt count. Brown thereafter sought and, in 2005, was denied post-conviction relief.

¶3 In September 2013, Brown initiated another proceeding for post-conviction relief. He argued in his petition that the trial court had aggravated his sentences improperly and that he had received ineffective assistance of counsel. The trial court summarily denied relief, concluding the claims were precluded and untimely.

¶4 On review, Brown argues the trial court abused its discretion in finding his claims precluded and untimely because he "file[d] his Petition pursuant to Rule 32.1(e) and (f)." The trial court

¹The Hon. Virginia C. Kelly, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and our supreme court.

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was correct, however, that Brown's sentencing claims arise under Rule 32.1(a), and therefore are precluded and untimely in this proceeding. See Ariz. R. Crim. P. 32.2(a)(2), (3), 32.4(a). Indeed, Brown raised a claim pursuant to *Blakely v. Washington*, 542 U.S. 296 (2004), in his pro se supplemental petition in his first Rule 32 proceeding and it was rejected on the merits. Likewise, we agree with the court that because this proceeding is not "of-right" as defined in Rule 32.1, he is not entitled to relief under Rule 32.1(f).

¶5 Therefore, although we grant the petition for review, we deny relief.