

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

FRANK KARL HERTEL,
Petitioner.

No. 2 CA-CR 2016-0356-PR
Filed January 24, 2017

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NOT FOR PUBLICATION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 Pima County
No. CR20002435
The Honorable Paul E. Tang, Judge

REVIEW GRANTED; RELIEF DENIED

Frank Karl Hertel, Kingman
In Propria Persona

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MEMORANDUM DECISION

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

M I L L E R, Judge:

¶1 After a jury trial was held in his absence in 2001, petitioner Frank Hertel was found guilty of sexual conduct with a minor, his fourteen-year-old daughter. Hertel was sentenced in 2012 to a twenty-year prison term after he was extradited from Germany. This court affirmed the conviction and sentence on appeal, *State v. Hertel*, No. 2 CA-CR 2012-0451 (Ariz. App. Oct. 23, 2013) (mem. decision),¹ and denied relief on review from the trial court's denial of Hertel's first petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., *State v. Hertel*, No. 2 CA-CR 2014-0315-PR (Ariz. App. Dec. 19, 2014) (mem. decision). Hertel now challenges the court's denial of his second Rule 32 petition and his motion for rehearing. "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). We see no such abuse here.

¶2 On appeal, Hertel challenged the trial court's admission of evidence of other sexual acts he had engaged in with his daughter. And in his first post-conviction proceeding, he raised claims of ineffective assistance of trial and appellate counsel related to his having been tried in absentia. The trial court had appointed counsel to represent Hertel in that first Rule 32 proceeding. The court again appointed counsel to represent him when he filed his second notice of post-conviction relief and commenced the instant

¹This court vacated the Criminal Restitution Order entered at sentencing but otherwise affirmed the conviction and sentence. *Hertel*, No. 2 CA-CR 2012-0451, ¶¶ 1, 10, 11.

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proceeding. Counsel filed a notice stating he had reviewed the entire record and found no issue to raise. Pursuant to counsel's request, the court permitted Hertel to file a pro se petition.

¶3 In his pro se petition, Hertel contended the trial court "lost jurisdiction" and violated his "speedy trial" rights when it sentenced him more than ten years after his jury trial. Additionally, he challenged the sentence, arguing (1) it was illegal because he was incorrectly sentenced under the statute for dangerous crimes against children rather than as a first-time felony offender; and (2) it was unconstitutionally disproportionate because of its length and he should be resentenced to a mitigated term. Addressing the claims on their merits, the trial court concluded Hertel had not raised a colorable claim for relief that would entitle him to an evidentiary hearing. The court denied the petition in a detailed ruling, as well as Hertel's subsequent motion for rehearing.

¶4 In his petition for review of the trial court's rulings, Hertel has essentially restated the claims he raised below.² But as the state correctly asserted in its response in opposition to the pro se petition Hertel filed below, he was precluded from raising these claims in this proceeding, having waived them by failing to raise them on appeal or in the initial Rule 32 proceeding, *see* Ariz. R. Crim. P. 32.2(a)(3). More importantly, however, because the claims do not fall within Rule 32.1(d), (e), (f), (g), or (h), they could not be raised at all in this successive and untimely proceeding, *see* Ariz. R. Crim. P. 32.4(a). *See State v. Lopez*, 234 Ariz. 513, ¶ 5, 323 P.3d 1164, 1165-66 (App. 2014). We therefore sustain the trial court's rulings because the claims were time-barred and summary dismissal of Hertel's petition was appropriate. *See id.* ¶ 10.

¶5 For the reasons stated, we grant the petition for review but deny relief.

²To the extent some of the claims Hertel is raising in his petition for review are actually new claims, which he did not present to the trial court first, we do not address them. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980).