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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ARIZONA, Respondent, v. BRYAN WILLIAM DAVID SICARD, Petitioner.	2 CA-CR 2008-0376-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court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-20014031, CR-20014057, and CR-20020384 (Consolidated)

Honorable Howard Hantman, Judge

REVIEW GRANTED; RELIEF DENIED

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

Bryan W. Sicard
Buckeye
In Propria Persona

P E L A N D E R, Chief Judge.

¶1 Petitioner Bryan Sicard seeks review of the trial court's denial of relief on a successive petition for post-conviction relief he filed pursuant to Rule 32, Ariz. R. Crim. P., challenging the propriety of his aggravated sentences. We will not disturb a trial court's denial of post-conviction relief unless the court has clearly abused its discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). No abuse occurred here.

¶2 In July 2002, pursuant to a single plea agreement encompassing four cases, Sicard pled guilty in cause number CR-20014031 to having unlawfully possessed methamphetamine for sale in November 2001; in cause number CR-20014057, to having unlawfully possessed methamphetamine for sale in December 2001; and in cause number CR-20020384, to having unlawfully taken the identity of another in January 2002. He also admitted having two prior felony convictions. In exchange for his guilty pleas, the state dismissed the charges pending in a fourth case, cause number CR-20014030. On August 22, 2002, the trial court sentenced Sicard to concurrent, aggravated, ten-year prison terms on the possession-for-sale charges and to a concurrent, enhanced, aggravated twelve-year term for the identity-theft offense. The aggravating factors cited in the sentencing minute entry are the same for each count: Sicard's "prior felony convictions and the threat he poses to the community." The sentences imposed were the maximum terms permitted by his plea agreement for each count.

¶3 In September 2002, Sicard filed a timely notice of post-conviction relief pursuant to Rule 32, and the court appointed counsel to represent him. In lieu of a petition for post-conviction relief, counsel filed a notice of review pursuant to Rule 32.4(c)(2), stating that he had reviewed the record without finding any colorable claims to raise. The trial court

gave Sicard until December 12, 2002, in which to file a pro se petition for post-conviction relief. When he failed to do so, the court dismissed the proceeding in January 2003. Sicard's convictions became final thirty days thereafter. *See* Ariz. R. Crim. P. 32.9(c); *State v. Towery*, 204 Ariz. 386, ¶ 8, 64 P.3d 828, 831-32 (2003) ("A defendant's case becomes final when 'a judgment of conviction has been rendered, the availability of [review] exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied.'"), *quoting Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987).

¶4 In October 2007, Sicard instituted the current proceeding by filing his second notice of post-conviction relief. In the ensuing petition, filed in June 2008, Sicard alleged the Supreme Court's decisions in *United States v. Booker*, 543 U.S. 220 (2005), and *Blakely v. Washington*, 542 U.S. 296 (2004), constituted a significant change in the law for purposes of Rule 32.1(g), exempting his current claims from preclusion under Rule 32.2(b) and entitling him to sentencing relief. In addition to his contention that he had been denied a jury trial on factors used to aggravate his sentence, Sicard also asserted the court had found the aggravating factors it relied on by a lesser standard of proof than beyond a reasonable doubt and had committed fundamental error by using his prior convictions both to enhance and to aggravate his sentences.

¶5 The trial court denied relief and also denied Sicard's subsequent motion for rehearing, on both occasions explaining its reasoning in a detailed minute entry. The court did not abuse its discretion. *Blakely* did not apply to Sicard's case because it is not retroactively applicable and his convictions had become final before *Blakely* was decided. *See State v. Ward*, 211 Ariz. 158, ¶¶ 10-11, 118 P.3d 1122, 1126 (App. 2005); *State v.*

Febles, 210 Ariz. 589, ¶ 17, 115 P.3d 629, 635 (App. 2005). Even had *Blakely* applied retroactively to Sicard, his prior felony convictions were sufficient to permit the court to find additional aggravating factors without a jury. *See State v. Martinez*, 210 Ariz. 578, ¶ 21, 115 P.3d 618, 624 (2005). And, to the extent Sicard is raising sentencing issues not derived from *Blakely*, they are precluded because he failed to raise them in his first, of-right post-conviction proceeding. *See* Ariz. R. Crim. P. 32.2(a)(3). They also patently lack merit. *See, e.g., State v. Bly*, 127 Ariz. 370, 372-73, 621 P.2d 279, 281-82 (1980) (neither double jeopardy nor double punishment considerations prevent court's use of a prior felony conviction for both sentence enhancement under A.R.S. § 13-703(C) (formerly A.R.S. § 13-604(C)) and aggravation under A.R.S. § 13-701(D)(11) (formerly A.R.S. § 13-702(C))).[1]

¶6 Finding no abuse of the trial court's discretion, we grant the petition for review but deny relief.

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JOHN PELANDER, Chief Judge

CONCURRING:

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JOSEPH W. HOWARD, Presiding Judge

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PHILIP G. ESPINOSA, Judge

[1]Significant portions of Arizona's criminal sentencing code have recently been renumbered, *see* 2008 Ariz. Sess. Laws, ch. 301, §§ 1-119, effective December 31, 2008, *id.* § 120. "[E]xcept for very limited adjustments to the sentence length for repetitive offenders" in certain circumstances, the amendments were "not intended to make any substantive changes to the criminal sentencing laws." *Id.* § 119.