

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

ROGELIO BERNAL-LAGUNAS,
Petitioner.

No. 2 CA-CR 2017-0291-PR
Filed November 1, 2017

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NOT FOR PUBLICATION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 Yavapai County
No. P1300CR20081174
The Honorable Tina R. Ainley, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Sheila Polk, Pinal County Attorney
By Robert J. Johnson, Deputy County Attorney, Prescott
Counsel for Respondent

Law Office of Francisco León, Tucson
By Francisco León
Counsel for Petitioner

STATE v. BERNAL-LAGUNAS
Decision of the Court

MEMORANDUM DECISION

Presiding Judge Vásquez authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Eppich concurred.

V Á S Q U E Z, Presiding Judge:

¶1 Rogelio Bernal-Lagunas seeks review of the trial court’s order summarily denying his untimely petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb the court’s order unless the court clearly abused its discretion. *See State v. Roseberry*, 237 Ariz. 507, ¶ 7, 353 P.3d 847, 848 (2015). Bernal-Lagunas has not met his burden of demonstrating such abuse here.

¶2 In 2008, Bernal-Lagunas pled guilty to two counts of attempted human smuggling in violation of A.R.S. § 13-2319. The trial court suspended the imposition of sentence and placed Bernal-Lagunas on concurrent three-year terms of probation. In June 2016, Bernal-Lagunas filed a petition for post-conviction relief asserting his conviction and sentence should be vacated based on *United States v. State of Arizona*, 119 F. Supp. 3d 955, 960 (D. Ariz. 2014), in which the district court concluded § 13-2319 was preempted by federal law and thus enjoined the state from enforcing it. In his reply to the state’s response, Bernal-Lagunas asserted for the first time that the district court’s ruling constituted a significant change in the law pursuant to Rule 32.1(g). The trial court summarily denied relief, concluding Bernal-Lagunas’s claim was “precluded pursuant to Rule 32.2(a).” This petition for review followed.

¶3 On review, Bernal-Lagunas first asserts the trial court erred by finding his claim precluded. We agree that preclusion under Rule 32.2(a) appears to be inapplicable here, but his petition is nonetheless untimely and, therefore, he was permitted to raise only those claims falling under Rule 32.1(d) through (h). Ariz. R. Crim. P. 32.4(a). Bernal-Lagunas identified no such claim in his petition for

STATE v. BERNAL-LAGUNAS
Decision of the Court

post-conviction relief. And, although he raised a claim under Rule 32.1(g) for the first time in his reply brief, the trial court was not required to address it.¹ See *State v. Lopez*, 223 Ariz. 238, ¶¶ 6-7, 221 P.3d 1052, 1054 (App. 2009).

¶4 In any event, even had Bernal-Lagunas properly raised a claim pursuant to Rule 32.1(g), he has not established it would have entitled him to relief. A petitioner seeking relief in an untimely proceeding must provide “reasons for not raising the claim . . . in a timely manner.” Ariz. R. Crim. P. 32.2 cmt. The district court decision preceded his petition by more than eighteen months, and he has not explained this delay in seeking relief. Moreover, he has not attempted to demonstrate the district court decision would be retroactively applicable to his conviction, even were it binding on Arizona courts.² See Ariz. R. Crim. P. 32.1(g) (relief available only if change in the law applies to petitioner’s case); see also *Weatherford ex rel. Michael L. v. State*, 206 Ariz. 529, ¶ 8, 81 P.3d 320, 323 (2003) (“[O]nly a decision of the Supreme Court binds a state court on a substantive federal issue.”); *State v. Febles*, 210 Ariz. 589, ¶ 8, 115 P.3d 629, 632 (App. 2005) (absent limited exception, “new constitutional rules do not apply retroactively to cases” that have become final); *State v. Flores*, 218 Ariz. 407, ¶ 15, 188 P.3d 706, 711 (App. 2008) (concluding § 13-2319 not preempted by federal law).

¶5 We grant review but deny relief.

¹Bernal-Lagunas also argues he is entitled to file an untimely petition pursuant to Rule 32.1(f). He did not raise this argument below and we decline to address it. See Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review must contain “issues which were decided by the trial court and which the defendant wishes to present to the appellate court for review”); see also *State v. Ramirez*, 126 Ariz. 464, 467-68, 616 P.2d 924, 927-28 (App. 1980).

²Post-conviction proceedings under Rule 32 do not provide an avenue for relief for defendants like Bernal-Lagunas who pled guilty long before the district court’s ruling. We express no opinion, however, as to whether Bernal-Lagunas could be entitled to relief under federal law. See generally 28 U.S.C. § 2254.