

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

DANIEL F. BUTIEREZ,
Petitioner.

No. 2 CA-CR 2017-0015-PR
Filed July 27, 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NOT FOR PUBLICATION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. CR035393
The Honorable Jeffrey T. Bergin, Judge

REVIEW GRANTED; RELIEF DENIED

Daniel Butierez, Marana
In Propria Persona

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MEMORANDUM DECISION

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

V Á S Q U E Z, Presiding Judge:

¶1 Daniel Butierez seeks review of the trial court’s order summarily denying his petition to set aside his judgment of guilt, which we treat as a petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that order unless the court clearly abused its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We find no such abuse here.

¶2 In July 1992, a jury found Butierez guilty of unlawful offer to sell marijuana with a weight greater than eight pounds. At the September 1992 sentencing hearing, the trial court ruled that the evidence had not established the marijuana weighed more than eight pounds and thus found Butierez guilty of the lesser offense of offering to sell less than one pound of marijuana. The court suspended the imposition of sentence and placed him on probation for three years.² In July 1994, the court revoked Butierez’s probation and sentenced him to an aggravated prison term of ten years.

¶3 In December 1995, appointed counsel filed a petition for post-conviction relief citing, *Anders v. California*, 386 U.S. 738 (1967), “submit[ting several] issues for review,” two of which related to the trial court’s entry of a conviction on the lesser-included offense in

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.

²Although Butierez asserts his direct appeal from his conviction was “denied,” the record shows it was dismissed. *State v. Butierez*, No. 2 CA-CR 92-0858 (Ariz. App. Oct. 15, 1993) (order).

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1992, and three of which related to the sentence entered after Butierez's probation was revoked. Butierez filed a pro se supplemental petition, asserting the trial court improperly had found him guilty of the lesser offense in violation of his due-process rights and the prohibition against double jeopardy and asking that his conviction be vacated. The court granted relief on two of counsel's issues, correcting an error in the presentence report and giving Butierez additional presentence incarceration credit, but determined the trial judge properly had found him guilty of the lesser offense, noting Butierez had "accepted the benefits of being found guilty of a lesser offense."

¶4 We denied relief on Butierez's petition for review of the trial court's denial of his petition for post-conviction relief, rejecting his claim that the court erred because it did not instruct the jury on the lesser offense. We concluded that, in the absence of evidence supporting the greater offense, it would have been fundamental error to sentence Butierez for that offense. *State v. Butierez*, No. 2 CA-CR 96-0469-PR, 2-3 (Ariz. App. Apr. 17, 1997) (mem. decision). We also concluded that, because Butierez could have challenged but did not, the imposition of the lesser offense on appeal, "apparently deciding instead to accept the benefit of the claimed error," he was precluded from doing so in a proceeding "long after the trial court had sentenced him to an aggravated prison term for violating the terms of his probation." *Id.* at 3. In September 1997, Butierez filed a petition for writ of habeas corpus, which the court treated as a successive petition for post-conviction relief and summarily denied.

¶5 Almost nineteen years later, in August 2016, Butierez filed a petition to set aside his judgment of guilt, *see* A.R.S. § 13-907, arguing his conviction for the lesser offense is void and essentially reasserting the arguments he had raised in his first Rule 32 proceeding, specifically, that his conviction violated his due-process rights and was barred by double jeopardy.³ Noting that he had "an outstanding balance in the amount of \$1,620.00" for fines and fees, the

³It appears Butierez completed his ten-year prison term for this offense on March 25, 2004.

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trial court denied his petition to set aside his judgment of guilt, and this petition for review followed.⁴

¶6 Although Butierez suggests on review that he “recently discovered” there is no conviction in his file and the state committed a fraud on the court, he essentially raises the same underlying arguments he presented in his first Rule 32 proceeding—his conviction of the lesser offense is void and violated his due-process rights and the prohibition against double jeopardy. He asks that we vacate his conviction. Although it appears Butierez did not intend that his petition to set aside his judgment of guilt be treated as a Rule 32 petition, because the arguments raised therein are cognizable under Rule 32, we treat it as a petition for post-conviction relief. *See* Ariz. R. Crim. P. 32.3. And notably, because Butierez asserted in his petition below the same due-process and double-jeopardy violations he raised in his first Rule 32 petition, claims he also could have raised on appeal, he is precluded from doing so now. *See* Ariz. R. Crim. P. 32.2(a). Additionally, although Butierez suggests he recently learned about this claim, he provides no support for that argument.⁵

¶7 Moreover, even were we to review Butierez’s claim in the context of an appeal arising from a proceeding pursuant to § 13-907,

⁴Butierez initially filed a notice of appeal from the trial court’s ruling, followed by this petition for review.

⁵To the extent Butierez argues for the first time on review that because “[t]he [t]ranscripts from September 14, 1992 were never disclosed” to him until October 26, 2016, possibly attempting to assert a claim based on newly discovered evidence, *see* Ariz. R. Crim. P. 32.1(e), we note he has not argued, much less established, such a claim. In any event, we do not consider claims raised for the first time on review. *See* Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review must contain “issues which were decided by the trial court and which the defendant wishes to present to the appellate court for review”); *see also State v. Ramirez*, 126 Ariz. 464, 467-68, 616 P.2d 924, 927-28 (App. 1980). We similarly do not consider the exhibits attached to the petition for review, which Butierez did not attach to his petition below.

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because he has failed to present any argument establishing that the trial court abused its discretion by denying his petition, the outcome would be the same. *See State v. Hall*, 234 Ariz. 374, ¶ 3, 322 P.3d 191, 192 (App. 2014) (appellate court reviews trial court's decision in setting aside conviction for abuse of discretion); *see also* A.R.S. § 13-908 (grant of relief "under the provisions of [title 13, chapter 9] shall be in the discretion of the superior court judge"). We can assume the court understood it had discretion and exercised it. *See State v. Ramirez*, 178 Ariz. 116, 128, 871 P.2d 237, 249 (1994) ("[T]he trial court is presumed to know and follow the law."); *cf. State v. Key*, 128 Ariz. 419, 421, 626 P.2d 149, 151 (App. 1981) (judge exercising discretion).

¶8 We thus conclude the trial court did not abuse its discretion in summarily denying Butierez's petition. *Cf. State v. Oakley*, 180 Ariz. 34, 36, 881 P.2d 366, 368 (App. 1994) (appellate court "will affirm the trial court when it reaches the correct result even though it does so for the wrong reasons"). Accordingly, although we grant review, we deny relief.