IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

PAUL FAHRING,
Petitioner.

No. 2 CA-CR 2024-0122-PR
Filed December 4, 2024

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NOT FOR PUBLICATION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 Pinal County
No. S1100CR201402338
The Honorable Joseph R. Georgini, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Kent P. Volkmer, Pinal County Attorney
By Geraldine Roll, Deputy County Attorney, Florence
Counsel for Respondent

Paul Fahring, Buckeye
In Propria Persona

MEMORANDUM DECISION

Judge Kelly authored the decision of the Court, in which Presiding Judge O'Neil and Judge Vásquez concurred.

K E L L Y, Judge:

¶1 Paul Fahring seeks review of the superior court's order summarily dismissing his petition for post-conviction relief filed pursuant to Rule 33, 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). Fahring has not met his burden of establishing such abuse.

¶2 In 2015, Fahring pled guilty to three counts of completed or attempted sexual exploitation of a minor under the age of fifteen based on his possession and attempted possession of images of child sexual abuse material. The superior court sentenced Fahring to a seventeen-year prison term for the completed offense and, for the remaining counts, suspended the imposition of sentence and placed him on concurrent terms of lifetime probation upon his release from prison. Fahring filed a timely notice of post-conviction relief and, after delays due to collateral litigation, filed a pro se petition for post-conviction relief in November 2023.

¶3 In that petition, Fahring argued his "sentence is illegal" and "multiplicitous" because his three counts constituted a "single act of simultaneous possession of 3 undefined images." He additionally argued he was improperly sentenced under A.R.S. § 13-705 because the age of his victims was not established by the factual basis. The superior court summarily dismissed Fahring's petition, and this petition for review followed.

¶4 Fahring reurges his claims on review, first asserting that his sentences are multiplicitous. "A charge is multiplicitous if it charges a single offense in multiple counts and thereby raises the potential for multiple punishments for a single act." *State v. Scott*, 243 Ariz. 183, ¶ 9 (App. 2017). Fahring reasons that his possession of multiple images is a single offense because the sexual exploitation statute, A.R.S. § 13-3553, prohibits possession of "any visual depiction," which, in his view, means "one or more" depictions.

¶5 But, by pleading guilty, Fahring waived all non-jurisdictional defects unrelated to the voluntariness of his plea, including deprivations of constitutional rights. *State v. Flores*, 218 Ariz. 407, ¶ 6 (App. 2008). Accordingly, even were his argument meritorious, after pleading guilty to three offenses, he cannot now argue he committed only a single offense. And, in any event, we rejected this argument in 2012 in *State v. McPherson*, concluding that "separate convictions and punishments for different images on the same DVD are constitutionally permissible because the legislature intended the unit of prosecution to be each individual 'depiction.'" 228 Ariz. 557, ¶ 7 (App. 2012) (quoting § 13-3553(A)(2)).[1]

¶6 Fahring also repeats his argument that the factual basis for his plea did not establish the age of his victims, thus rendering his sentence under § 13-705 illegal. He seems to suggest the state was required to identify the victims or provide the photographs to the superior court. But, at his change of plea hearing, Fahring admitted the children in the images he admitted possessing were under the age of fifteen. Nothing more was needed. *See* Ariz. R. Crim. P. 17.3(b) (court may consider "defendant's statements" in determining factual basis).

¶7 We grant review but deny relief.

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[1]Fahring argued below that our decision in *McPherson* is inconsistent with federal caselaw, namely *Bell v. United States*, 349 U.S. 81 (1955), and *United States v. Chilaca*, 909 F.3d 289 (9th Cir. 2018). He does not develop this argument in his petition for review, instead referring us to his petition for post-conviction relief. Our rules do not permit the incorporation of argument by reference. *See* Ariz. R. Crim. P. 32.16(c)(2)(D), (d); *see also State v. Stefanovich*, 232 Ariz. 154, ¶ 16 (App. 2013) (insufficient argument waives claim). And, notwithstanding Fahring's failure to properly raise this argument on review, the cases he identifies address federal statutes, *see Bell*, 349 U.S at 83-84; *Chilaca*, 909 F.3d at 292-93, and have no bearing on an Arizona court's interpretation of Arizona law. Nor do we agree with his passing assertion that our supreme court's recent analysis in *State v. Moninger*, ___ Ariz. ___, 552 P.3d 519 (2024), renders our analysis in *McPherson* suspect.