IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

BENJAMIN HENRY TYAU,
Appellant.

No. 2 CA-CR 2020-0171
Filed March 3, 2021

Appeal from the Superior Court in Pima County
No. CR20092314001
The Honorable Deborah Bernini, Judge

AFFIRMED

COUNSEL

Laura Conover, Pima County Attorney
By Jason Philip Gannon, Deputy County Attorney, Tucson
Counsel for Appellee

Benjamin H. Tyau, Tucson
In Propria Persona

OPINION

Judge Eckerstrom authored the opinion of the Court, in which Presiding Judge Espinosa and Vice Chief Judge Staring concurred.

E C K E R S T R O M, Judge:

¶1 Benjamin Tyau appeals from the trial court's ruling denying his application to set aside judgments of guilt. He contends the court erred in applying A.R.S. § 13-905(K) to his two convictions for criminal trespass. He also challenges the constitutionality of § 13-905(K), arguing its application in this case violated his constitutional rights to petition the government for redress of grievances, due process, and equal protection. For the reasons that follow, we affirm.

Factual and Procedural Background

¶2 In 2010, Tyau pled guilty to kidnapping, second-degree burglary, and two counts of first-degree criminal trespass. As the trial court later recounted when dismissing Tyau's petition for post-conviction relief pursuant to Rule 33, Ariz. R. Crim. P.[1] (a ruling we upheld[2]): "As to all counts, the Defendant entered the apartments of young women when he thought they were not home. He would obtain their underwear or other items of sexual interest and then masturbate and ejaculate in their bedrooms."

¶3 Sentencing occurred in August 2010. For Tyau's kidnapping and criminal trespass convictions, the trial court sentenced him to aggravated, consecutive prison terms totaling ten years. The court suspended sentence on the burglary count and placed Tyau on a five-year term of intensive probation on the Sex Offender Treatment Caseload and

[1] Our supreme court amended the post-conviction relief rules effective January 1, 2020. Ariz. Sup. Ct. Order R-19-0012 (Aug. 29, 2019). Those amendments apply to all cases pending on the effective date unless it is determined that "applying the rule or amendment would be infeasible or work an injustice." *Id.* We cite to the current version of the rules here because doing so is feasible and works no injustice.

[2] *State v. Tyau*, No. 2 CA-CR 2011-0294-PR (Ariz. App. Jan. 25, 2012) (mem. decision).

subject to the Special Conditions of Probations for Sex Offenders, to be served after his prison terms. The court also ordered Tyau to register as a sex offender for the remainder of his life, consistent with the plea agreement.

¶4 In August 2020, after serving his sentence and completing probation, Tyau filed an application to have his convictions set aside. The trial court summarily denied the application on the ground that, under § 13-905(K), Tyau was not entitled to a set aside of the judgments of guilt "due to the underlying nature of his convictions." This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 13-4033(3).

Application of § 13-905(K) to Tyau's Criminal Trespass Convictions

¶5 Tyau first contends the trial court erred in denying his application to set aside the two criminal trespass convictions, arguing § 13-905(K) does not apply to them. We review a denial of an application to set aside a conviction for an abuse of discretion, but we review issues of statutory construction *de novo*. *State v. Hall*, 234 Ariz. 374, ¶ 3 (App. 2014). "An error of law committed in reaching a discretionary conclusion may . . . constitute an abuse of discretion." *Id.* (alteration in *Hall*) (quoting *State v. Wall*, 212 Ariz. 1, ¶ 12 (2006)). However, Tyau has not established an error of law or any other abuse of discretion here.

¶6 Tyau notes, correctly, that the trial court did not specify which prong of § 13-905(K) formed the basis for its denial of his application to set aside his convictions. Both he and the state assume the court was referring to subsection (K)(3), which bars defendants convicted of "[a]n offense for which there has been a finding of sexual motivation pursuant to [A.R.S.] § 13-118" from applying to have their convictions set aside. Tyau contends that, because neither the plea agreement nor the trial court's sentencing minute entry expressly reference a finding of sexual motivation pursuant to § 13-118 for the two criminal trespass counts, there was no such finding. We disagree.

¶7 The state filed a special allegation that all four counts, including the two criminal trespass counts, were committed for the purpose of Tyau's sexual gratification, as required by § 13-118(A). *See also* § 13-118(C) ("For purposes of this section 'sexual motivation' means that one of the purposes for which the defendant committed the crime was for the purpose of the defendant's sexual gratification.").

