

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK
MAY -4 2007
COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,)
)
Respondent,)
)
v.)
)
KURT WOODBURN,)
)
Petitioner.)
_____)

2 CA-CR 2006-0433-PR
DEPARTMENT B
MEMORANDUM DECISION
Not for Publication
Rule 111, Rules of
the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20010528

Honorable Michael Alfred, Judge

REVIEW GRANTED; RELIEF DENIED

Terry Goddard, Arizona Attorney General
By Sylvia Goodwin

Tucson
Attorneys for Respondent

Kurt Woodburn

Buckeye
In Propria Persona

E C K E R S T R O M, Presiding Judge.

¶1 Petitioner Kurt Woodburn was charged by indictment with forty-five counts of financial crimes involving eight victims occurring between August 1993 and September 2000, including illegally conducting an enterprise, money laundering, financial exploitation

of a vulnerable adult, fraudulent scheme and artifice, sale of unregistered securities, sale of securities by an unregistered dealer or salesman, fraud in the provision of investment advisory services, theft from a vulnerable adult, and forgery. Pursuant to an agreement, he pled guilty to eight amended counts, one for fraudulent scheme and artifice, four for sale of unregistered securities, and three for forgery. The trial court sentenced Woodburn in November 2002 to an aggravated prison term of ten years for fraudulent scheme and artifice, pursuant to his stipulation, to be followed by two, consecutive probationary terms of four years each. The court also ordered Woodburn to pay restitution in the amount of \$1,772,825.92.

¶2 Woodburn then filed a petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., 17 A.R.S., asking the trial court to correct its sentencing error in placing him on consecutive terms of probation and arguing trial counsel had been ineffective in failing to inform Woodburn he could reject probation. The trial court granted relief and resentenced Woodburn in February 2004 to concurrent, presumptive prison terms of 2.5 years each on the convictions for sale of unregistered securities and forgery, to be served concurrently with the sentence for fraudulent scheme and artifice.

¶3 In April 2006, Woodburn filed a second notice of post-conviction relief. In his subsequent post-conviction petition, Woodburn argued his aggravated sentence for fraudulent scheme and artifice violates the rulings in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000), and *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004),

entitling him to be resentenced to a presumptive prison term. The trial court summarily dismissed the petition, and this petition for review followed. We review for an abuse of discretion a trial court's ruling on a post-conviction petition, *State v. Decenzo*, 199 Ariz. 355, ¶ 2, 18 P.3d 149, 150 (App. 2001), and find no abuse.

¶4 Contrary to Woodburn's assertion below, his previous post-conviction proceeding was not pending when *Blakely* was decided in June 2004. He was resentenced in February 2004 after the trial court granted relief, and the state did not petition for review of the court's ruling. Accordingly, *Blakely* did not apply to his of-right, post-conviction proceeding. See *State v. Ward*, 211 Ariz. 158, ¶ 1, 118 P.3d 1122, 1124 (App. 2005) (*Blakely* "applies to all 'Rule 32 of-right' post-conviction relief proceedings not yet final on direct review when *Blakely* was decided"). Moreover, *Blakely* is not retroactive to defendants whose convictions were final before it was decided, as Woodburn's were. See *State v. Febles*, 210 Ariz. 589, ¶ 1, 115 P.3d 629, 631 (App. 2005).

¶5 And any claim Woodburn might have had under *Apprendi*, a questionable assertion in light of the discussion in *Febles* about the general understanding of the *Apprendi* holding before *Blakely* was decided, 210 Ariz. 589, ¶¶ 21-24, 115 P.3d at 636-37, is precluded as waived by Woodburn's failure to raise it either at sentencing or in his previous post-conviction proceeding. See Ariz. R. Crim. P. 32.2(a)(3). Finally, we do not address Woodburn's arguments on review about trial counsel's ineffectiveness because

Woodburn did not raise the claim in his post-conviction petition. *See State v. Herrera*, 183 Ariz. 642, 648, 905 P.2d 1377, 1383 (App. 1995).

¶6 Finding no abuse of discretion in the trial court's dismissal of the post-conviction petition, we grant review but deny relief.

PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

J. WILLIAM BRAMMER, JR., Judge

PHILIP G. ESPINOSA, Judge