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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. EARL FELTON CRAGO JR., Petitioner.	2 CA-CR 2011-0162-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR94000471

Honorable Wallace R. Hoggatt, Judge

REVIEW GRANTED; RELIEF DENIED

Earl F. Crago — Buckeye
In Propria Persona

E C K E R S T R O M, Presiding Judge.

¶1 Following a jury trial, petitioner Earl Crago was convicted in 1995 of first-degree murder, was sentenced to life in prison without the possibility of release for twenty-five years, and was ordered to serve community supervision for three years and seven months upon his release. We affirmed Crago's conviction and sentence on appeal, denied relief in part on a consolidated petition for review of the denial of his first petition

for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P., and remanded for an evidentiary hearing on two claims of ineffective assistance of counsel. *State v. Crago*, Nos. 2 CA-CR 95-0488, 2 CA-CR 98-0230-PR (consolidated) (memorandum decision filed Mar. 18, 1999). We subsequently denied relief on Crago's petition for review of the denial of post-conviction relief after the evidentiary hearing, *State v. Crago*, No. 2 CA-CR 2000-0259-PR (memorandum decision filed Mar. 13, 2001), and on his petitions for review of the denial of relief on his second and third petitions for post-conviction relief. *State v. Crago*, No. 2 CA-CR 2001-0381-PR (memorandum decision filed Feb. 19, 2002); *State v. Crago*, No. 2 CA-CR 2004-0224-PR (decision order filed Mar. 29, 2005).

¶2 Crago then filed a petition for writ of habeas corpus, which the trial court deemed a petition for post-conviction relief, followed by a petition for special action, both of which the court dismissed; we denied relief on Crago's petition for review of the denial of the former, but remanded the court's dismissal of the petition for special action. *State v. Crago*, No. 2 CA-CR 2008-0396-PR (memorandum decision filed May 12, 2009). In 2010, Crago filed his fifth petition for post-conviction relief, which the court dismissed, and this petition for review followed. We will not disturb a trial court's summary denial of post-conviction relief absent an abuse of the court's discretion. *State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006). We find no abuse here.

¶3 Relying on Rule 32.1(c) and (d),[1] Crago argues, as he did below, that when the Arizona Department of Corrections (ADOC) noted in 2008 he was not eligible for

[1]Rule 32.1(c), Ariz. R. Crim. P., provides a ground for post-conviction relief when the sentence imposed exceeds the maximum authorized by law or is not in accordance

community supervision, it essentially converted his sentence from one of life imprisonment without the possibility of release for twenty-five years to one of natural life. In support of his argument, Crago contrasts ADOC's 1996 release date calculation form, which showed his community supervision term beginning on September 17, 2019 and ending on April 13, 2023, with ADOC's time computation memorandum prepared in 2006, which showed a life sentence without community supervision. Crago asserts, as he did below, that he "is now being required to serve a sentence beyond the sentence which was imposed."

¶4 In its response to the petition for post-conviction relief the state argued that, because Crago was not sentenced to a determinate twenty-five year term, but can only "be considered for a recommendation for release" in twenty-five years, the original sentence erroneously provided that he serve community supervision upon his release in 2019. The state asserted "the community supervision statute does not logically apply" to Crago and the imposition of community supervision thus constituted an illegal sentence. *See State v. Cowles*, 207 Ariz. 8, ¶ 14, 82 P.3d 369, 372 (App. 2004) (community supervision part of sentence imposed). The state thus requested that Crago's petition be "granted to the extent he is asking to be considered for release by way of commutation, pardon or reprieve after serving 25 years," but "that the community supervision clause in [Crago]'s sentence b[e] stricken as contrary to law." Crago further contends that if the state had objected to the illegal sentence at sentencing, he would have argued on appeal

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with the law, while Rule 32.1(d) provides potential relief if the person is being held in custody after the sentence imposed has expired.

that he had rejected the twenty-two year plea offer the state had made in reliance on the court's assurance he was receiving a twenty-five year sentence.

¶5 In its ruling denying the petition for post-conviction relief, the trial court determined that, although the community supervision portion of Crago's sentence was illegal, it was unable to correct his sentence because of the time constraints imposed in Rule 24.3, Ariz. R. Crim. P., which allows a trial court to correct an illegal sentence within sixty days of the judgment and sentence but before perfection of the appeal. The court further determined:

> . . . [Crago] was not sentenced to serve twenty-five years in prison. Such a sentence would have been illegal. Rather, [Crago] was sentenced to serve life in prison, with the possibility that after serving twenty-five years, he could achieve his release if recommended by the Board of Executive Clemency and the sentence [is] commuted by the Governor. Release after the service of twenty-five years is a possibility but isn't guaranteed.
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> [Crago] contends that the Department of Corrections, through its Time Computation Unit, has converted his sentence from a sentence of life imprisonment to one of natural life. Not so. Nothing that the Department of Corrections did has precluded Mr. Crago from exercising his right, after he serves the required twenty-five calendar years, to apply to the Board of Executive Clemency and the Governor for release.
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> . . . .
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> Because the court followed the law by imposing a life sentence without possibility of release for twenty-five calendar years, and also because [Crago] has not yet served twenty-five calendar years, it cannot be said [Crago] is being held in custody after the sentence has expired. Indeed, even after he has served twenty-five calendar years, he could not be held in custody after the expiration of the sentence because the sentence is one of life imprisonment.

> Further, the sentence imposed was not clearly excessive nor contrary to law . . . however, as the State correctly notes in its response, the imposition of community supervision of three years and seven months *was* contrary to law. The imposition of community supervision in any amount would be.

¶6 Crago asserts the trial court's ruling is "conflicting, befuddled, [and] confusing" and asks that he be released after twenty-five years, or alternatively, that his conviction be vacated and remanded "for new proceedings," or that his conviction be "downgrade[d]" to second-degree murder and this matter be remanded for resentencing. We initially note that Crago previously has raised the issue now before us. As we stated in our 2009 memorandum decision,

> [i]n March 2008, Crago filed a pro se petition for writ of habeas corpus asserting that, although the trial court had sentenced him to life imprisonment without the possibility of parole for twenty-five years, . . . [ADOC] was instead treating his sentence as "a 'natural life' sentence with no release date, and no community supervision [d]ate, and no parole eligibility date."

Crago, No. 2 CA-CR 2008-0396-PR, ¶ 2. In that matter, the trial court deemed Crago's habeas corpus petition a Rule 32 petition and permitted Crago to file a pro se petition when counsel reported he was unable to find any meritorious issues to raise. After Crago failed to file a pro se petition, the court dismissed the notice of post-conviction relief, and Crago immediately filed a petition for special action, again raising the same claim he had raised in his habeas corpus petition, and the same claim now before us. The court dismissed the special action petition on the grounds Crago had alleged the same issue he had asserted in the habeas corpus petition and noted Crago had not presented his claim in

a pro se Rule 32 petition. On review, we denied relief on Crago's petition for review of the denial of the notice of post-conviction relief, but remanded the court's dismissal of the petition for special action.

¶7 Accordingly, the claim now before us, which Crago has raised to some extent in two prior pleadings, is precluded. *See* Ariz. R. Crim. P. 32.2(a). However, to the extent Crago may have been confused by our prior ruling remanding his special action petition, and in light of the trial court's finding that the instant claim was not precluded, we nonetheless address it.

¶8 We note at the outset that Crago's argument is based on the unsupported notion that his original sentence was converted from a determinate term of twenty-five years to one of natural life, thereby "eliminat[ing]" his release eligibility. First, his original sentence expires at the end of his life, an indeterminate period, not in twenty-five years, as he asserts. The court committed Crago "to a Life term in the Department of Corrections," and ordered him to "serve every day of twenty-five . . . years of the sentence imposed before he is eligible for any type of release."[2] Second, ADOC's 2006 time computation memorandum did not change Crago's sentence to one of natural life, as he asserts. Rather, it removed the community supervision requirement, but did not, as Crago claims, make him ineligible for release.

[2]Former A.R.S. § 13-703, the statute under which Crago was sentenced, provided: "If the court does not sentence the defendant to natural life, the defendant shall not be released on any basis until the completion of the service of twenty-five calendar years . . . ." *See* 1993 Ariz. Sess. Laws, ch. 153, § 1; *see also* 2008 Ariz. Sess. Laws, ch. 301, §§ 26, 38 (renumbering former § 13-703 as current A.R.S. § 13-751).

¶9 Moreover, we are unaware of any authority, statutory or otherwise, that supports the imposition of community supervision following a life sentence. The trial court imposed community supervision under A.R.S. § 13-603(I), which provides that it "shall be served consecutively to the actual period of imprisonment." However, Crago never had, nor does he now have a sentence that assures he will be released after twenty-five years, or for that matter, during his lifetime. His sentence was and always has been one of life, and his sentence expiration date was and always has been the end of his life. Accordingly, the court correctly concluded "the imposition of community supervision . . . *was* contrary to law."

¶10 Conversely, we do not find any evidence in the record to support Crago's position that he somehow is ineligible to be considered for release after serving twenty-five years. *See* A.R.S. § 31-402(C)(2), (4) (allowing board of executive clemency to recommend commutation); *see also McDonald v. Thomas*, 202 Ariz. 35, ¶ 12, 40 P.3d 819, 824 (2002) (governor's ultimate decision to approve or reject commutation). By the very terms of his original sentence, Crago is required to serve twenty-five years "before he is eligible for any type of release." ADOC's 2008 time computation memorandum did not change this fact. *See State v. Womble*, 225 Ariz. 91, ¶ 41, 235 P.3d 244, 254 (2010) (Arizona law does not prohibit release of defendant given life sentence once defendant serves twenty-five years); *see also* § 31-402(C)(2), (4). However, because Crago began serving his sentence in 1994, he may not be considered for release until 2019.

¶11 Finally, to the extent we understand Crago's argument that ADOC's removal of the erroneous imposition of community service somehow prejudiced him, we

reject that argument. The imposition of community supervision had no bearing on Crago's life sentence or his eligibility to have that sentence commuted.

¶12 Accordingly, although we grant the petition for review, we deny relief.

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

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge