

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

FOX JOSEPH SALERNO,
Petitioner.

No. 2 CA-CR 2020-0232-PR
Filed December 31, 2020

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NOT FOR PUBLICATION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. 31.19(e).

Petition for Review from the Superior Court in Maricopa County
No. CR2001006753
The Honorable Arthur T. Anderson, Judge

REVIEW GRANTED; RELIEF DENIED

Fox Joseph Salerno, Canon City, Colorado
In Propria Persona

MEMORANDUM DECISION

Chief Judge Vásquez authored the decision of the Court, in which Presiding Judge Staring and Judge Brearcliffe concurred.

V Á S Q U E Z, Chief Judge:

¶1 Fox Salerno seeks review of the trial court’s order summarily dismissing his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P.¹ We review a court’s denial of post-conviction relief for an abuse of discretion. *State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). Salerno has not met his burden of establishing such abuse here.

¶2 Following a jury trial, Salerno was convicted of two counts of third-degree burglary, two counts of trafficking in stolen property, and fraudulent scheme and artifice. He was sentenced in 2002 to concurrent prison terms, the longer of which were 15.75 years, to be served consecutively to the twenty-year sentence in another matter. He was also sentenced to community supervision “to be served consecutively to the actual period of imprisonment.” We affirmed Salerno’s convictions and sentences on appeal. *State v. Salerno*, No. 1 CA-CR 02-0511 (Ariz. App. Mar. 20, 2003) (mem. decision). Salerno sought post-conviction relief multiple times between 2003 and 2017, followed by his most recent petition in 2019, apparently his tenth such proceeding.

¶3 In this most-recent proceeding, Salerno argued the Arizona Department of Corrections (ADOC) is “prematurely” holding him in custody in this matter, citing Rule 32.1(d). He maintained he should have been released on June 25, 2018, his earned release credit date in the other matter, to complete his community supervision in that matter before

¹ Our supreme court amended the post-conviction relief rules, effective January 1, 2020. Ariz. Sup. Ct. Order R-19-0012 (Aug. 29, 2019). “The amendments apply to all cases pending on the effective date unless a court determines that ‘applying the rule or amendment would be infeasible or work an injustice.’” *State v. Mendoza*, 249 Ariz. 180, n.1 (App. 2020) (quoting Ariz. Sup. Ct. Order R-19-0012). “Because it is neither infeasible nor works an injustice here, we cite to and apply the current version of the rules.” *Id.*

-serving his five sentences in this case. He asserted ADOC violated his due process rights by failing to release him to community supervision, thereby impermissibly “splitting” the consecutive sentences the court had imposed. He also asserted ADOC incorrectly calculated two different earned release dates in 2031 for two of his three, 15.75-year sentences in this matter.

¶4 The trial court summarily dismissed Salerno’s petition in November 2019, correctly pointing out that Salerno had made “identical claims” in his post-conviction proceeding in the other matter, which the court noted it had dismissed in August 2019. The court concluded that Salerno’s “claims continue to be without merit,” and that he is not being held beyond his sentence in the other matter “because he is properly serving his consecutive term of imprisonment” in this case.² This petition for review followed.

¶5 Insofar as Salerno criticizes the trial court for failing to address what he characterizes as his “premature” custody in this matter, we note that the court correctly pointed out that it had recently dismissed Salerno’s petition in the other matter, in which he had raised “identical claims” regarding his request for immediate release on community supervision. We additionally note that, in its previous ruling, the court provided detailed reasons and legal support to explain why it was dismissing essentially the same claims Salerno now raises. Accordingly, although the court did not specifically address the issues in summarily dismissing Salerno’s petition below, we may affirm the court’s ruling on any ground supported by the record. *See State v. Banda*, 232 Ariz. 582, n.2 (App. 2013).

¶6 Rule 32.1(d)³ provides relief for a defendant who “continues to be or will continue to be in custody after his or her sentence expired.” Notably, Salerno does not argue that his sentences in this matter have expired. On review, Salerno reasserts that ADOC violated his due process rights by refusing to immediately release him so he can serve his community supervision in the other matter, and reincarcerate him so that he can then serve his sentences in this case. Arguing that community supervision is part of his “sentence” in the other matter, Salerno asserts,

²Salerno’s anticipated release date in this matter is in 2031.

³We address Salerno’s Rule 32.1(d) claims regarding his community release in the other matter because, although they are not properly before us on review, they necessarily relate to his arguments regarding his release in this matter.

without meaningful support, that he cannot begin serving his terms in this matter until he has completed community supervision in the other case. He maintains that although A.R.S. § 13-105(5)⁴ provides that community supervision is served “after completing a period of imprisonment,” it does not require that it follow “all” terms of imprisonment.⁵ He similarly asserts that § 13-603(I) provides that community supervision be served consecutively to the actual period of imprisonment, rather than future terms of imprisonment. He also points out that A.R.S. § 41-1604.07(E) states that “[a] prisoner who has reached the prisoner’s earned release date or sentence expiration date shall be released to begin the prisoner’s term of community supervision.”

¶7 Section 13-603(I) unambiguously contemplates that community supervision will extend past the end of the entire aggregate prison term. Notably absent from that statute or from § 13-105(5) is any provision providing for the repeated release and reincarceration scenario Salerno urges us to adopt. We additionally note, as Salerno has correctly pointed out, that § 41-1604.07(E) provides that a prisoner who has reached the prisoner’s earned release or sentence expiration date be released to community supervision. However, we also note that § 41-1604.07(J) “authorize[s] the release of any prisoner on the prisoner’s earned release credit date to serve any consecutive term imposed on the prisoner,” and notably provides “[t]he prisoner shall remain under the custody and control of the department.” The language in subsection (J) is consistent

⁴Section 13-105(5) defines community supervision as that portion of a sentence imposed by the court pursuant to A.R.S. § 13-603(I), and served in the community “after completing a period of imprisonment.” Section 13-603(I) provides that at the time of sentencing a court shall impose a term of community supervision, which “shall be served consecutively to the actual period of imprisonment.”

⁵We cite the current version of the applicable statutes because no revisions material to this decision have occurred since Salerno’s offenses. And, insofar as Salerno suggests on review that some of the statutes in effect when he was sentenced require a different outcome here, we note that he did not expressly raise this argument in his petition below. We thus do not address it. *See State v. Ramirez*, 126 Ariz. 464, 468 (App. 1980) (issues raised for first time in petition for review not addressed). In any event, he has not developed such an argument in a meaningful way. *See State v. Stefanovich*, 232 Ariz. 154, ¶ 16 (App. 2013) (insufficient argument waives claim). We likewise do not address Salerno’s argument related to economic due process, raised for the first time on review. *See Ramirez*, 126 Ariz. at 468.

with the view that the relevant statutes do not contemplate, much less require, releasing incarcerated individuals between consecutive sentences, as Salerno argues.

¶8 As he did below, Salerno also attempts to distinguish *State v. Cowles*, 207 Ariz. 8 (App. 2004), a case he also cited in the other matter, and which the trial court found supported the denial of relief. Salerno suggests *Cowles* stands “only” for the proposition that community supervision cannot be served while incarcerated. *Id.* ¶ 13. However, as we noted in *Cowles*, although “[c]ommunity supervision is not equivalent to imprisonment,” it is “part of the sentence that has to be served in the community after completion of a period of imprisonment.” *Id.* ¶¶ 9, 14. Importantly, we also concluded that “the community supervision terms began after [Cowles] was released from ADOC.” *Id.* ¶¶ 13-14.

¶9 Finally, Salerno claims that ADOC miscalculated his earned release time by estimating two different release dates in 2031 for two of his 15.75-year sentences in this matter. However, Salerno does not argue that the latter of the two dates would keep him in custody after his sentence expired, *see* Rule 32.1(d), but instead merely points out the inconsistency in the calculations. Therefore, we cannot say the trial court abused its discretion by dismissing his claim.

¶10 We grant review but deny relief.