

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

SHAWN DAVIS SVIHL,
Petitioner.

No. 2 CA-CR 2017-0085-PR
Filed July 25, 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NOT FOR PUBLICATION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 Pinal County
No. S1100CR201101434
The Honorable Henry G. Gooday Jr., Judge

DISMISSED

COUNSEL

Kent P. Volkmer, Pinal County Attorney
By Thomas C. McDermott, Deputy County Attorney, Florence
Counsel for Respondent

Shawn D. Svihl, Florence
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 Shawn Svihl seeks review, pursuant to Rule 32.9, Ariz. R. Crim. P., of the trial court's denial of his "Motion to Modify Special Conditions of Probation." We conclude we lack jurisdiction to review the court's order, and we therefore dismiss the petition for review.

¶2 Pursuant to a plea agreement in 2011, Svihl was convicted of three counts of attempted child molestation. The trial court sentenced him to a 7.5-year term of imprisonment on one count and lifetime terms of probation on the others, to commence upon his release from prison. As a term of that probation, Svihl was required to "submit to any program of psychological assessment at the direction of [his] probation officer, including the penile plethysmograph . . . to assist [him] in treatment."

¶3 In May 2015 Svihl filed a "motion to clarify sentence," which the trial court deemed a petition for post-conviction relief. The court granted relief, correcting its sentencing minute entry to "reflect as Non-Dangerous" certain of Svihl's convictions.

¶4 Svihl subsequently filed a "motion to modify special conditions of probation," asking the court "to remove the condition requiring [a] penile plethysmograph test." After hearing argument on the matter, the trial court denied the motion.

¶5 Svihl filed notices of appeal in the trial court and this court, as well as a petition for review pursuant to Rule 32.9 in this

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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court. Neither party has questioned this court's jurisdiction over this matter, but we are required to consider our own jurisdiction. *See State v. Wynn*, 114 Ariz. 561, 562, 562 P.2d 734, 735 (App. 1977).

¶6 This court has jurisdiction to consider only those direct appeals authorized by statute. *See* Ariz. Const. art. 6, § 9; A.R.S. § 12-120.21(A). Pursuant to A.R.S. §§ 13-4031 to 13-4033, certain rulings on post-trial motions "are separately appealable orders." *Wynn*, 114 Ariz. at 563, 562 P.2d at 736. Those rulings, assuming the right to appeal has not been waived, may be appealed pursuant to § 13-4033(A)(3), which provides that an appeal may be had from "[a]n order made after judgment affecting the substantial rights of the party."

¶7 However, this court has determined that when such a motion is denied, and the trial court's order therefore does not "actually change[] or modif[y] the judgment or sentence originally imposed," this court lacks jurisdiction over an appeal from that ruling. *State v. Jimenez*, 188 Ariz. 342, 345, 935 P.2d 920, 923 (App. 1996). This is so because in the absence of a change to the defendant's sentence, his or her "substantial rights" are not affected, and § 13-4033(A)(3) does not provide a statutory basis for an appeal. *Jimenez*, 188 Ariz. at 344-45, 935 P.2d at 922-23.

¶8 We also concluded in *Jimenez* that a pleading defendant could not circumvent the effect of § 13-4033(B) by filing a motion to modify terms of probation. 188 Ariz. at 344-45, 935 P.2d at 922-23. We stated, "If the trial court's order had actually changed or modified the judgment or sentence originally imposed, we assume defendant would have had the right of direct appeal." *Id.* But in this case, as in *Jimenez*, the terms of probation were not changed. *See id.* at 434, 935 P.2d at 921. And even were we to accept *arguendo* that such a claim could be raised in a Rule 32 proceeding, even when an appeal is not statutorily allowed, such a claim would be precluded in a successive, untimely proceeding such as this one. *See* Ariz. R. Crim. P. 32.2.

¶9 We therefore conclude we lack jurisdiction to review the trial court's ruling, and therefore dismiss the petition.