¶8 At the change of plea hearing, the trial court explained that Tyau would be required to register as a sex offender "because of the nature

of these offenses." This statement was general, referencing all four of the crimes to which Tyau was pleading guilty. Tyau confirmed that the requirement had been explained to him and that he understood. He then proceeded to plead guilty to all four counts, none of which were framed in terms of a finding of sexual motivation. Defense counsel then provided the factual background for the case, noting that all the charges stemmed from Tyau's "sexual issues, voyeuristic and exhibitionism issues" and his interest in obtaining "items of sexual interest" such as underwear after entering the homes of his victims. Tyau confirmed that these characterizations by his counsel were "true and correct."

¶9 Tyau's counsel stipulated that the kidnapping and burglary counts had been committed with sexual motivation pursuant to § 13-118, but made no such statement with regard to the two criminal trespass counts. This was consistent with the terms of the written plea agreement. However, as the trial court later explained when dismissing Tyau's petition for post-conviction relief, Tyau "admitted to the factual basis at his change of plea hearing supporting sexual motivation for all counts."

¶10 Thus, at the sentencing hearing in August 2010, the trial court found that Tyau had "admitted as part of [his] plea that all of these offenses were committed for sexual motivation." *See* § 13-118(B) (requiring trier of fact to determine "whether the defendant committed the offense with a sexual motivation"). The court also commented that Tyau's were "sexually-motivated offenses." Neither Tyau nor his counsel contested these findings at the time.[3] To the contrary, his counsel agreed that the two criminal trespass convictions stemmed from behaviors linked to Tyau's "underwear fetish" and the fact that "the thrill of being caught was sexually exciting to him," as evidenced by the semen he left behind.

¶11 Tyau is correct that the minute entry from the sentencing hearing lists § 13-118 only under the kidnapping and burglary counts. However, a trial court's oral pronouncement at sentencing controls over the corresponding minute entry when a discrepancy exists and the court's intention is clear from the record. *State v. Ovante*, 231 Ariz. 180, ¶ 38 (2013).

[3] In the Rule 33 proceeding, Tyau did challenge the trial court's finding that he had "admitted as part of [his] plea that all of these offenses were committed for sexual motivation." But that challenge—which focused on whether his sentences for criminal trespass were properly aggravated—was unsuccessful before both the trial court and this court. *See Tyau*, No. 2 CA-CR 2011-0294-PR, ¶¶ 1, 3, 9, 19.

Moreover, the sentencing minute entry reflects that the court aggravated the sentences for the two criminal trespass counts in part because of Tyau's "criminal history of sex offense[s], [for] which [he] was given treatment, and [his] risk to re-offend." As the court expressed directly on multiple occasions, the criminal trespasses were both, quite plainly, "sexually-motivated offenses." And, the court issued a "Notice of Registration of Sex Offender" on the day of Tyau's sentencing, which listed all four convictions as sexual offenses requiring registration.[4]

¶12 Nor did the trial court inform Tyau of any right to apply to have his criminal trespass convictions set aside in the future after fulfillment of his sentences and probation. Such notice is mandatory under the set-aside statute, which expressly does not apply to persons convicted of criminal offenses falling within the exclusions of subsection K. § 13-905(A). The fact that the court did not inform Tyau at sentencing of any future right to apply for a set aside indicates the court's understanding that not only the kidnapping and burglary convictions, but also the criminal trespass convictions, were sexually motivated offenses that would be ineligible for set aside in the future.

¶13 For all these reasons, Tyau is incorrect that § 13-905(K)(3) does not apply to his convictions for criminal trespass. The trial court correctly concluded that Tyau is not eligible for any set aside "due to the underlying nature of his convictions," which were all for sexually motivated offenses.

Constitutional Challenges

¶14 Tyau next contends § 13-905(K) is unconstitutional. We review a statute's constitutionality *de novo*, construing it to arrive at a constitutional meaning, if possible. *State v. Johnson*, 243 Ariz. 41, ¶ 8 (App. 2017). A statute is presumed to be constitutional, and "[t]he party challenging the validity of a statute has the heavy burden of overcoming that presumption." *State v. McMahon*, 201 Ariz. 548, ¶ 5 (App. 2002). Tyau has not carried that burden here.

¶15 He first argues that § 13-905(K) prohibits citizens from "exercising free speech by way of petitioning the government for redress of grievances." But an application asking the trial court to exercise its

[4]The Notice referenced violations of "Chapter 14 or Chapter 35.1 of Title 13, Criminal Code." As none of the crimes involved "Sexual Exploitation of Children" (Chapter 35.1), they must all have been listed in the Notice as "Sexual Offenses" (Chapter 14).

