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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OF ARIZONA, Respondent, v. KELLY SCOT KLEINSCHMIDT, Petitioner.	2 CA-CR 2009-0029-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR200100741

Honorable Boyd T. Johnson, Judge

REVIEW GRANTED; RELIEF DENIED

Mary Wisdom, Pinal County Public Defender
By Dwight P. Callahan
Florence
Attorneys for Petitioner

V Á S Q U E Z, Judge.

¶1 In 2002, petitioner Kelly Scot Kleinschmidt was convicted pursuant to a plea agreement of attempted aggravated assault and attempted child molestation, a dangerous crime against children in the second degree, both committed in June 2001. The trial court

sentenced him to a 2.5-year prison term for the attempted aggravated assault and suspended sentence and imposed lifetime probation for the attempted child molestation. The court later revoked Kleinschmidt's probation, after he admitted violating its terms, and sentenced him in August 2004 to a presumptive, ten-year term of imprisonment for the attempted molestation conviction.

¶2 In March 2008, Kleinschmidt filed his first notice and petition seeking post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P. In his pro se petition below, he alleged he was entitled to relief based on newly discovered material facts and a significant change in the law, asserting his failure to timely file a Rule 32 of-right petition was without fault on his part. *See* Ariz. R. Crim. P. 32.1(e), (f), (g). In summary, he challenged his ten-year sentence by arguing A.R.S. § 13-604.01 is unconstitutional for many reasons and that its penalties, including lifetime probation and sentence enhancements, could not legally be applied to his conviction for attempted child molestation.[1] Kleinschmidt relied on *State v. Gonzalez*, 216 Ariz. 11, 162 P.3d 650 (App. 2007), as well as other authorities, as support for his claim of a significant change in applicable law and to excuse his failure to file his

[1]The provisions of Arizona's criminal code were renumbered effective December 31, 2008. *See* 2008 Ariz. Sess. Laws, ch. 301, §§ 1-120. We refer in this decision to the statutes as they were numbered when Kleinschmidt committed these offenses, rather than by their current section numbers. Similarly, to the extent nonmaterial changes were made to a statute between the time of Kleinschmidt's offense and the date of his sentencing, we refer to the provision in effect at the time of sentencing.

petition within ninety days of his conviction and sentence. *See* Ariz. R. Crim. P. 32.4(a) (time limits and exceptions).

¶3 Initially, the state responded by conceding error and agreeing that Kleinschmidt was entitled to be resentenced, citing this court's decision in *Gonzalez*. Based on the state's response and briefing by counsel appointed to represent Kleinschmidt, the trial court then vacated Kleinschmidt's 2004 sentence and scheduled a resentencing hearing. Before that hearing date, however, the state filed a motion for reconsideration seeking to withdraw its confession of error. According to the state's motion, it had mistakenly believed Kleinschmidt had been sentenced for attempted sexual conduct with a child under twelve—the only crime affected by our narrow holding in *Gonzalez*—instead of attempted child molestation. *See Gonzalez*, 216 Ariz. 11, ¶ 9, 162 P.3d at 652-53. After hearing arguments on the motion, the trial court vacated its earlier order, denied relief on Kleinschmidt's Rule 32 petition, and reaffirmed his 2004 sentence.

¶4 In his petition for review to this court, Kleinschmidt urges us to "adopt the reasoning in *Gonzales* and apply it to all sentences for convictions for attempts" of dangerous crimes against children when the victim is under age twelve. We cannot oblige Kleinschmidt's request, and we find no abuse of discretion in the trial court's denial of relief. *See State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990) (denial of Rule 32 petition reviewed for abuse of discretion).

¶5 As an initial matter, Kleinschmidt's claim is precluded as untimely. *See* Ariz. R. Crim P. 32.4(a) ("Any notice not timely filed may only raise claims pursuant to rule 32.1(d), (e), (f), (g) or (h)."). We cannot agree with Kleinschmidt that an allegation of "newly discovered material facts" permitted under Rule 32.1(e) encompasses recent legal opinions, and our supreme court has specifically held that *Gonzalez* did not effect a significant change in the law entitling a defendant to relief under Rule 32.1(g). *State v. Shrum*, 220 Ariz. 115, ¶ 23, 203 P.3d 1175, 1180 (2009). Regardless of how he veils his claim, Kleinschmidt is alleging his sentence "exceeded the maximum authorized by law" pursuant to Rule 32.1(c), and that claim is subject to preclusion. *See* Ariz. R. Crim. P. 32.2(a), (b); 32.4(a).

¶6 Moreover, our reasoning in *Gonzalez* was required by the plain language of § 13-604.01, with respect to Gonzalez's crime of attempted sexual conduct with a child under the age of twelve. *See Gonzalez*, 216 Ariz. 11, ¶¶ 9-10, 15, 162 P.3d at 652-53. That reasoning does not extend to Kleinschmidt's crime of attempted child molestation.

¶7 In *Gonzalez*, we were constrained to remand the defendant's case for resentencing because § 13-604.01(I), which had set forth sentences for attempt and other preparatory offenses by reference, had failed to incorporate § 13- 604.01(B), which governed sentences for sexual conduct with a child younger than the age of twelve.[2] 216 Ariz. 11,

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

¶¶ 7-10, 162 P.3d at 652-54; *see also* § 13-604.01(J) (second-degree offenses), 13-604.01(N)(1) (defining second-degree offense as preparatory commission of enumerated offenses). In contrast, at the time of Kleinschmidt's sentencing, the paragraph of § 13-604.01 that provided sentences for crimes involving attempt clearly incorporated § 13- 604.01(D), which governed sentencing for all crimes of child molestation. *See* 2000 Ariz. Sess. Laws, ch. 50, § 1. Accordingly, the reasoning in *Gonzalez* does not apply in this case.[3]

¶8 For the foregoing reasons, although we grant review, we deny relief.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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J. WILLIAM BRAMMER, JR., Judge

[3]Kleinschmidt also suggests in passing that we should vacate his sentence so that he is not punished more severely than other similarly situated defendants. To the extent Kleinschmidt argues his sentence is grossly disproportionate to his crime in violation of the Eighth Amendment to the United States Constitution, we find the claim lacking merit. *See State v. Berger*, 212 Ariz. 473, ¶ 10, 134 P.3d 378 (2006) (noting noncapital sentences are subject only to a "narrow proportionality principle"), *quoting Ewing v. California*, 538 U.S. 11, 20 (2003). In any event, Kleinschmidt has failed to develop this argument as required. *See id*., *generally*. Consequently, we do not address it. *See State v. Moody*, 208 Ariz. 424, n.9, 94 P.3d 1119, 1147 n.9 (2004) ("Merely mentioning an argument is not enough.").