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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. GILBERT W. BANKS, Appellant.	)	2 CA-CR 2010-0031 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. S1100CR13924

Honorable Craig A. Raymond, Judge Pro Tempore

AFFIRMED

Gilbert Banks — Apache Junction
In Propria Persona

K E L L Y, Judge.

¶1 Appellant Gilbert Banks appeals from the trial court's order denying his application, filed after receiving his absolute discharge from imprisonment, in which he sought the restoration of his civil rights and the vacation of his felony conviction or withdrawal of his guilty plea. He maintains the court abused its discretion in refusing to

restore his right to possess or carry a gun or firearm and vacate his conviction or to allow him to withdraw his guilty plea. For the following reasons, we affirm.

Background

¶2 In 1989, Banks pled guilty to attempted sexual conduct with a minor. In 2009, ten years after he received his absolute discharge from imprisonment, Banks applied for the restoration of his civil rights, *see* A.R.S. § 13-912, including the right to possess or carry a gun or firearm, *see* A.R.S. § 13-906. He also asked the trial court to set aside his judgment of guilt, *see* A.R.S. § 13-907, or to permit him to withdraw his guilty plea, *see* Ariz. R. Crim. P. 32.1. Following a hearing, the court denied the application. Banks then moved for reconsideration, asserting that his guilty plea should be set aside because he had been "falsely convicted," and his counsel in the earlier criminal proceeding had not "really . . . defend[ed] [him] to the best of his ability." The trial court denied the motion.

Discussion

¶3 As a threshold matter, Banks's opening brief fails to set forth specific, cogent arguments as required by Rule 31.13(c)(1)(vi), Ariz. R. Crim. P. ("The appellant's brief shall include . . . [a]n argument which shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on."). Notwithstanding Banks's pro se status, he is held to the same standards as a qualified attorney. *See Old Pueblo Plastic Surgery, P.C. v. Fields*, 146 Ariz. 178, 179, 704 P.2d 819, 820 (App. 1985). Nonetheless,

in our discretion, we will attempt to discern and address the substance of his arguments. *See State v. West*, 224 Ariz. 575, ¶ 10, 233 P.3d 1154, 1157 (App. 2010).

I. Restoration of Civil Rights

¶4 In his opening brief, Banks asks this court to restore his right to vote, apparently believing that the trial court rejected that request when it denied his application. But Banks overlooks the fact that this right was restored automatically when he received his absolute discharge from prison in 1999. With the exception of the right to possess a firearm, a first-time offender's civil rights are automatically restored upon absolute discharge from prison. A.R.S. §§ 13-912, 13-904; *see also State v. Buonafede*, 168 Ariz. 444, 446, 814 P.2d 1381, 1383 (1991) (first-time felony offenders entitled to automatic restoration of civil rights upon completion of probation or sentence) and *State v. Key*, 128 Ariz. 419, 421, 626 P.2d 149, 151 (App. 1981) ("restoration of civil rights automatic for first offenders . . . upon discharge from imprisonment").

¶5 Because we assume the trial court knew that the law provided for the automatic restoration of Banks's right to vote, we conclude the court's denial of his application generally did not concern those rights that had been restored automatically. *State v. Moody*, 208 Ariz. 424, ¶ 81, 94 P.3d 1119, 1144 (2004) ("[W]e presume that the court was aware of the relevant law and applied it correctly . . . ."). Therefore, we conclude that Banks's civil rights that had been automatically restored in 1999 were not affected by the court's ruling.

II. Right to Carry and Possess a Weapon and Vacation of Conviction

¶6 Banks next argues that the trial court's denial of his requests to possess and carry a gun or firearm and to vacate his conviction should be reversed because the court relied on incorrect facts in making its ruling. Banks claims that he misunderstood the court's questions about whether he had received counseling and had responded incorrectly. When asked by the court whether he had received "any type of sex offender treatment," Banks responded, "No, sir, it was unavailable during my time." Banks also testified that he had "engaged in some treatment" before he was released and while in the state hospital awaiting the outcome of the petition the state had filed seeking his commitment as a sexually violent person, presumably under the Sexually Violent Persons Act, A.R.S. §§ 36-3701 through 36-3717.

