

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

LATASHA NICOLE HOPPER,
Petitioner.

No. 2 CA-CR 2014-0029-PR
Filed October 24, 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NOT FOR PUBLICATION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. CR056915

The Honorable Leslie Miller, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

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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 Latasha Hopper seeks review of the trial court's summary dismissal of her successive, untimely petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. We grant review and, for the following reasons, we deny relief.

Background

¶2 Pursuant to a 1998 plea agreement, Hopper was convicted of first-degree murder committed during the course of an attempted armed robbery in April 1997 and was sentenced "to life imprisonment with no possibility of release until completion of [twenty-five] years in the Arizona Department of Corrections." In her most recent post-conviction relief proceeding, Hopper argued the United States Supreme Court's decision in *Miller v. Alabama*, ___ U.S. ___, 132 S.Ct. 2455 (2012), was a significant change in the law that entitled her to relief. *See* Ariz. R. Crim. P. 32.1(g).

¶3 In *Miller*, the Supreme Court held state laws that mandate life imprisonment without parole for juvenile offenders violate the Eighth Amendment. ___ U.S. at ___, 132 S.Ct. at 2460. As we recently explained in *State v. Vera*, on its face, Arizona's relevant sentencing statute does not appear to mandate life imprisonment without parole for a first-degree murder committed by a juvenile offender. 695 Ariz. Adv. Rep. 13, ¶ 17 (Ct. App. Sept. 16, 2014). A sentencing court is authorized to sentence a juvenile to "natural life," which precludes her release from confinement "on any basis" and renders her ineligible for "commutation or parole, work furlough or work release." A.R.S. §§ 13-751(A)(2), 13-752(A). Section 13-751(A)(2) also authorizes an alternative sentence of "life"

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imprisonment without “release[] on any basis until the completion of the service of twenty-five calendar years,” without reference to parole or other forms of early release. Thus, a “‘life’” sentence appears to provide “a lesser alternative” to a natural life sentence, which expressly prohibits release on parole.¹ *Vera*, 695 Ariz. Adv. Rep. 13, ¶ 17.

¶4 Like the petitioner in *Vera*, Hopper argued below that because Arizona had eliminated parole for all defendants who committed offenses after January 1, 1994, *see* A.R.S. § 41-1604.09(I), 1993 Ariz. Sess. Laws, ch. 255, § 88, her sentence “was, in effect,” a mandatory life sentence without parole “in violation of the rule announced in *Miller*.” *Vera*, 695 Ariz. Adv. Rep. 13, ¶ 17; *see also Miller*, ___ U.S. at ___ & n.13, 132 S.Ct. at 2473 & n.13 (citing § 41-1604.09(I) as basis for counting Arizona among “the 29 jurisdictions mandating life without parole for children”). Hopper thus maintained that “there is no meaningful difference between ‘natural life’ and ‘life’ sentences” and that, although the trial court had imposed what appeared to be the lesser of the two sentences, “that choice was illusory.”

¶5 The trial court summarily denied relief, and this petition for review followed. After briefing was complete, the legislature enacted A.R.S. § 13-716, which provides that a juvenile “who is sentenced to life imprisonment with the possibility of release after serving a minimum number of calendar years” is eligible for parole upon completion of the minimum sentence and, “[i]f granted parole, . . . shall remain on parole for the remainder of the person’s life,” subject to parole revocation provisions in A.R.S. § 31-415. *See* 2014 Ariz. Sess. Laws, ch. 156, § 2 (effective July 24, 2014). We directed the parties to file supplemental briefs addressing the effect of the legislation on Hopper’s claim.

¹With respect to the issues considered here, these sentencing statutes are substantially the same as those in effect on the date of Hopper’s offense. *See* 1993 Ariz. Sess. Laws, ch. 153, § 1.

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¶6 In her supplemental brief, Hopper argues the legislature’s enactment of § 13-716 violates the separation of powers doctrine and the constitutional prohibition against ex post facto laws. We will not disturb a trial court’s summary denial of post-conviction relief absent an abuse of discretion. *State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006). We conclude Hopper’s *Miller* claim is moot in light of the legislature’s enactment of § 13-716, and we deny relief on that basis. *Cf. State v. Canez*, 202 Ariz. 133, ¶ 51, 42 P.3d 564, 582 (2002) (appellate court must uphold trial court’s ruling “if legally correct for any reason”).

