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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STATE OF ARIZONA, Respondent, v. MARK S. BRASHIER, Petitioner.	2 CA-CR 2008-0308-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court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 No. CR-20031139

Honorable Kenneth Lee, Judge

REVIEW GRANTED; RELIEF DENIED

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Mark Stephen Brashier
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In Propria Persona

E S P I N O S A, Judge.

¶1 After pleading guilty in 2004, Mark Brashier was convicted of two counts of attempted sexual exploitation of a minor under the age of fifteen and one count of luring a minor for sexual exploitation. The trial court sentenced him to a presumptive term of ten

years' imprisonment on one of the attempted exploitation convictions and suspended imposition of sentence and placed him on lifetime probation for the other two convictions.

¶2 This is Brashier's fourth attempt to obtain post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P.[1] In his petition for post-conviction relief, Brashier argued the trial court had erred in sentencing him pursuant to former A.R.S. § 13-604.01, a statute that provides for enhanced sentences for dangerous crimes against children.[2] Brashier sought resentencing and requested an evidentiary hearing.

¶3 Because Brashier failed to raise this claim in his previous post-conviction proceedings, it would normally be precluded. *See* Ariz. R. Crim. P. 32.2(a)(3) (defendant precluded from relief based on any ground that "has been waived at trial, on appeal, or in any previous collateral proceeding"). To avoid preclusion, Brashier argued our decision in *State v. Gonzalez*, 216 Ariz. 11, 162 P.3d 650 (App. 2007), constituted either newly discovered evidence under Rule 32.1(e) or "a significant change in the law" that, if applied, "would probably overturn the defendant's conviction or sentence" under Rule 32.1(g). *See* Ariz. R.

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[1]Brashier's first Rule 32 proceeding was dismissed on Brashier's own motion. In his second proceeding, the trial court denied relief and dismissed Brashier's petition, and we denied relief on his petition for review. *State v. Brashier*, No. 2 CA-CR 2006-0291-PR (memorandum decision filed Feb. 27, 2007). The court also denied relief on Brashier's third petition, filed in June 2007; Brashier did not seek review of that decision.

[2]For consistency with court documents, we cite the version of § 13-604.01 prior to its renumbering as A.R.S. § 13-705 pursuant to 2008 Ariz. Sess. Laws, ch. 301, §§ 17, 29. *See generally* 2008 Ariz. Sess. Laws, ch. 301, § 119. This previous version may be found at 2008 Ariz. Sess. Laws, ch. 97, § 1, and is materially the same as the version in effect when Brashier committed his offenses. *See* 2001 Ariz. Sess. Laws, ch. 334, § 7.

Crim. P. 32.2(b) (Rule 32.2(a) preclusion does not apply to claims based on Rule 32.1(d), (e), (f), (g), or (h)).

¶4 The trial court denied Brashier's claim as both precluded and lacking merit, and Brashier challenges both rulings in his petition for review. We will not disturb the court's decision absent an abuse of its discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). A court abuses its discretion when it errs in "ruling on a question of law, such as whether a post-conviction claim is . . . precluded," *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007), or whether a defendant was sentenced under the proper sentencing statute, *Gonzalez*, 216 Ariz. 11, ¶ 2, 162 P.3d at 651. Here, the trial court thoroughly analyzed Brashier's arguments and correctly applied the law in resolving them. We find no abuse of discretion.

¶5 In finding Brashier precluded from relief pursuant to Rule 32.2(a)(3), the court noted his claim was not based on either newly discovered evidence or on a change in the law but was instead a claim of sentencing error under Rule 32.1(c) that had been waived by Brashier's failure to raise it in previous petitions for post-conviction relief. The court reasoned that: (1) Rule 32.1(e) requires an allegation of "newly discovered facts" that does not encompass recent legal opinions, and (2) *Gonzalez* did not effect a significant change in the law pursuant to Rule 32.1(g) but interpreted existing law as a matter of first impression. *See Gonzalez*, 216 Ariz. 11, ¶ 2, 162 P.3d at 651; *cf. State v. Garcia*, 152 Ariz. 245, 248, 731 P.2d 610, 613 (App. 1986) (Rule 32.1(g) claim of significant change in the law presented when intervening case "established a new constitutional principle"), *disapproved on other*

grounds by State v. Slemmer, 170 Ariz. 174, 184, 823 P.2d 41, 51 (1991). As a result of this ruling, Brashier's petition for relief was subject to summary dismissal under Rule 32.6(c).

¶6 On review, Brashier argues the trial court failed to apply the proper standard to determine whether his claim was precluded. Quoting *Stewart v. Smith*, 202 Ariz. 446, ¶ 1, 46 P.3d 1067, 1068 (2002), Brashier asserts his claim implicates a fundamental right of "'sufficient constitutional magnitude to require a knowing, voluntary and intelligent waiver for purposes of Rule 32.2(a)(3)'" and argues he has never personally waived his right to have only a legal sentence imposed.

¶7 "Imposition of an illegal sentence constitutes fundamental error," *State v. Thues*, 203 Ariz. 339, ¶ 4, 54 P.3d 368, 369 (App. 2002), and a defendant's claim that his sentence is illegal is subject to review on direct appeal. *See State v. Smith*, 219 Ariz. 132, ¶ 22, 194 P.3d 399, 403 (2008) (claim of improper sentence enhancement not raised at trial reviewable on appeal for fundamental error). But we reject Brashier's suggestion that his claim may be raised in this successive Rule 32 proceeding without regard for Rule 32.2. A claim that a sentence is "not in accordance with the sentence authorized by law" is authorized by Rule 32.1(c), and claims under that subsection of Rule 32.1 are not exempt from preclusion. Thus, Brashier's sentencing claim is foreclosed by his failure to raise it at trial or in any of his previous post-conviction proceedings. *See* Ariz. R. Crim. P. 32.2(a), (b).