¶7 Section 13-912(B) provides that all felons seeking restoration of their right to possess and carry a gun or firearm must apply to the trial court under A.R.S. §§ 13-905 or 13-906. Thus, unlike other civil rights, the right to possess and carry a gun or firearm is not restored automatically. Similarly, felons must apply to the court to have their convictions vacated or judgments of guilt set aside. *See* § 13-907. And, it is within the court's discretion to grant requests to restore the right to carry a gun or firearm or to vacate a conviction. A.R.S. § 13-908; *Key*, 128 Ariz. at 421, 626 P.2d at 151.

¶8 A defendant may *request* that his judgment of guilt be set aside after he has successfully completed the conditions of his sentence. *See* § 13-907. Under the current version of § 13-907, Banks is not eligible for relief. The current version provides, inter alia, that the section does not apply to a person like Banks, who has been convicted of an

offense "[f]or which the person is required to register pursuant to [A.R.S.] § 13-3821," § 13-907(D)(3), or "[i]n which the victim is a minor under fifteen years of age," § 13-907(D)(5).

¶9 At the time Banks committed his offense, however, § 13-907 precluded relief for felons who acted in "violation of Chapter 14 of [Title 13]," which included the completed offense of sexual conduct with a minor. 1985 Ariz. Sess. Laws, ch. 364, § 11. Because Banks was convicted only of the attempted offense, this subsection would not apply because Banks's conviction fell under Title 10. *See State v. Peek*, 219 Ariz. 182, ¶¶ 10-12, 195 P.3d 641, 643 (2008) (attempts are convictions under Title 10, not Title 14, of the criminal code). But, like the current statute, the former version of § 13-907 precluded relief for felons convicted of crimes in which "the victim is a minor under fifteen years of age." 1985 Ariz. Sess. Laws, ch. 364, § 11. Thus, under both versions of the statute, Banks is precluded from relief for crimes involving a minor victim "under fifteen years of age."

¶10 We cannot discern, based on the limited record before us, the age of Banks's victim. However, because the trial court stated it had considered the presentence report, we assume it knew the age of Banks's victim and, therefore, whether Banks was precluded from relief. *State v. Villalobos*, 114 Ariz. 392, 394, 561 P.2d 313, 315 (1977) (an appellate court "must assume that any testimony or evidence not included in the record on appeal supported the action taken by the trial court"). But, regardless of whether Banks's claims were precluded, it is clear that the court understood it had discretion and exercised it. *See Key*, 128 Ariz. at 421, 626 P.2d at 151.

¶11 The trial court's minute entry makes clear that it relied entirely on Banks's own statements in denying his application to restore his right to carry a gun or firearm and to vacate his conviction. A trial court does not abuse its discretion when it bases its decision on a defendant's own testimony. *See State v. Gonzalez-Gutierrez*, 187 Ariz. 116, 118, 927 P.2d 776, 778 (1996) ("We . . . give deference to the trial court's factual findings, including findings regarding [witness] credibility . . . ."); *cf. A.N.S. Props., Inc. v. Gough Indus., Inc.*, 102 Ariz. 180, 183, 427 P.2d 131, 134 (1967) (party who introduces evidence is bound to that evidence). The trial court did not abuse its discretion by relying on Banks's own testimony to determine he had received insufficient treatment to justify reinstating his right to bear arms or vacating his conviction. To the extent Banks believes he misspoke at the hearing, nothing in the rule prevents him from filing a second application. *See Buonafede*, 168 Ariz. at 444, 814 P.2d at 1381 (reviewing appellant's second application to set aside judgment of guilt, dismiss charges and restore civil rights).

III. Application to Withdraw Guilty Plea

¶12 Requests to set aside plea agreements are governed by Rule 32, Ariz. R. Crim. P. *See State v. Smith*, 184 Ariz. 456, 458, 910 P.2d 1, 3 (1996) ("A pleading defendant . . . may seek review only by filing in the trial court a petition for post-conviction relief pursuant to Rule 32."). Banks did not frame his request to the trial court as a motion or petition for post-conviction relief pursuant to Rule 32, nor did his appeal to this court comply with Rule 32.9. *See State v. Ekmanis*, 180 Ariz. 429, 430, 885 P.2d

117, 118 (App. 1994) (dismissing Rule 32 petition for review for failure to comply with the requirements of Rule 32.9). Therefore, we do not address this issue.

Disposition

¶13 The trial court's decision is affirmed.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge