IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. NESTOR MACIELL, Petitioner.	2 CA-CR 2010-0219-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR42918

Honorable Howard Hantman, Judge

REVIEW GRANTED; RELIEF DENIED

Nestor Maciell — Florence
In Propria Persona

K E L L Y, Judge.

¶1 In March 1994, pursuant to a plea agreement and a plea of no contest under *North Carolina v. Alford*, 400 U.S. 25 (1970), petitioner Nestor Maciell was convicted of one count of child molestation and one count of child abuse. The trial court sentenced him to aggravated, consecutive prison terms of twenty-two and five years respectively. Maciell filed a petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., in which he challenged the aggravated, consecutive prison terms. The court denied relief and this court denied relief on review. *State v. Maciell*, No. 2 CA-CR 95-0151-PR, 1-3 (memorandum decision filed May 31, 1995). In October 2009, Maciell again sought post-conviction relief. After the trial court denied relief, this petition for review followed. Absent an abuse by the trial court of its discretion to determine whether post-conviction relief is warranted, we will not disturb that court's ruling. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 In his pro se petition below, Maciell asserted that his sentence exceeded the statutory parameters, that the special sentencing provision for dangerous crimes against children that applied to his sentence was unconstitutional, that his sentences amounted to cruel and unusual punishment, and that his rights under *Blakely v. Washingto*n, 542 U.S. 296 (2004), were violated because the court, not a jury, had found the aggravating circumstances. In its minute entry denying relief, the trial court clearly identified these claims, noting that, in his reply to the state's response to the petition for post-conviction relief, Maciell had alleged there had been errors in the presentence report. The court

found Maciell's claims precluded or, if not precluded, lacking in merit.[1] On review, Maciell reiterates most of the claims he raised below.

¶3 Maciell has not sustained his burden of establishing the trial court abused its discretion when it denied his petition. Maciell's challenges to his sentences as either excessive or unconstitutionally cruel and unusual and the result of the application of an allegedly unconstitutional sentencing statute could have been raised in his first post-conviction petition and do not fall within any of the exceptions to the rule of preclusion. *See* Ariz. R. Crim. P. 32.2(b). By failing to raise these claims in the initial proceeding, he waived them and the court correctly found them precluded. *See* Ariz. R. Crim. P. 32.2(a)(3). Although Maciell is correct that claims based on a significant change in the law under Rule 32.1(g) are among exceptions to the rule of preclusion, Rule 32.2(b), the trial court correctly found Maciell had not established any ground for relief. Those claims that are based on *Blakely* are not viable because, as the court correctly found, *Blakely* is not retroactively applicable, *State v. Ward*, 211 Ariz. 158, ¶ 10, 118 P.3d 1122, 1126 (App. 2005), and Maciell's case was final when *Blakely* was decided. *See State v. Febles*, 210 Ariz. 589, ¶ 9, 115 P.3d 629, 632 (App. 2005). Finally, Maciell appears to be raising some claims for the first time on review, such as a claim of ineffective

[1]Although the trial court addressed Maciell's claim that there were errors in the presentence report, which was raised for the first time in his reply to the state's response to his petition, and found the claim either precluded or without merit, the court was not required to address that claim. *See State v. Lopez*, 223 Ariz. 238, ¶¶ 6-7, 221 P.3d 1052, 1054 (App. 2009) (trial court need not address claim raised for first time in reply).

assistance of counsel. We will not address claims that were not presented first to the trial court. *State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980).

¶4 The petition for review is granted but relief is denied.

/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