

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

ANDRE LEON GELDARSKI,
Petitioner.

No. 2 CA-CR 2014-0443-PR
Filed March 12, 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NOT FOR PUBLICATION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 Gila County

No. CR201300269

The Honorable Peter J. Cahill, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Bradley D. Beauchamp, Gila County Attorney
By June Ava Florescue, Deputy County Attorney, Globe
Counsel for Respondent

Andre Leon Geldarski, Winslow
In Propria Persona

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MEMORANDUM DECISION

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

M I L L E R, Presiding Judge:

¶1 Petitioner Andre Geldarski seeks review of the trial court's order dismissing his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. "We will not disturb a trial court's ruling on a petition for post-conviction relief absent a clear abuse of discretion." *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). For the reasons set forth below, we find no such abuse here.

¶2 Pursuant to a plea agreement, Geldarski pled guilty to aggravated harassment (Count Ten) and aggravated assault (Count One), both domestic violence offenses. The trial court imposed an aggravated, 2.5-year term of incarceration for Count Ten, to be followed by a consecutive, three-year term of intensive probation for Count One, with a one-year jail term as a condition of probation.¹ After Geldarski "relieved" appointed counsel in October 2014, a request the court granted, he filed a supplemental, pro se petition for post-conviction relief, which the court summarily dismissed. This petition for review followed.

¶3 In its ruling dismissing the petition below, the trial court found that "[a]lthough [Geldarski] was not convicted of a 'prior' harassment" against the victim, he had agreed to plead guilty to aggravated harassment as a "'subsequent offense,' a Class 5

¹ Geldarski was sentenced to an additional thirty days in jail for contempt of court for making an obscene gesture to the victim and calling the judge "a corrupt turd."

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felony.” See A.R.S. § 13-2921.01(A)(1), (C).² The court also noted Geldarski “had engaged in other acts of harassment against [the victim] despite the fact that there was an Order of Protection against him, an order that had been validly served and was in effect.” Finally, the court concluded it “had discretion pursuant to the Plea Agreement to impose a ‘probation tail’ [on Count One] after the DOC sentence” on Count Ten.

¶4 On review, Geldarski first contends he was improperly charged with and sentenced for a class five, rather than a class six, felony for aggravated harassment under § 13-2921.01(A)(1) and (C), and asserts he was not aware when he pled guilty that the indictment was “not in accordance with the law.” He argues, as he did below, that because he did not have a prior conviction under § 13-2921.01, he could not be charged with or sentenced for a class five, subsequent aggravated harassment offense. See A.R.S. § 13-2921.01(A)(1), (C). However, as the trial court correctly found, even though Geldarski “was not convicted of a ‘prior’ harassment charge against the victim,” because prior harassment charges were included in the indictment,³ it was appropriate to treat Count Ten as a “subsequent offense” under § 13-2921.01. Compare A.R.S. § 13-2921.01(A)(1), (C) (person who commits “second or subsequent violation” of subsection (A)(1) guilty of class five felony), with (A)(2), (C) (person previously “convicted of” domestic violence offense

² Section 13-2921.01(A)(1), A.R.S., defines aggravated harassment as that committed by a person after “[a] court has issued an order of protection or an injunction against harassment against the person and in favor of the victim of harassment and the order or injunction has been served and is still valid.” The statute further provides, “A person who violates subsection A, paragraph 1 of this section is guilty of a class 6 felony. A person who commits a second or subsequent violation of subsection A, paragraph 1 of this section is guilty of a class 5 felony.”

³The twenty-one count indictment included seven counts of aggravated harassment, two of which occurred before the commission of Count Ten.

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guilty of class five felony). Notably, Counts Four and Eight of the indictment charged Geldarski with having “communicated with [the victim] by verbal, electronic, mechanical, telegraphic, telephonic, or written means in a manner that harassed [the victim], to wit:” telephone calls and/or text messages and by making threats in August 2012, before the commission of the acts charged in Count 10, all while a valid order of protection was in place.

¶5 Additionally, the record is clear that Geldarski acknowledged he understood he was pleading guilty to aggravated harassment, a class five felony: the guilty plea stated he was pleading guilty to “aggravated harassment . . . a class 5 felony”; at the change-of-plea hearing, Geldarski informed the trial court he had read the entire plea agreement and his attorney had explained it to him and had answered his questions; and at sentencing, Geldarski again acknowledged he had pled guilty to “aggravated harassment a class five felony.”

¶6 Moreover, to the extent Geldarski attempts to challenge the legal sufficiency of the indictment by asserting he was convicted of and sentenced to an “unlawful charge” – a class five felony – he has waived the right to do so.⁴ See *State v. Chairez*, 235 Ariz. 99, ¶ 16, 327 P.3d 886, 890 (App. 2013) (by entering guilty plea, defendant “waive[s] any arguments relating to the legal sufficiency of the indictment and the amendment of charges that are distinct from direct challenges to the validity of the plea”); see also *Tollett v. Henderson*, 411 U.S. 258, 267 (1973) (“When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.”); *State v. Flores*, 218 Ariz. 407, ¶ 6, 188 P.3d 706, 708-09 (App. 2008) (guilty

⁴Although Geldarski contends he “would have insisted on pleading to one of the class 6 felonies, had they been charged on the indictment, or else there would be no agreement,” he has not meaningfully asserted that his guilty plea was not knowing, voluntary, and intelligent.

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plea waives all non-jurisdictional defects, including deprivations of constitutional rights). Last, Geldarski has waived the right to challenge the indictment by failing to object in the trial court before pleading guilty, pursuant to Rule 13.5(e), Ariz. R. Crim. P., which requires such defects be raised in accordance with pretrial procedures outlined in Rule 16, Ariz. R. Crim. P.

¶7 Geldarski also contends the probationary term imposed on Count One was illegal because: (1) it is “attached” to the illegal prison term on Count Ten, it too is illegal; and, (2) the plea agreement provided that any sentences would be concurrent, the trial court was prohibited from imposing a term of probation to be served consecutively to his prison term. In light of our determination that the court did not abuse its discretion by finding the conviction on Count Ten proper, we need not address Geldarski’s first argument.

¶8 And regarding his second argument, although Geldarski correctly notes the plea agreement provided “[i]f the defendant is sentenced to prison, then any term(s) shall run concurrent,” we conclude the trial court did not abuse its discretion by finding the imposition of probation permissible under the plea agreement. Not only was the court aware of this language in the plea agreement, a fact it discussed at length when it noted its reluctance to place Geldarski on probation, but the single prison term the court imposed was neither consecutive to nor concurrent with any other prison term. *See State v. Smith*, 112 Ariz. 416, 419, 542 P.2d 1115, 1118 (1975) (probation “is a sentencing alternative which a court may use in its sound judicial discretion”).

¶9 Finally, to the extent Geldarski challenges the restitution order for the first time on review, a claim he did not raise in his petition, we do not address it. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (appellate court will not consider on review claims not raised below); *see also* Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review limited to “issues which were decided by the trial court and which the defendant wishes to present to the appellate court for review”).

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¶10
relief.

Therefore, we grant the petition for review but deny