

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2008-0217-PR
)	DEPARTMENT B
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
EDDIE SARMIENTO SALAZAR,)	Rule 111, Rules of
)	the Supreme Court
Petitioner.)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-64851

Honorable Howard Fell, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

Eddie Sarmiento Salazar

Tucson
In Propria Persona

B R A M M E R, Judge.

¶1 In this petition for review, petitioner Eddie Sarmiento Salazar challenges the trial court’s order of June 19, 2008, denying relief in what appears to have been Salazar’s sixth post-conviction proceeding pursuant to Rule 32, Ariz. R. Crim. P.¹ Salazar contended

¹Although Salazar characterized the most recent petition as a petition for writ of habeas corpus, he challenged the legality of the sentence that had been imposed in June 2000. The trial court properly regarded the petition as a petition for post-conviction relief pursuant to Rule 32. See Ariz. R. Crim. P. 32.3.

in the petition filed below he had been sentenced improperly and the sentence is therefore illegal. The trial court found there are no material issues of fact or law that would entitle Salazar to relief and summarily dismissed the petition. The court noted it previously had precluded him from raising similar issues because they had been raised and adjudicated in his appeal or prior post-conviction proceedings or could have been raised in such proceedings but were not. In his petition for review, filed pursuant to Rule 32.9, Salazar reiterates the sentencing challenge that he raised below. We will not disturb the trial court's ruling on the petition absent an abuse of discretion. *See State v. Schrock*, 149 Ariz. 433, 441, 719 P.2d 1049, 1057 (1986).

¶2 Salazar was convicted after a jury trial of three counts of sale of cocaine, one count of possession of cocaine, and one count of possession of drug paraphernalia. The trial court sentenced him to concurrent, substantially mitigated prison terms, the longest of which was the 10.5-year term that appears to be the subject of this most recent petition for post-conviction relief. We affirmed the convictions and sentences on appeal and denied relief on the consolidated petition for review of the denial of relief on Salazar's first Rule 32 petition. *State v. Salazar*, Nos. 2 CA-CR 2000-0311, 2 CA-CR 2001-0330-PR (consolidated) (memorandum decision filed Sept. 5, 2002). Salazar filed a subsequent petition for post-conviction relief, raising, among other issues, a challenge to his sentences, which he claimed had been improperly enhanced pursuant to former A.R.S. § 13-604(D). The court denied relief and, on review, we, too, denied relief, noting Salazar's claims were precluded pursuant to Rule 32.2., because he had ample opportunity to raise the claims on appeal or in his first post-conviction proceeding. *State v. Salazar*, No. 2 CA-CR 2004-0201-PR (decision order

filed Mar. 11, 2005). But we also agreed with the trial court that Salazar's claim that his sentences improperly had been enhanced was not meritorious.

¶3 Salazar apparently filed other petitions for post-conviction relief before he filed the present petition for writ of habeas corpus in February 2008. Salazar asserted in this petition that there exist "newly discovered evidential facts that the herein defendant is illegally confined to date, and should've only been sentenced under A.R.S. [§] 13-604(B)." Apparently referring to the 10.5-year prison term, Salazar contended the term could only be enhanced by one historical prior felony conviction, not three, and that the term the court should have imposed is 4.5 years. He argued the illegal sentence is fundamental error that must be corrected despite his failure to object below.

¶4 In its June 2008 minute entry denying relief, the trial court itemized all prior proceedings, including a third petition for post-conviction relief that it had denied in October 2005 and a fourth it had denied in March 2006. The court noted further that Salazar had also filed a petition for writ of habeas corpus in June 2006, in which he had claimed his sentence had not been calculated properly and was illegal. According to the court, it had denied that petition and precluded Salazar "from seeking future post-conviction relief." On review, Salazar essentially reiterates the substance of his current petition for writ of habeas corpus. He has not persuaded us the trial court abused its discretion by denying relief. Salazar has had numerous opportunities to challenge his sentences in previous post-conviction proceedings and on appeal and has, in fact, done so. Consequently, the court correctly found the claim precluded. *See* Ariz. R. Crim. P. 32.2. Salazar has not established the claim falls within any of the exceptions to the rule of preclusion, notwithstanding his

assertion in his petition for writ of habeas corpus that the claim is based on newly discovered facts. *See* Ariz. R. Crim. P. 32.2(b). The claim is not cognizable under Rule 32.1(e).

¶5 To the extent Salazar is suggesting fundamental error occurred here and that fundamental error can be raised at any time, he is mistaken. As this court stated in *State v. Swoopes*, 216 Ariz. 390, ¶ 41, 166 P.3d 945, 958 (App. 2007), “Not all error that is fundamental involves the violation of a constitutional right that can be waived only if the defendant personally does so knowingly, voluntarily, and intelligently.” And, we added, “if our supreme court had intended that fundamental error be an exception to preclusion under Rule 32.2, the court presumably would have expressly said so in the rule itself or the comment thereto.” *Id.* ¶ 42. Additionally, both the trial court and this court have previously examined the propriety of Salazar’s sentences. Salazar has not sustained his burden of establishing the trial court abused its discretion when it denied relief on his most recent habeas corpus petition.

¶6 Although we grant Salazar’s petition for review, we deny relief.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge