IN THE

ARIZONA COURT OF APPEAL

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

BRENT PEARSON,
Appellant.

No. 2 CA-CR 2019-0047
Filed June 11, 2020

Appeal from the Superior Court in Pima County
No. CR050982001
The Honorable Danelle B. Liwski, Judge

AFFIRMED

COUNSEL

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Counsel for Appellee

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MEMORANDUM DECISION

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

E S P I N O S A, Judge:

¶1 Brent Pearson appeals the trial court's denial of his petition to terminate the requirement that he register as a sex offender, following his successful motion to set aside his conviction for attempted sexual assault. For the following reasons, we affirm.

Factual and Procedural Background

¶2 In 1996, Pearson pled guilty to attempted sexual assault. The trial court suspended the imposition of sentence and placed him on five years' probation, ordering him to serve a ninety-day jail term as a condition of probation. Pursuant to his plea agreement and A.R.S. § 13-3821,[1] Pearson was also required to register as a sex offender. In March 2016, Pearson filed a petition to terminate the sex offender registration requirement, arguing "[i]t is more than reasonably possible to interpret A.R.S. § 13-3821 to avoid" lifetime registration, which the court denied. He appealed that ruling but subsequently stipulated to the dismissal of the appeal in December 2016, apparently after the trial court granted his application to set aside his conviction and restored his civil rights. *See State v. Pearson*, No. 2 CA-CR 2016-0304 (Ariz. App. Dec. 20, 2016) (order).

¶3 In December 2018, Pearson filed a second petition to terminate his sex offender designation and registration requirement. The trial court denied the petition in January 2019, and Pearson appealed that ruling. But because the court had not yet ruled on a motion for reconsideration by Pearson, we granted his motion to stay the appeal and revested jurisdiction in the trial court to permit it to enter a final ruling. In June 2019, the trial court issued its order confirming its January denial of

[1]We refer to this statute, 1996 Ariz. Sess. Laws, ch. 315, § 2, by its designation at the time of Pearson's plea agreement.

Pearson's petition to terminate the registration requirement. We then vacated the stay of appeal and revested jurisdiction in this court.

Jurisdiction

¶4 At the outset, the state, citing A.R.S. § 13-4033(B) and *Fisher v. Kaufman*, 201 Ariz. 500 (App. 2001), contends we lack jurisdiction to consider Pearson's appeal because his sex-offender-registration requirement was established following his conviction pursuant to a plea agreement and resulting sentence. Section 13-4033(B) provides that a defendant "may not appeal from a judgment or sentence that is entered pursuant to a plea agreement." Pearson responds that he "is not appealing a judgment or sentence entered pursuant to a plea agreement," but rather the trial court's denial of his post-judgment petition to terminate his registration requirement, citing § 13-4033 generally, but presumably relying on § 13-4033(A)(3).

¶5 In *Fisher*, we acknowledged that a defendant may appeal "[a]n order made after judgment affecting the substantial rights of the party," § 13-4033(A)(3), but we held that Fisher was precluded from appellate review "because she challenge[d] a refusal to alter part of the sentence originally imposed: the registration requirement." *Fisher*, 201 Ariz. 501, ¶¶ 5-6. In so holding, we noted that § 13-4033(B) "does not bar an appeal from a post-judgment order when the issue raised is 'not one that effectively challenges the plea agreement or sentence.'" *Id.* ¶ 5 (quoting *State v. Delgarito,* 189 Ariz. 58, 59 (App. 1997)). The state points out that Pearson's appeal, like Fisher's, arises from the trial court's denial of a petition to terminate sex offender registration, and "challenges a refusal to alter part of the sentence originally imposed," asserting *Fisher* is thus directly on point. *Id.*

¶6 Pearson attempts to distinguish *Fisher*, arguing that unlike in *Fisher*, he is challenging a post-judgment order and not "the original judgment and sentence," citing *Delgarito*, upon which *Fisher* relied. In *Delgarito*, the defendant pled guilty to an undesignated offense that the trial court, a year later, designated a felony without mandatory notice to Delgarito or a hearing. *Delgarito*, 189 Ariz. at 59-60; *State v. Pinto,* 179 Ariz. 593, 597 (App. 1994) (before trial court can designate open-ended offense a felony, defendant must be afforded notice and hearing). This court found the defendant's challenge to the designation order appealable because the issue presented—whether the trial court had deprived him of required due process—did not challenge his plea agreement or sentence and thus was not barred by § 13-4033(A)(3). *Id.* at 59.

¶7 Pearson contends that "[t]o deny jurisdiction would be tantamount to denying [him] the same due process that the defendant was denied in *Delgarito*. Specifically, no notice and a hearing." But Pearson has not been denied a notice and hearing, nor has he identified any other due process deprivation, and he fails to explain how his action is "not one that effectively challenges the plea agreement or sentence." *Fisher,* ¶ 5 (quoting *Delgarito,* 189 Ariz. at 59).

¶8 The registration requirement here was part of Pearson's original plea and sentencing; consequently, a petition to terminate that requirement, even if by way of a collateral action, "effectively challenges" the sentence originally imposed. *See id.* ¶¶ 5-6 (13-4033(B) precludes appeal of post-judgment order requiring defendant to continue sex offender registration because registration was contemplated in plea agreement); *State v. Jimenez*, 188 Ariz. 342, 344 (App. 1996) (pleading defendant may not circumvent § 13-4033(B) by filing post-judgment motion raising sentencing issues); *see also Hoffman v. Chandler*, 231 Ariz. 362 (2013) (defendant precluded by statute from appealing contested post-judgment restitution order entered pursuant to plea agreement). And though Pearson also argues that his "challenge in general, could not have been raised at the time of [his] sentence," citing *Delgarito*, the court there contrasted such a situation with one where the condition was imposed at sentencing and "the challenged order did not modify or change the defendant's original sentence." 189 Ariz. at 60. In sum, given the clear language of A.R.S. § 13-4033(B) and precedent noted above, although Pearson's petition to terminate his registration requirement was renewed following a new event, it nevertheless challenges, and would directly abrogate, a term of his plea agreement and sentence.

¶9 In *Fisher*, however, although we lacked appellate jurisdiction, we nevertheless afforded appellate review by invoking our discretionary special-action jurisdiction. 201 Ariz. 500, ¶ 4; *see State ex rel. Romley v. Hutt*, 195 Ariz. 256, ¶ 5 (App. 1999). It may be appropriate for this court to accept special-action jurisdiction when the party has no plain, speedy, or adequate remedy by appeal, Ariz. R. P. Spec. Act. 1(a), and the issue raised is a matter of first impression, involves a question of law, or is likely to arise again, *Luis A. v. Bayham-Lesselyong*, 197 Ariz. 451, ¶ 2 (App. 2000). It does not appear that Pearson has "an equally plain, speedy, and adequate remedy by appeal." Ariz. R. P. Spec. Act. 1(a). Moreover, the issue presented is a purely legal one. *See State ex rel. Romley v. Martin*, 203 Ariz. 46, ¶ 4 (App. 2002). Accordingly, while we lack appellate jurisdiction to review this matter, we nevertheless elect to exercise special-action jurisdiction and

address Pearson's arguments.[2] *See, e.g.*, *Danielson v. Evans*, 201 Ariz. 401, ¶ 35 (App. 2001) (although appellate jurisdiction lacking, special-action jurisdiction accepted sua sponte).

Discussion

¶10 We may grant special-action relief only when a respondent judge has, inter alia, abused his or her discretion. *See* Ariz. R. P. Spec. Act. 3(c). An abuse of discretion includes an error in interpreting or applying the law. *See Sierra Tucson, Inc. v. Lee*, 230 Ariz. 255, ¶ 22 (App. 2012). The interpretation and application of statutes and the constitution are questions of law, which we review de novo. *See Univ. Med. Ctr. Corp. v. Dep't of Revenue*, 201 Ariz. 447, ¶ 14 (App. 2001).

¶11 Arizona's sex offender statute provides in relevant part, "A person who has been convicted of . . . a violation or attempted violation of any of the following offenses . . . shall register with the sheriff of that county." § 13-3821(A). In challenging the trial court's refusal to set aside his registration requirement, Pearson points out that when a court sets aside a judgment of guilt under A.R.S. § 13-905,[3] it orders the person released "from all penalties and disabilities" resulting from the conviction. Pearson

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[2]Although we consider Pearson's argument that the trial court erred in refusing to set aside the registration requirement as a "penalty or disability," we do not address his claim that A.R.S. § 13-3821(A) is ambiguous as to lifetime registration. That issue could have been pursued, by special action if not direct appeal, *see Fisher*, 201 Ariz. 500, when Pearson first sought appellate review but chose not to maintain it. And in any event, much of his argument overlaps with the issues regarding the interpretation of the relevant statutes addressed herein. More importantly, our supreme court has spoken definitively on this issue, including recently, reaffirming that registration under § 13-3821(A) is a "life-long requirement." *State v. Trujillo*, ___ Ariz. ___, ¶ 11, 462 P.3d 550, 552 (2020); *Fushek v. State*, 218 Ariz. 285, ¶ 23 (2008) ("lifelong obligation" because statute "do[es] not provide for termination of the registration requirement, except for registrants who committed offenses as juveniles"); *see also Fisher*, 201 Ariz. 500, ¶ 8 ("[S]ex offender registration lasts for the life of the registrant, with certain exceptions not applicable here."). Accordingly, we do not extend our special-action jurisdiction to this issue.

[3]Section 13-905 was formerly cited as § 13-907. 2018 Ariz. Sess. Laws, ch. 83, § 1. Because it has not changed in substance, however, we refer to the current law.

contends the court erroneously concluded that "the consequences of Arizona's Sex Offender Registration Statute are regulatory in purpose." He maintains the court should have instead found the statute punitive and his registration requirement therefore discharged.

¶12 The state responds that the trial court properly denied Pearson's motion to terminate the statutory registration requirement because preliminarily it did not have authority to set aside the underlying felony. The state asserts that, under § 13-905(K)(2), the court "was powerless to set aside Pearson's judgment of guilt because that statute expressly excludes all convictions '[f]or which a person is required or ordered by the court to register pursuant to § 13–3821.'" But whether Pearson's conviction was properly set aside is not before this court. His petition was granted in 2016, and the state could have sought review of that decision but did not do so. *See State v. Bernini*, 233 Ariz. 170, ¶¶ 7-8 (App. 2013). We therefore do not address this issue further.

¶13 The state alternatively argues that even if the trial court had the authority to set aside Pearson's conviction, the registration requirement does not constitute a penalty or disability as referred to in § 13-905. This court has noted that granting relief pursuant to § 13-905 "is not intended to eliminate all consequences of a person's criminal conviction under Arizona law." *State v. Hall*, 234 Ariz. 374, ¶ 11 (App. 2014). In *Hall*, we explained that because setting aside a conviction is "a special benefit conferred by statute," *id.*, it is "naturally subject to legislative control and limitations." *State v. Key*, 128 Ariz. 419, 421 (App. 1981). For example, the legislature has determined set-aside convictions may be used to "enhance or aggravate future sentences" and to impeach witnesses. *Id.*; *State v. Tyler*, 149 Ariz. 312, 315 (App. 1986). We similarly concluded in *Hall* that a set-aside conviction under § 13-905 "may continue to serve as the basis for restricting a defendant's right to bear firearms." *Hall*, 234 Ariz. 374, ¶ 11.

¶14 Further, the term "disability," as used in § 13-905 and as defined by case law, does not include affirmative obligations, such as the requirement to register as a sex offender. *See State v. Henry*, 224 Ariz. 164, ¶¶ 18-26 (App. 2010); *see also Clark v. Ryan*, 836 F.3d 1013, 1018 (9th Cir. 2016) (not unreasonable for this court in *Henry* to conclude registration statute "is not so burdensome as to impose an affirmative disability or restraint"). Although the legislature did not expressly define "disability" for purposes of § 13-905, the term generally means a "legal incapacity or disqualification," *State v. Zaputil*, 220 Ariz. 425, ¶ 12 (App. 2008) (quoting *Webster's II New College Dictionary* 822 (1995)), and the registration requirement itself does not result in any legal incapacity or disqualification

because it "does not affirmatively inhibit or restrain an offender's movements or activities," *State v. Noble*, 171 Ariz. 171, 176-77 (1992) (holding sex-offender registration regulatory rather than punitive for purposes of ex post facto analysis).

¶15 Pearson nevertheless argues that the burdensome and negative consequences of registration, such as lost business opportunities, negative publicity, and sanctions for failing to register, should "certainly qualify as either a penalty or disability," and maintains that they would qualify as such "in any honest assessment and commonsense application to Arizona's set aside statute." He also points out "the legislature expressly itemized what penalties and disabilities will not be set aside [under 13-905] even if the underlying conviction is set aside," but has not done so for sex-offender registration, thus "the intent of the sex registration statute is not at odds with the set aside statute." Our supreme court, however, has recently spoken directly on these issues.

¶16 In *State v. Trujillo*, the court comprehensively analyzed the legal character of lifetime registration pursuant to § 13-3821(A) and reaffirmed, consistent with prior case law, that its consequences do not constitute either a penalty or disability, expressly concluding that, "Arizona's sex offender registration statutes are civil regulatory statutes, not criminal penalties." ___ Ariz. ___, ¶ 1, 462 P.3d 550, 551 (2020). The court observed that when the legislature enacted the community notification portion of the statute, "it expressly stated its intent to create a civil regulatory scheme," rather than a punitive provision. *Id.* ¶ 28. Upon examining in detail community supervision, internet registry provisions, and any physical restrictions, the court found no "affirmative disability or restraint on offenders." *See id.* ¶¶ 38, 40, 41, 43. Further, as the state points out, "A.R.S. § 13-3821 expressly enumerates the . . . circumstances under which an individual can be relieved of the registration requirement," *see* § 13-3821(D)-(H), and its specific provisions control over the more general ones of § 13-905, *cf. Hall*, 234 Ariz. 374, ¶ 10.

¶17 Finally, we consider Pearson's argument that the trial court erred on public policy grounds because his registration requirement was the result of one isolated, youthful mistake years ago, he poses no risk of repeating the behavior, and sex offender registration constitutes an "invasion of privacy," stigmatizing him and "affect[ing] virtually every part of his life and his family's life." But the court in *Trujillo* considered similar points and expressly rejected them, noting "[s]tigma and shame are not unique to criminal punishment; civil remedial sanctions may also harm a person's reputation." *Trujillo*, ___ Ariz. ___, ¶ 54, 462 P.3d at 560. The

court further concluded "the effects of Arizona's sex offender registration statutes do not negate the legislature's intent to create a civil regulatory scheme." *Id.* ¶ 64. Thus, Pearson's argument is better directed to the legislature than this court, whose purview is to determine whether the trial court erred by following the law as enacted and the applicable precedent. *See Stein v. Sonus USA, Inc.*, 214 Ariz. 200, ¶ 18 (App. 2007) ("[D]eciding public policy is, within constitutional limits, the province of the legislature."); *In re A.D.*, 119 A.3d 241, 254 (N.J. Super. Ct. App. Div. 2015) (court "not unsympathetic" to appellant's argument that procedure to terminate registration requirement "should be" more available, but that determination "for the Legislature to make"). [4]

Conclusion

¶18 In short, we are unable to conclude the trial court committed any error by finding the sex-offender registration requirement regulatory in purpose and therefore not a penalty or disability for purposes of § 13-905. Accordingly, the trial court's judgment denying Pearson's petition to terminate his registration requirement is affirmed.

[4]Pearson also claims the registration requirement "infringe[s] on his fundamental right to privacy." However, he fails to apply his cited cases to the facts of this case or include citations to the record on this point, thus failing to develop a cognizable legal argument. The claim is therefore waived. *See State v. Carver*, 160 Ariz. 167, 175 (1989) ("[O]pening briefs must present significant arguments, supported by authority, setting forth an appellant's position on the issues raised."); *see also State v. Moody*, 208 Ariz. 424, n.9 (2004) ("Merely mentioning an argument is not enough.").