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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OF ARIZONA, Respondent, v. JOHN CONRAD WHEELOCK, Petitioner.	2 CA-CR 2008-0306-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause Nos. CR-20063076 and CR-20071828 (Consolidated)

Honorable Richard Nichols, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines
Tucson
Attorneys for Respondent

John Conrad Wheelock
Florence
In Propria Persona

E S P I N O S A, Judge.

¶1 Pursuant to a plea agreement, Conrad Wheelock pled guilty to aggravated driving under the influence of an intoxicant (DUI) while his license was suspended or revoked. The trial court sentenced him to an aggravated term of three years' imprisonment. Wheelock filed a notice of post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P. His

appointed counsel filed a notice in lieu of a petition, citing *Montgomery v. Sheldon*, 181 Ariz. 256, 260, 889 P.2d 614, 618 (1995), and stating his belief that "no good faith basis in fact and/or law for post-conviction relief exists." Wheelock filed a supplemental petition for relief pro se. He now challenges the trial court's summary dismissal of that petition. We grant review to determine whether the trial court abused its discretion. *See State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). Finding it did not, we deny relief.

¶2 As he did below, Wheelock contends his sentence exceeds the maximum authorized by law and that his trial counsel was ineffective in failing to object to the court's imposition of an illegal sentence. His contentions, however, are based entirely on his mistaken belief that the sentencing provisions in title 13 of Arizona's criminal code do not apply to offenses classified under title 28 of the code. Section 13-602(F), A.R.S., provides: "Any offense defined outside this title with a specification of the classification of such offense is punishable according to the provisions of this title." And our supreme court has held expressly that, "regardless of the classification created by Title 28, one must . . . look to Title 13 for the applicable range of permissible sentences" for felony DUI offenses. *See State v. Campa*, 168 Ariz. 407, 411, 814 P.2d 748, 752 (1991).

¶3 Wheelock argues *Campa* is not applicable to his case because the supreme court stated therein that its "discussion of statutes . . . [was] limited to those in force at the time of [Campa's] offenses" and, although "[s]ome amendments have been made since then, . . . they d[id] not apply, to [that] case." *Id*. at 409, 814 P.2d at 750. But Wheelock interprets this language too broadly. It does not mean, as he contends, that title 13 applies only to felony DUI offenses committed in 1988 or earlier. *See*, *e.g.*, *State v. Pitts*, 178 Ariz. 405,

407, 874 P.2d 962, 964 (1994) (applying holding in *Campa* to aggravated DUI offense committed in September 1991); *cf. State v. Fell*, 203 Ariz. 186, ¶ 8, 52 P.3d 218, 220 (App. 2002) (considering whether determination that justification defense not applicable to title 28 offenses was consistent with holding in *Campa*). Wheelock has not shown that any subsequent statutory change has rendered the holding in *Campa* obsolete. Thus the trial court did not abuse its discretion in denying relief on this claim.

¶4 To the extent Wheelock also argues that the court's use of his five prior DUI convictions and his extreme degree of intoxication[1] constituted "double counting" of elements necessary to his offense, we disagree. Wheelock's prior convictions were not necessary elements of his offense. *See* A.R.S. § 28-1383(A)(1); *see also Pitts*, 178 Ariz. at 407, 874 P.2d at 964. Moreover, "[w]here the degree of the defendant's misconduct rises to a level beyond that which is merely necessary to establish an element of the underlying crime, the trial court may consider such conduct as an aggravating factor." *State v. Germain*, 150 Ariz. 287, 290, 723 P.2d 105, 108 (App. 1986).

¶5 Although we grant review of Wheelock's petition, we deny relief.

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PHILIP G. ESPINOSA, Judge

CONCURRING:

_____
JOHN PELANDER, Chief Judge

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JOSEPH W. HOWARD, Presiding Judge

[1]Wheelock's alcohol concentration at the time of the offense was .319.