

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

JOHN JOSEPH RUSHINSKY JR.,
Petitioner.

No. 2 CA-CR 2017-0027-PR
Filed February 17, 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NOT FOR PUBLICATION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 Maricopa County
No. CR2011142060001DT
The Honorable Warren J. Granville, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

William G. Montgomery, Maricopa County Attorney
By Gerald R. Grant, Deputy County Attorney, Phoenix
Counsel for Respondent

John Joseph Rushinsky Jr., Florence
In Propria Persona

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MEMORANDUM DECISION

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

ECKERSTROM, Chief Judge:

¶1 Petitioner John Rushinsky Jr. 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). Rushinsky has not sustained his burden of establishing such abuse here.

¶2 After a jury trial, Rushinsky was convicted of two counts of child molestation. The trial court sentenced him to concurrent, mitigated prison terms, the longer of which was fourteen years. The convictions and sentences were affirmed on appeal. *State v. Rushinsky, Jr.*, No. 1 CA-CR 12-0529 (Ariz. App. Oct. 15, 2013) (mem. decision).

¶3 Rushinsky thereafter sought post-conviction relief, and appointed counsel filed a notice stating she had reviewed the record and was "unable to find a colorable issue to submit to the court pursuant to Rule 32." In a pro se, supplemental petition, however, Rushinsky argued that A.R.S. §§ 13-1407 and 13-1410 were unconstitutional, as the burden to prove sexual intent had been improperly shifted to him as an affirmative defense, and that his appellate counsel was ineffective in failing to argue that issue on appeal. The trial court summarily denied relief.

¶4 On review Rushinsky again contends the statutory scheme is unconstitutional and he received ineffective assistance of counsel. Our supreme court recently addressed and rejected the arguments Rushinsky raises in *State v. Holle*, 240 Ariz. 300, 379 P.3d

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197 (2016). The court determined that “lack of sexual motivation is an affirmative defense” and that the statutory scheme is not unconstitutionally vague. *Id.* ¶¶ 46, 50.

¶5 In this case, Rushinsky’s claims, other than that of ineffective assistance of counsel, are precluded by his failure to raise them on appeal. *See* Ariz. R. Crim. P. 32.2(a)(3). And because our supreme court has rejected his argument, we cannot say he has established a colorable claim of ineffective assistance of counsel based on counsel’s failure to raise it. *See State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006) (“To state a colorable claim of ineffective assistance of counsel, a defendant must show both that counsel’s performance fell below objectively reasonable standards and that this deficiency prejudiced the defendant.”); *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984). We therefore cannot say the trial court abused its discretion in denying Rushinsky relief.

¶6 Although we grant the petition for review, we deny relief.