

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

JON HARRY IRWIN,
Petitioner.

No. 2 CA-CR 2013-0536-PR
Filed April 28, 2014

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

See Ariz. R. Sup. Ct. 111(c); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Pima County

No. CR20102663001

The Honorable Christopher C. Browning, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

West, Elsberry, Longenbaugh and Zickerman, P.L.L.C., Tucson
By Anne Elsberry
Counsel for Petitioner

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MEMORANDUM DECISION

Presiding Judge Vásquez authored the decision of the Court, in which Chief Judge Howard and Judge Miller concurred.

V Á S Q U E Z, Presiding Judge:

¶1 Jon Irwin petitions this court for review of the trial court's order summarily dismissing his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that ruling unless the court clearly has abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Irwin has not met his burden of demonstrating such abuse here.

¶2 After a jury trial, Irwin was convicted of six counts of sexual exploitation of a minor under the age of fifteen based on his possession of child pornography. The trial court sentenced him to consecutive prison terms totaling seventy-seven years. This court affirmed his convictions and sentences on appeal. *State v. Irwin*, No. 2 CA-CR 2012-0019 (memorandum decision filed Dec. 27, 2012).

¶3 Irwin then sought post-conviction relief, claiming his consecutive sentences violated double jeopardy because his convictions were based on "the possession of three videos and three still photos," but that "[t]wo of the videos were the same video" and that the "still photos were taken from" that video. The trial court summarily denied relief, concluding that Irwin's consecutive sentences were proper, relying primarily on *State v. McPherson*, 228 Ariz. 557, 269 P.3d 1181 (App. 2012).

¶4 On review, Irwin repeats his claim and argues that *McPherson* does not apply. We need not address his sentencing claim, however; it is precluded because he could have but did not

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raise it on appeal.¹ *See* Ariz. R. Crim. P. 32.2(a)(3). Although the state did not raise preclusion below, “any court on review of the record may determine and hold that an issue is precluded regardless of whether the state raises preclusion.” Ariz. R. Crim. P. 32.2(c). And we may uphold a trial court’s correct ruling “for any reason supported by the record.” *State v. Banda*, 232 Ariz. 582, n.2, 307 P.3d 1009, 1012 n.2 (App. 2013).

¶5 Although we grant review, we deny relief.

¹To the extent Irwin implies his claim is not precluded because it constitutes fundamental, prejudicial error, he is mistaken. *See State v. Shrum*, 220 Ariz. 115, ¶¶ 6-7, 23, 203 P.3d 1175, 1177, 1180 (2009) (holding illegal sentence claim precluded); *Swoopes*, 216 Ariz. 390, ¶¶ 40-42, 166 P.3d at 958 (fundamental error not excepted from preclusion).