

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

BRYAN STUART DUNLOP,
Petitioner.

No. 2 CA-CR 2017-0315-PR
Filed December 11, 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NOT FOR PUBLICATION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. CR2014148799001DT
The Honorable Michael W. Kemp, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

William G. Montgomery, Maricopa County Attorney
By Daniel Strange, Deputy County Attorney, Phoenix
Counsel for Respondent

Bruce F. Peterson, Maricopa County Office of the Legal Advocate
By Andrew C. Marcy, Deputy Legal Advocate, Phoenix
Counsel for Petitioner

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MEMORANDUM DECISION

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

ECKERSTROM, Chief Judge:

¶1 Bryan Dunlop 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 that order unless the court abused its discretion. *State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). Dunlop has not met his burden of demonstrating such abuse here.

¶2 Dunlop pled guilty to two counts of forgery and two counts of attempted sexual exploitation of a minor. The trial court sentenced him to consecutive prison terms totaling six years for forgery and, for attempted sexual exploitation, suspended the imposition of sentence and imposed lifetime probation.

¶3 For the forgery counts, the state requested the court order restitution of \$271,193.11, including \$171,874 for “[c]ompensation for time” for the victim and his employees spent investigating Dunlop’s activities. Dunlop argued, however, that he was entitled to offset a civil judgment the victim had obtained against him that included the “time lost by the [victim’s] employees” and, additionally, that those losses were merely consequential and not direct. The court ordered Dunlop pay \$251,193.11 in restitution, including the \$171,874 for time spent by employees “to assess and attempt to limit the losses” caused by his conduct. The court also determined that, although a civil judgment had been awarded, no offset was required because Dunlop “has not paid anything to satisfy the judgment.”

¶4 Dunlop sought post-conviction relief, again claiming he was entitled to offset the civil judgment and the restitution award consisted of consequential damages not properly awarded as restitution. He further argued the \$171,874 was “based upon speculation” because “[t]here was no testimony . . . as to the actual amount paid, any clients that were turned away, or any business that was refused.” The trial court summarily denied relief. This petition for review followed.

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¶5 On review, Dunlop argues that he presented a colorable claim warranting an evidentiary hearing that the \$171,874 in restitution was “speculative.”¹ A defendant is entitled to a hearing only if he presents a colorable claim for relief, that is, “he has alleged facts which, if true, would probably have changed the verdict or sentence.” *State v. Amaral*, 239 Ariz. 217, ¶¶ 10-11 (2016).

¶6 At the restitution hearing, the parties referred to the civil judgment, which stated the victim had “spent \$171,874 worth of time to investigate and remedy the damage caused by Dunlop’s wrongful actions.” Dunlop did not argue that amount was speculative – he instead argued he was entitled to offset the amount and it was not compensable because it was consequential damages. Therefore, even were Dunlop correct, the argument is precluded as waived pursuant to Rule 32.2(a)(3). Although an improper restitution order may constitute fundamental error, *see In re J.U.*, 241 Ariz. 156, ¶ 18 (App. 2016), Dunlop does not argue the error here was fundamental and, in any event, fundamental error is subject to preclusion, *see State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17 (App. 2008) (fundamental error waived if not asserted); *State v. Swoopes*, 216 Ariz. 390, ¶ 42 (App. 2007) (preclusion under Rule 32.2 applies to fundamental error).

¶7 We grant review but deny relief.

¹Dunlop has abandoned his claims the losses were non-recoverable consequential damages or subject to offset by the civil judgment.