

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

ALBERT DALE LEWIS,
Petitioner.

No. 2 CA-CR 2023-0079-PR
Filed June 1, 2023

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NOT FOR PUBLICATION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 Pima County
No. CR20113758002
The Honorable Christopher Browning, Judge

REVIEW GRANTED; RELIEF DENIED

Albert D. Lewis, Tucson
In Propria Persona

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MEMORANDUM DECISION

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

G A R D, Judge:

¶1 Albert Lewis seeks review of the trial court’s ruling denying his successive petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that ruling unless the court abused its discretion. *See State v. Martinez*, 226 Ariz. 464, ¶ 6 (App. 2011). Lewis has not met his burden of establishing such abuse here.

¶2 After a jury trial, Lewis was convicted of unlawful imprisonment, assault, aggravated robbery, second-degree burglary, and aggravated assault on an incapacitated victim. The trial court sentenced him to enhanced and aggravated, consecutive and concurrent prison terms totaling 17.5 years. On appeal, this court vacated a criminal restitution order but otherwise affirmed Lewis’s convictions and sentences. *State v. Lewis*, No. 2 CA-CR 2012-0404 (Ariz. App. May 12, 2014) (mem. decision). Thereafter, Lewis sought and was denied post-conviction relief on three occasions. *See State v. Lewis*, No. 2 CA-CR 2018-0057-PR, ¶¶ 2-4 (Ariz. App. Aug. 6, 2018) (mem. decision) (describing case history).

¶3 In November 2021, Lewis filed a notice of post-conviction relief, requesting the appointment of counsel. The trial court, however, denied that request and dismissed his notice, pointing out that “two independent attorneys [had] already reviewed this case in detail and found no good faith claim to be raised.” Lewis did not seek review of that decision. In December 2022, Lewis filed a motion to modify his sentence. The court denied that motion, explaining that Lewis’s argument “focuse[d] on a misstatement by the Court (which was later corrected in the same hearing).”

¶4 In January 2023, Lewis simultaneously filed a notice of and petition for post-conviction relief, citing Rule 32.1(c) and (e). He argued that his “sentence was illegal and not authorized by law” because the state had failed to give “notice alleging aggravating factors before trial” or to pursue a jury determination as to those factors. He further maintained that

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he had “[j]ust found out that judicial fact finding violates [his] constitutional and substantial rights.”

¶5 In March 2023, the trial court summarily dismissed Lewis’s petition. It explained that his argument “essentially mirrors” what it had already considered and rejected in Lewis’s 2016 proceeding for post-conviction relief. The court additionally observed that his petition was successive and “as such may be summarily dismissed as precluded.” This petition for review followed.

¶6 On review, Lewis repeats his claim that the trial court violated his constitutional rights by imposing an aggravated prison term without a jury determination as to the aggravating factors. He maintains the court erred in dismissing his petition because it did not mirror the argument raised in his 2016 proceeding. Rather, he contends, “This petition deals with the fact that [he] was never given notice by the state of intent to use aggravated circumstances. Nor did he waive his right to a jury determination of aggravating circumstances.”

¶7 Lewis misapprehends the law concerning aggravating circumstances. Unlike other aggravating factors used to increase the penalty for a crime beyond the prescribed statutory maximum, “the fact of a prior conviction” need not be submitted to a jury and can be found by the trial court. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); see *Blakely v. Washington*, 542 U.S. 296, 302 (2004); *State v. Price*, 217 Ariz. 182, ¶ 1 (2007). “A judicial determination of a prior conviction constitutes an aggravating circumstance which, without the need for any additional jury findings, exposes the defendant to the maximum term of imprisonment authorized by A.R.S. § 13-703, which sets the sentencing range for repetitive offenders.” *State v. Bonfiglio*, 228 Ariz. 349, ¶ 22 (App. 2011).

¶8 Here, contrary to Lewis’s suggestion otherwise, the record includes a pretrial allegation of prior convictions for aggravation and enhancement purposes. The trial court found the state had proven three prior convictions—one of which it used for enhancement—thereby exposing Lewis to an aggravated sentence under § 13-703. See *Bonfiglio*, 228 Ariz. 349, ¶ 21 (“A trial court may use the same convictions to enhance or increase the sentencing range and to aggravate a defendant’s sentence within the enhanced range.”).

¶9 Moreover, as the trial court pointed out, Lewis’s petition was subject to summary dismissal under Rule 32.2. “[W]hen a defendant raises a claim that falls under Rule 32.1(b) through (h) in a successive or untimely

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post-conviction notice, the defendant must explain the reasons for not raising the claim in a previous notice or petition, or for not raising the claim in a timely manner.” Ariz. R. Crim. P. 32.2(b). If the defendant fails to “provide sufficient reasons . . . , the court may summarily dismiss the notice.” *Id.* Lewis’s assertion that he “[j]ust found out” about his claim is insufficient. The case law on which he has relied is approximately twenty years old, and he raised a similar issue grounded in the same caselaw in a previous proceeding.¹ See *Apprendi*, 530 U.S. at 490; *Blakely*, 542 U.S. at 302. We therefore cannot say the court abused its discretion in dismissing the petition. See *Martinez*, 226 Ariz. 464, ¶ 6.

¶10 Accordingly, we grant review but deny relief.

¹In 2016, Lewis argued that prosecutorial misconduct had occurred because the jury was not the trier of fact as to his prior convictions. The court addressed the merits of the underlying argument and determined that “there was no error or prosecutorial misconduct when the trial court, and not a jury, found the existence of [Lewis’s] prior convictions.”