Discussion

¶7 “The [United States] Constitution prohibits both federal and state governments from enacting any ‘ex post facto Law.’” *Peugh v. United States*, ___ U.S. ___, ___, 133 S. Ct. 2072, 2081 (2013), quoting U.S. Const. art. I, § 9, cl. 3 & § 10; see also Ariz. Const. art. 2, § 25; *State v. Noble*, 171 Ariz. 171, 173 n.4, 829 P.2d 1217, 1219 n.4 (1992) (concluding analysis of prohibition “under both constitutions is the same”). This prohibition encompasses any law “that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed,” *Peugh*, ___ U.S. at ___, 133 S. Ct. at 2078, quoting *Calder v. Bull*, 3 U.S. 386, 390, (1798) (emphasis omitted in *Peugh*), “to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed,” *Weaver v. Graham*, 450 U.S. 24, 28-29 (1981). “The ex post facto prohibition also upholds the separation of powers by confining the legislature to penal decisions with prospective effect and the judiciary and executive to applications of existing penal law.” *Id.* at 29 n.10.

¶8 In *Vera*, we concluded § 13-716 did “not alter [a defendant’s] penalty, create an additional penalty, or change the sentence imposed,” but instead was remedial in nature, affecting only the future implementation of a juvenile’s sentence by establishing her eligibility for parole after her minimum term had been served. *Vera*, 695 Ariz. Adv. Rep. 13, ¶ 21. For similar reasons, we concluded the legislature’s enactment of § 13-716 had not violated the separation of powers doctrine, *id.* ¶ 22; and, based on

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the same analysis, it did not violate the prohibition against ex post facto laws. See *State v. Carver*, 227 Ariz. 438, n.10, 258 P.3d 256, 262 n.10 (App. 2011) (stating “ex post facto analysis is substantially similar to a retroactivity analysis”).

¶9 In her supplemental brief, Hopper argues the statute’s requirement of lifetime parole impairs her “vested right to petition the Board of Executive Clemency for an absolute discharge from parole,” because other offenders eligible for parole—limited to those who committed offenses before January 1, 1994, see § 41-1604.09(I)—have the opportunity to apply for such a discharge. See A.R.S. § 31-414. She acknowledges that when she committed her offenses relevant statutes prohibited her release on parole, and that enactment of § 13-716 therefore appears to provide a new benefit of parole eligibility. But she asserts this view of the statute relies on “an obviously false premise” because “[pre-]existing law—*Miller*—mandates that such persons are in fact parole-eligible.” She then maintains § 13-716 “deprives those in the *Miller* class from ever petitioning the Board of Executive Clemency for absolute discharge from parole” and is therefore “more restrictive than the law that was in effect at the time those in the *Miller* class committed their offenses.”

¶10 Hopper cites no authority for this novel argument, and we conclude it has no basis in the law. We need not resolve whether § 13-716 forecloses Hopper’s ability to apply for absolute discharge from parole pursuant to § 31-414, and we express no opinion on the issue. Assuming, without deciding, that her prediction is correct, her argument would not render the recent legislation unconstitutional. First, in *Miller*, the Supreme Court did not “mandate” parole-eligibility for juvenile offenders like Hopper in Arizona. It held that Alabama and Arkansas statutes violated the Eighth Amendment by mandating sentences of life imprisonment without parole for juvenile homicide offenders, and it remanded the two cases considered to those state courts for further proceedings. *Miller*, ___ U.S. at ___, 132 S.Ct. at 2475.

¶11 In addition, the Supreme Court has squarely rejected the proposition that a judicial declaration of a statute’s constitutional

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infirmity, issued after the commission of an offense, renders the statute a nullity for the purpose of considering whether a subsequent, remedial statute violates the Ex Post Facto Clause. *See Dobbert v. Florida*, 432 U.S. 282, 297-98 (1977). In *Dobbert*, the defendant had argued “that at the time he murdered his children there was no death penalty ‘in effect’ in Florida . . . because the earlier statute enacted by the legislature was, after the time he acted, found by the Supreme Court of Florida to be invalid.” *Id.* at 297. The Court stated such “sophistic argument mocks the substance of the Ex Post Facto Clause. Whether or not the old statute would in the future, withstand constitutional attack, . . . its existence on the statute books provided fair warning” of applicable penalties. *Id.* Similarly here, when Hopper committed her offense, existing statutes absolutely prohibited her release on parole. *See* 1993 Ariz. Sess. Laws, ch. 255, § 88. Section 13-716, which establishes Hopper’s eligibility for lifetime parole after her minimum sentence is served, is not “more restrictive” than the law in effect when she committed her offense, and its enactment did not violate ex post facto or separation of powers principles.

Disposition

¶12 Because § 13-716 now affords Hopper an opportunity for release on parole after twenty-five years have been served, her *Miller* claim is moot. Accordingly, although we grant review, we deny relief.