NOTICE: NOT FOR PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Respondent*,

v.

VICTOR MANUEL CASTILLO ESTOBAR, *Petitioner*.

No. 1 CA-CR 13-0110 PRPC
FILED 08-21-2014

Petition for Review from the Superior Court in Maricopa County
No. CR2009-007077-001
The Honorable Maria del Mar Verdin, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Maricopa County Attorney's Office, Phoenix
By Diane Meloche
Counsel for Respondent

Victor Manuel Castillo Estobar, Douglas
Petitioner Pro Se

MEMORANDUM DECISION

Judge Margaret H. Downie delivered the decision of the Court, in which Presiding Judge Samuel A. Thumma and Judge Maurice Portley joined.

D O W N I E, Judge:

¶1 Petitioner Victor Manuel Castillo Estobar petitions this Court for review from the dismissal of his petition for post-conviction relief. For the following reasons, we grant review and deny relief.

¶2 A jury convicted Estobar of participating in a criminal syndicate, smuggling, forgery, and two counts of kidnapping. The trial court sentenced him to an aggregate term of forty-two years' imprisonment, and we affirmed the convictions and sentences as modified on direct appeal. *State v. Estobar*, 1 CA-CR 10-0442, 2011 WL 2306651, *2, ¶ 8 (Ariz. App. June 2, 2011) (mem. decision). Estobar filed a *pro se* petition for post-conviction relief after his counsel found no colorable claims for relief. The trial court summarily dismissed the petition, and Estobar now seeks review. We have jurisdiction pursuant to Arizona Rule of Criminal Procedure 32.9(c).

¶3 Estobar first argues his convictions were based in part on information law enforcement officers obtained illegally when they placed a Global Positioning System ("GPS") device on Estobar's vehicle without obtaining a warrant.[1] This issue is precluded because Estobar could have raised it on direct appeal. *See* Ariz. R. Crim. P. 32.2(a). None of the exceptions under Rule 32.2(b) apply.

¶4 Estobar next argues the trial court erred when it allowed one victim to remain in the courtroom during the testimony of another victim. This issue is also precluded because Estobar could have raised it on direct appeal. Further, Rule 9.3(a) provides that a victim has the right to be present at all proceedings at which a defendant has the right to be present. This includes the right to be present during the testimony of another victim.

¶5 Finally, Estobar argues his counsel was ineffective when he failed to file a motion to suppress all evidence obtained directly or indirectly through the warrantless use of the GPS device. To state a colorable claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below objectively reasonable standards and that the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). We deny relief. At the time of Estobar's 2010 trial, then-current decisions of the United States Supreme Court and the Ninth Circuit held that the warrantless use of an electronic

[1] Estobar conceded below that no GPS evidence was actually admitted at trial.

device to track the movements of a suspect's vehicle did not violate the Fourth Amendment. *See United States v. Knotts*, 460 U.S. 276, 281-82 (1983); *United States v. Pineda-Moreno*, 591 F.3d 1212, 1216-17 (9th Cir. 2010), *vacated*, 132 S. Ct. 1533 (2012), *affirmed on remand*, 688 F.3d 1087 (9th Cir. 2012) (affirming in part because law enforcement agents acted within then-existing circuit precedent in attaching tracking devices to defendant's vehicle). Counsel's failure to file a suppression motion in light of the law existing at that time did not fall below objectively reasonable standards.[2]

¶6 Although the petition for review arguably presents additional issues, Estobar did not raise those issues in the petition for post-conviction relief he filed below. A petition for review may not present issues not first presented to the trial court. Ariz. R. Crim. P. 32.9(c)(1)(ii); *State v. Bortz*, 169 Ariz. 575, 577, 821 P.2d 236, 238 (App. 1991).

¶7 For the reasons stated, we grant review and deny relief.



Ruth A. Willingham · Clerk of the Court
FILED: gsh

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[2] Estobar makes no reference to the Supreme Court's subsequent decision in *United States v. Jones*, in which the Court held for the first time that government installation of a GPS device on a vehicle to monitor movement constitutes a "search" that ordinarily requires a warrant. *United States v. Jones*, ___ U.S. ___, 132 S. Ct. 945, 949 (2012). Even so, defense counsel's failure to predict the Supreme Court's decision in *Jones*, which came nearly two years after Estobar's trial, did not fall below objectively reasonable standards.