¶8 Moreover, as we stated in *Swoopes*, 216 Ariz. 390, ¶ 41, 166 P.3d at 958, "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." *Id.* ¶ 42. Rather, we concluded, our supreme court intended in *Stewart v. Smith* to suggest a narrow exception to preclusion for those constitutional rights "that can only be waived by a defendant personally." *Swoopes*, 216 Ariz. 390, ¶ 28, 166 P.3d at 954. Thus, "[a]n alleged violation of the general due process right of every defendant to a fair trial, without more, does not save that belated claim from preclusion." *Id*. Brashier's claim sounds in his general due process right to fair sentencing, not "'an inherently personal right of fundamental importance' that . . . must be personally and expressly waived." *State v. Espinosa*, 200 Ariz. 503, ¶ 8, 29 P.3d 278, 280 (App. 2001), *quoting State v. Smith*, 197 Ariz. 333, ¶ 13, 4 P.3d 388, 393 (App. 1999). Accordingly, the trial court correctly found Brashier's claim precluded. *See id.*

¶9 This conclusion is a sufficient basis to deny Brashier relief on his claim, and we therefore need not address the trial court's ruling on Brashier's substantive claim at all. We will nonetheless briefly explain our conclusion that the court was also correct in ruling that Bashier's claim is without merit.

¶10 In *Gonzalez*, the defendant was convicted of attempted sexual conduct that apparently involved an eleven-year-old victim. 216 Ariz. 11, ¶ 3, 162 P.3d at 651. We found that § 13-604.01, by its terms, did not apply to Gonzalez's conviction because § 13-604.01(J), which set forth sentences for attempt and other preparatory offenses by internal reference to subsections pertaining to specific completed offenses, failed to incorporate § 13-604.01(B),

which governed sentencing for sexual conduct with a child younger than twelve years old. *Id*. ¶¶ 7-8; *see also* § 13-604.01(J) (second-degree offenses), 13-604.01(N)(1) (defining second-degree offense as preparatory commission of enumerated offenses). We were therefore constrained to remand Gonzalez's case for resentencing based on "the plain language of § 13-604.01." *Gonzalez*, 216 Ariz. 11, ¶¶ 9-10, 15, 162 P.3d at 652-54.[3]

¶11 Brashier argued his sentence was similarly illegal because § 13-604.01 did not expressly refer to "attempted sexual exploitation." But Brashier cannot claim the benefit of the legislative omission that necessitated our remanding Gonzalez's case because, unlike attempted sexual conduct with a minor under twelve, attempted sexual exploitation of a minor was included by reference in § 13-604.01(J), which provided for a presumptive, ten-year sentence for the offense.[4] *See* § 13-604.01(D), (J), (N); *cf. State v. Peek*, 219 Ariz. 182, ¶¶ 7, 19, 195 P.3d 641, 642, 644 (2008) (describing reference in § 13-604.01 to second-degree (preparatory) dangerous crimes against children as "clear language subjecting attempt offenses" to its provisions). Brashier's sentence was thus within the range authorized by law.

¶12 In an alternative argument based principally on semantics, Brashier also contends the court erroneously construed "preparatory offense" as including attempt. But by its express language, § 13-604.01(J) relates to the same subject matter as chapter 10 of

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[3]We recognized this was likely a "legislative oversight," *Gonzalez*, 216 Ariz. 11, ¶ 10, 162 P.3d at 653, and the statute has since been amended to correct this omission, 2008 Ariz. Sess. Laws, ch. 195, § 1.

[4]Although § 13-604.01 has been amended several times, this substantive provision has been continuously in effect since before Brashier committed these offenses. *See* 2001 Ariz. Sess. Laws, ch. 334, § 7.

title 13, which governs the classification of preparatory offenses and includes §§ 13-1001 (attempt), 13-1002 (solicitation), 13-1003 (conspiracy), and 13-1004 (facilitation). Moreover, Brashier's suggestion that we employ a different meaning of the term is contrary to settled Arizona law. *See*, *e.g.*, *State v. Newell*, 212 Ariz. 389, n.13, 132 P.3d 833, 849 n.13 (2006) ("attempt is considered a preparatory offense"); *State v. Van Adams*, 194 Ariz. 408, ¶ 41, 984 P.2d 16, 28 (1999) (attempt "is a preparatory offense"); *State v. Carlisle*, 198 Ariz. 203, ¶ 17, 8 P.3d 391, 395 (App. 2000) ("[In § 13-604.01,] the legislature specifically classified preparatory offenses such as attempt . . . as dangerous crimes against children in the second degree provided the completed offense would have been a dangerous crime against children in the first degree."). "[W]e are bound by decisions of the Arizona Supreme Court and have no authority to overrule, modify, or disregard them." *City of Phoenix v. Leroy's Liquors, Inc.*, 177 Ariz. 375, 378, 868 P.2d 958, 961 (App. 1993).

¶13 The trial court did not abuse its discretion in finding that Brashier was precluded from relief pursuant to Rule 32.2 and that his claim, even had it not been precluded, would not have entitled him to relief. Accordingly, although we grant review, we deny relief.

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PHILIP G. ESPINOSA, Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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JOSEPH W. HOWARD, Presiding Judge