discretion to set aside a criminal conviction is plainly not a petition for redress of any grievance.[5] *See State v. Bernini*, 233 Ariz. 170, ¶ 11 (App. 2013) ("When a motion to set aside a conviction is filed by an eligible applicant . . . the decision to grant or deny the request 'is always discretionary with the court.'" (quoting *State v. Key*, 128 Ariz. 419, 421 (App. 1981))). A convicted person has no fundamental right to have a criminal conviction set aside. *See Key*, 128 Ariz. at 421. Rather, a set aside under § 13-905 is "a special benefit conferred by statute," *id.*, and it is therefore "naturally subject to legislative control and limitations," *Hall*, 234 Ariz. 374, ¶ 11. It was well within the legislature's authority to place certain limitations on its grant of the statutory right to apply to have a conviction set aside at the discretion of the trial court. Nothing in the United States or Arizona constitutions obligated our legislature to make that ability unlimited. "We will not substitute our judgment for that of the legislature as to where precisely appropriate lines should be drawn" in establishing who should be permitted to seek the setting aside of criminal convictions. *Martin v. Reinstein*, 195 Ariz. 293, ¶ 52 (App. 1999).

¶16 Tyau next contends § 13-905(K) violates his right to due process because it prohibits him "from applying for set aside and enjoying the privilege/freedom of [a] fresh start without first permitting him a way to object, present evidence, provide testimony, or make a written or oral argument in support of his position." But, as this court has previously explained, "there is no due process right to have a judgment of guilt set aside." *State v. Barr*, 217 Ariz. 445, ¶ 15 (App. 2008). Substantive due process only "protects an individual from government interference with rights implicit in the concept of ordered liberty." *State v. Arevalo*, 249 Ariz. 370, ¶ 11 (2020) (quoting *Samiuddin v. Nothwehr*, 243 Ariz. 204, ¶ 13 (2017)). No such right is at issue in this case. *See* U.S. Const. amend. XIV, § 1 (prohibiting deprivation of "*life, liberty, or property* without due process of law") (emphasis added); Ariz. Const. art. II, § 4 (same).

¶17 Finally, Tyau contends subsections (K)(2) and (K)(3) of the statute are unconstitutional under the Equal Protection Clauses of both the

[5] The one case cited by Tyau, *Bill Johnson's Rests., Inc. v. NLRB*, involved the filing of a civil lawsuit alleging such grievances as harassment of customers, a threat to public safety, and libel. 461 U.S. 731, 734 (1983). Tyau's application for a discretionary set aside of his criminal convictions is in no way analogous.

United States and Arizona constitutions. Section 13-905(K)(2) bars defendants convicted of "[a]n offense for which the person is required or ordered by the court to register pursuant to [A.R.S.] § 13-3821" from applying for a set aside. As discussed above, § 13-905(K)(3) excludes persons convicted of "[a]n offense for which there has been a finding of sexual motivation pursuant to § 13-118." Tyau argues these provisions of the statute "arbitrarily discriminate against a particular class of people, namely registered sex offenders and/or those who have been convicted of a sexually motivated crime, thus creating a second-class citizen."[6]

¶18 "[I]t is not always a denial of equal protection when the state treats different classes of individuals in different ways." *Big D Constr. Corp. v. Court of Appeals*, 163 Ariz. 560, 565 (1990). When equal protection claims do not involve a fundamental right,[7] our level of scrutiny depends on the classification at issue. *State v. Coleman*, 241 Ariz. 190, ¶ 9 (App. 2016). Tyau's assertions to the contrary notwithstanding, registered sex offenders and persons convicted of sexually motivated crimes are not a "suspect class" as that term is used in constitutional law. Thus, the "rational basis" test applies, and "we will uphold the statute so long as it is 'rationally related to a legitimate government purpose.'" *Id.* (quoting *State v. Panos*, 239 Ariz. 116, ¶ 8 (App. 2016)).

¶19 Under this standard of review, we need only consider whether the statutory exclusion in question "is rationally related to '*any* legitimate legislative goal.'" *Id.* ¶ 10 (emphasis added in *Coleman*) (quoting

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[6]In support of his equal protection claim, Tyau relies primarily on *Arevalo*, in which our supreme court recently found unconstitutional a statute that enhances a criminal sentence based solely on gang membership. 249 Ariz. 370, ¶ 1. But that holding was based on a finding that the statute in question violated substantive due process, and the court expressly declined to address the appellant's equal protection claim. *Id.* ¶¶ 1, 8. More importantly, that statute punished affected defendants with enhanced criminal penalties. In contrast, § 13-905(K), subsections (2) and (3), merely disqualify registered sex offenders and people convicted of sexually motivated crimes from applying for the special statutory benefit of a discretionary set aside, which the legislature that created it was free to limit and control. *See Key*, 128 Ariz. at 421; *Hall*, 234 Ariz. 374, ¶ 11. Tyau's reliance on *Arevalo* is therefore misplaced.

[7]As noted above, "[t]here is no fundamental right . . . to have one's criminal record expunged." *Key*, 128 Ariz. at 421.

