

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

SAMUEL LOUIS COHEN JR.,
Petitioner.

No. 2 CA-CR 2017-0271-PR
Filed December 29, 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NOT FOR PUBLICATION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 Graham County
No. CR2005293
The Honorable Michael D. Peterson, Judge

REVIEW GRANTED; RELIEF DENIED

Samuel Louis Cohen Jr., Kingman
In Propria Persona

STATE v. COHEN
Decision of the Court

MEMORANDUM DECISION

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

ECKERSTROM, Chief Judge:

¶1 Samuel Cohen Jr. seeks review of the trial court's order summarily denying his successive and untimely "Notice for Rule 32.1 Petition for Post-Conviction Relief," filed pursuant to Rule 32, Ariz. R. Crim. P. We grant review, but we deny relief.

¶2 In 2005, Cohen pleaded guilty to attempted sexual conduct with a minor and attempted molestation of a child and was sentenced to a five-year term of imprisonment to be followed by a five-year term of intensive probation. In 2013, he admitted violating his probation on the attempted molestation charge, and the trial court reinstated him on probation for a term of ten years, to begin on May 1, 2013.

¶3 In December 2014, his probation officer filed a petition to revoke his reinstated probation. Cohen entered admissions to several of the alleged violations, and, in March 2015, the trial court terminated his probation and sentenced him to a 7.5-year prison term. Cohen filed a notice of post-conviction relief in June 2015. After appointed counsel notified the court that she could find no colorable claims to raise pursuant to Rule 32, the court granted Cohen until October 24, 2015, to file a pro se petition for post-conviction relief. When Cohen had not filed a petition by November 4, 2015, the court summarily dismissed the proceeding.

¶4 Cohen initiated the instant post-conviction relief proceeding on July 28, 2017. Relying on A.R.S. § 13-902(A)(2), he argued "the maximum term of probation for a class 3 felony is 5 years," and he maintained his current prison term "may have been illegally imposed since his previous term of probation was illegally extended in excess of the prescribed statutory maximum." He argued that "any [prison] term imposed following an illegally imposed term of probation" violates due process, and he asked the trial court to "vacate his current conviction and reinstate his probation to a maximum term of five years," with credit given for time served.

STATE v. COHEN
Decision of the Court

¶5 The trial court construed Cohen’s filing as a petition for post-conviction relief and summarily dismissed it, concluding it was “neither timely nor meritorious.” In Cohen’s petition for review, he relies on the same arguments he made below. He asserts the court abused its discretion in imposing a longer term of probation than that authorized by statute and by failing to address the claim in his petition “for fundamental error.”¹

¶6 We review a trial court’s denial of post-conviction relief for an abuse of discretion. *State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). We find none here. As the court correctly observed, § 13-902(E) governs the probation terms available for Cohen’s conviction for attempted child molestation, and it provides that “probation may continue for a term of not less than the term that is specified in subsection A of this section up to and including life.” *See also State v. Peek*, 219 Ariz. 182, ¶ 10 (2008) (“lifetime probation was clearly available for an attempted child molestation occurring . . . after the effective date of the 1997 amendment” of § 13-902(E)). As the trial court suggested, Cohen’s claim of an illegal sentence is also barred as untimely; it may not be raised in an untimely and successive proceeding such as this. *See Ariz. R. Crim. P. 32.2(b), 32.4(a)*.

¶7 Accordingly, we approve both grounds cited by the trial court as correct, independent bases for the dismissal of Cohen’s Rule 32 filing. *See State v. Whipple*, 177 Ariz. 272, 274 (App. 1993) (declining to “rehash[] the trial court’s correct ruling” on a petition for post-conviction relief “in a written decision”). Cohen’s reference to “fundamental error” does not alter this result. *See State v. Swoopes*, 216 Ariz. 390, ¶¶ 40-42 (App. 2007) (rejecting suggestion that “notwithstanding the rules of preclusion, fundamental

¹ On review, Cohen does not challenge the trial court’s characterization of his filing as a petition. We find no abuse of discretion in the court’s ruling, as the filing was subject to dismissal whether it was considered as a notice or a petition. *See Ariz. R. Crim. P. 32.2(b)* (notice subject to dismissal if “specific exception [to preclusion] and meritorious reasons do not appear substantiating the claim and indicating why the claim was not stated in the previous petition or in a timely manner”); *Ariz. R. Crim. P. 32.6(c)* (petition subject to dismissal if it fails to state non-precluded claim that “presents a material issue of fact or law which would entitle the defendant to relief”); *see also Ariz. R. Crim. P. 32.4(a)* (“Any notice not timely filed may only raise claims pursuant to Rule 32.1(d), (e), (f), (g) or (h).”).

STATE v. COHEN
Decision of the Court

error may be raised at any time and, if found, compel relief in a successive post-conviction proceeding such as this”).

¶8 For the foregoing reasons, although we grant review, we deny relief.