

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

DAVID ALAN BORGGREEN,
Petitioner.

No. 2 CA-CR 2014-0403-PR
Filed March 18, 2015

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NOT FOR PUBLICATION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)(1); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Maricopa County

No. CR1997004772

The Honorable Karen L. O'Connor, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

William G. Montgomery, Maricopa County Attorney
By Diane Meloche, Deputy County Attorney, Phoenix
Counsel for Respondent

David Borggreen, Florence
In Propria Persona

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MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Chief Judge Eckerstrom and Presiding Judge Miller concurred.

ESPINOSA, Judge:

¶1 David Borggreen seeks review of the trial court's order denying 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. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Borggreen has not met his burden of demonstrating such abuse here.

¶2 After a jury trial, Borggreen was convicted of child molestation and indecent exposure. He was sentenced to consecutive prison terms totaling eighteen years. In the same cause number, Borggreen pled guilty to attempted sexual conduct with a minor and was placed on lifetime probation. We affirmed on appeal his trial convictions and sentences. *State v. Borggreen*, No. 1 CA-CR 98-0080 (memorandum decision filed Dec. 10, 1998). Before this proceeding, Borggreen has unsuccessfully sought post-conviction relief on two occasions.

¶3 In 2009, the Adult Probation Office (APO) filed a petition to modify Borggreen's probation to a term of years pursuant to *State v. Peek*, 219 Ariz. 182, 195 P.3d 641 (2008).¹ The trial court granted the petition, changing the term of Borggreen's probation to five years. The court first signed a portion of APO's petition, in

¹In *Peek*, our supreme court held that a defendant could not be sentenced to lifetime probation for second-degree, or attempted, dangerous crimes against children committed between January 1, 1994, and July 20, 1997. 219 Ariz. at 182, ¶¶ 1, 8, 10, 195 P.3d at 641, 642-43.

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which it “modif[ed] the condition(s) of probation as recommended above,” that Borggreen “serve five years probation beginning from January 20, 1998, with an amended probation termination date to be determined.” The petition was silent as to Borggreen’s prison terms. Four days later, a minute entry was filed in which the court stated only that it had modified the probation term “to five years.” That order also did not mention Borggreen’s prison terms.

¶4 In 2011, Borggreen filed a motion seeking to modify his term of probation pursuant to *Peek*. The trial court denied the motion as moot, noting it already had “modified [Borggreen’s] probation term to five years,” pursuant to the earlier minute entry.

¶5 In 2012, Borggreen filed a motion to waive community supervision following completion of his prison terms, arguing it was unnecessary in light of his term of lifetime probation. The trial court denied the motion in May 2013, stating it “finds no basis for waiving community supervision” and “reaffirming” that Borggreen “will begin a 5-year probation term” after he “completes his community supervision.”

¶6 Borggreen then filed a notice of and petition for post-conviction relief, asserting he was bringing claims pursuant to Rule 32.1(e), (f), and (g), that his probationary term had been modified without his knowledge, and that he had first learned of the modification in May 2011. In his petition, Borggreen claimed his term of lifetime probation was imposed “concurrent” to his prison terms and the trial court lacked authority to make the term consecutive. He also argued the court could not impose community supervision to follow his “flat-time” prison sentence. The court summarily denied Borggreen’s claims, concluding they could not be raised in an untimely proceeding. This petition for review followed.

¶7 On review, Borggreen argues his claims are cognizable under Rule 32.1(e) and thereby may be raised in an untimely proceeding. *See* Ariz. R. Crim. P. 32.4(a). Although he asserts he only recently learned of the modification to his sentence, that does not constitute newly discovered evidence as contemplated by Rule 32.1(e), which encompasses only evidence related to his conviction

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or sentence that existed at the time of trial or sentencing. *See State v. Sanchez*, 200 Ariz. 163, ¶ 11, 24 P.3d 610, 613-14 (App. 2001). It does not apply to a later court ruling purportedly modifying that sentence. And, to the extent Borggreen challenges the imposition of community supervision, imposed at his initial sentencing, his opportunity to object has long since passed, and the claim cannot be raised in this untimely proceeding.² *See* Ariz. R. Crim. P. 32.4(a).

¶8 It is not entirely clear, however, that Borggreen's claim regarding the start of his term of probation is untimely. The sentencing minute entry imposing lifetime probation stated it was to begin on the date his prison terms were imposed, and none of the trial court's subsequent orders were inconsistent with that statement until its May 2013 order rejecting Borggreen's motion to waive community supervision.³ Borggreen's notice of and petition for post-conviction relief were filed within ninety days of that order, in compliance with Rule 32.4(a), Ariz. R. Crim. P.

¶9 To the extent the state suggests that a term of probation is necessarily consecutive to a term of imprisonment, it is mistaken. *See State v. Rogowski*, 130 Ariz. 99, 103, 634 P.2d 387, 391 (1981); *State*

²Borggreen suggests the imposition of community supervision was an illegal sentence, thereby implicating the court's subject matter jurisdiction and allowing him to raise the claim at any time. But an illegal sentence is not a jurisdictional defect. *See State v. Bryant*, 219 Ariz. 514, ¶ 17, 200 P.3d 1011, 1015 (App. 2008). And, in any event, jurisdictional claims cannot be raised in an untimely petition. *See* Ariz. R. Crim. P. 32.1(e)-(h); 32.4(a); *see also State v. Shrum*, 220 Ariz. 115, ¶¶ 6-7, 23, 203 P.3d 1175, 1177, 1180 (2009) (claim of illegal sentence subject to preclusion pursuant to Rule 32.2(a)(3)).

³We recognize that, in light of the imposition of lifetime probation, there was little practical reason for the trial court to be concerned with the date that probation would begin. And, as we have noted, nothing in the court's later rulings reducing the probation term suggest the court considered Borggreen's prison terms.

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v. Jones, 124 Ariz. 24, 26-27, 601 P.2d 1060, 1062-63 (1979). And, although Rule 27.3, Ariz. R. Crim. P., permits a trial court to modify the length of a probationary term, *see State v. Dean*, 226 Ariz. 47, ¶ 17, 243 P.3d 1029, 1034 (App. 2010), it cannot alter that term to the defendant's detriment without giving the defendant notice and an opportunity to be heard, Ariz. R. Crim. P. 27.3; *see also State v. Rutherford*, 154 Ariz. 486, 488, 744 P.2d 13, 15 (1987) ("[T]he discretionary authority given the sentencing court to impose, modify, or revoke probation is limited by several statutory provisions, as well as constitutional due process considerations."). Thus, the trial court's later order specifying that the term of probation is to run consecutively to Borggreen's sentences is arguably an improper modification of his probation because Borggreen was not given notice or an opportunity to be heard.

¶10 But, even assuming without deciding that Borggreen timely sought relief pursuant to Rule 32.4(a), and that the trial court's May 2013 order was improper, any error was harmless. Section 13-903(E), A.R.S., provides that, "[i]f probation is imposed on one who at the time is serving a sentence of imprisonment imposed on a different conviction, service of the sentence of imprisonment shall not satisfy the probation." Thus, because Borggreen had been sentenced to prison before probation was imposed, *see State v. Ball*, 157 Ariz. 382, 383-84, 758 P.2d 653, 654-55 (App. 1988), the beginning of his term of probation is, by operation of law, tolled until those sentences expire.

¶11 For the reasons stated, although we grant review, relief is denied.