Martin, 195 Ariz. 293, ¶ 52). We may "consider either the legislature's stated goal or any hypothetical basis for its action." *State v. Lowery*, 230 Ariz. 536, ¶ 15 (App. 2012). "[W]here there is a reasonable, even though debatable, basis for enactment of the statute, the act will be upheld unless it is clearly unconstitutional." *Arevalo*, 249 Ariz. 370, ¶ 9 (quoting *State v. Ramos*, 133 Ariz. 4, 6 (1982)).

¶20 As the Arizona Supreme Court has explained, our legislature made plain when enacting the sex offender registration requirements referenced in § 13-905(K)(2) and the sexual motivation statute referenced in § 13-905(K)(3) that both are aimed at public safety. *See Fushek v. State*, 218 Ariz. 285, ¶ 29 (2008). In particular, when outlining the legislative intent behind sex offender registration requirements and justifying concordant privacy restrictions, the legislature expressly found: "Some sex offenders pose a high risk of engaging in sex offenses after being released from imprisonment or commitment and . . . protecting the public from sex offenders is a paramount governmental interest." 1995 Ariz. Sess. Laws, ch. 257, § 10(2). As our supreme court explained in *Fushek*, the legislature's simultaneous adoption of § 13-118 also demonstrates that it views even "misdemeanors committed with sexual motivation as serious offenses"; it "reflects a legislative view that those who commit offenses with sexual motivation have engaged in more than simple petty crimes." 218 Ariz. 285, ¶ 29.

¶21 Notably, the statutory provisions Tyau now challenges reflect a legislative decision to affirmatively shrink the universe of sex offenders who are barred from applying for a set aside to these two categories. Before 2001, the statute excluded *all* convicted sex offenders, through a general reference to all violations of Chapter 14 of the Criminal Code, which addresses "Sexual Offenses." The law was amended in 2001 to exclude only those required by statute or court order to register as sex offenders and those convicted of an offense "[f]or which there has been a finding of sexual motivation pursuant to section 13-118." 2001 Ariz. Sess. Laws, ch. 109, § 1. Given the ostensive legislative purpose of Arizona's sex offender registration requirements and § 13-118 (*see* ¶ 20, *supra*), that change evinced a legislative determination that not *all* sex offenders, but only those who have been convicted of "serious offenses" or who pose a potential threat to public safety should not be permitted to apply to have their convictions set aside. Indeed, Tyau concedes that our legislature "likely concluded that denying this particular group's right to have a fresh start, by having their convictions set aside, was outweighed by the potential public safety benefit it could provide the community."

¶22 Unquestionably, "protecting the community from potentially dangerous sex offenders" is a legitimate and compelling governmental interest. *State v. Trujillo*, 248 Ariz. 473, ¶ 55 (2020); *see also Coleman*, 241 Ariz. 190, ¶¶ 14, 19; *Lowery*, 230 Ariz. 536, ¶ 17; *Martin*, 195 Ariz. 293, ¶¶ 61, 99; *Ariz. Dep't of Pub. Safety v. Superior Court*, 190 Ariz. 490, 499 (App. 1997). Because this is not a case requiring strict scrutiny, we need not determine whether the challenged statutory provisions are narrowly tailored to that or any other legislative purpose. *See Coleman*, 241 Ariz. 190, ¶ 10. "A perfect fit is not required," and a statute can survive rational basis scrutiny even if it results in some inequality. *Big D Constr. Corp.*, 163 Ariz. at 566.

¶23 Tyau has not carried his burden of showing that subsections (K)(2) and (K)(3) of the statute are "wholly unrelated to any legitimate legislative goal." *Martin*, 195 Ariz. 293, ¶ 52. The fact that other portions of the statute exclude persons convicted of "dangerous offense[s]," § 13-905(K)(1), and felonies "in which the victim is a minor under fifteen," § 13-905(K)(4), does not alter our conclusion. The legislature could rationally conclude that registered sex offenders and those convicted of sexually motivated offenses are guilty of sufficiently serious crimes that a set aside is contrary to public policy, even if those offenses did not involve a deadly weapon, serious physical injury, or a victim under fifteen. *See* A.R.S. § 13-105(13) (defining "dangerous offense"); *see also State ex rel. Romley v. Gaines*, 205 Ariz. 138, ¶ 19 (App. 2003) (consideration of public policy issues "firmly in the province of the legislature, not this court"). "The legislature's response to the sex crime problem and the terms it has selected to implement that response are reasonably related to its legitimate goals," and "we will defer to them." *Martin*, 195 Ariz. 293, ¶ 74.

Disposition

¶24 For the foregoing reasons, we affirm the trial court's ruling denying Tyau's application to set aside his convictions.