IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

JESUS RUIZ HERNANDEZ,
Petitioner.

No. 2 CA-CR 2019-0235-PR
Filed April 24, 2020

Petition for Review from the Superior Court in Pima County
No. CR51040
The Honorable Renee T. Bennett, Judge

REVIEW GRANTED; RELIEF DENIED

Jesus Ruiz Hernandez, Florence
In Propria Persona

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 Jesus Hernandez seeks review of the trial court's ruling dismissing his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P.[1] We will not disturb that ruling unless the court has abused its discretion. *See State v. Martinez*, 226 Ariz. 464, ¶ 6 (App. 2011). Hernandez has not met his burden of establishing such abuse here.

¶2 After a jury trial in March 1996, Hernandez was convicted of four counts of child molestation, two counts of kidnapping a child under the age of fifteen, one count of sexual abuse of a minor, and two counts of sexual conduct with a minor. The trial court sentenced him to a combination of concurrent and consecutive prison terms, including five terms of life imprisonment. Hernandez twice attempted to appeal, but this court dismissed both proceedings as untimely. *State v. Hernandez*, No. 2 CA-CR 96-0394 (Ariz. App. July 8, 1996) (order); *State v. Hernandez*, No. 2 CA-CR 96-0317 (Ariz. App. June 5, 1996) (order). Hernandez subsequently filed a petition for post-conviction relief, raising numerous claims of ineffective assistance of counsel. After an evidentiary hearing, the trial court denied relief, as did this court on review. *State v. Hernandez*, No. 2 CA-CR 2001-0486-PR (Ariz. App. May 23, 2002) (mem. decision). Several years later, Hernandez filed another petition for post-conviction relief, which the trial court summarily dismissed. Hernandez did not seek review of that decision.

¶3 In February 2019, Hernandez initiated this Rule 32 proceeding. In his petition, Hernandez alleged claims of significant change

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[1] Effective January 1, 2020, our supreme court amended the post-conviction relief rules. Ariz. Sup. Ct. Order R-19-0012 (Aug. 29, 2019). The amendments apply to all cases pending on the effective date unless a court determines that "applying the rule or amendment would be infeasible or work an injustice." *Id.* Because it is neither infeasible nor works an injustice here, we cite to and apply the current version of the rules.

in the law, newly discovered material facts, and ineffective assistance of counsel. *See* Ariz. R. Crim. P. 32.1(a), (e), (g). Specifically, he argued the statutory amendments to A.R.S. §§ 13-1401 and 13-1407 under House Bill (H.B.) 2283 constituted a significant change in the law and a newly discovered material fact that would probably overturn his convictions or sentences. *See* 2018 Ariz. Sess. Laws, ch. 266, §§ 1-2.[2] He similarly asserted that *State v. Brown*, 191 Ariz. 102 (App. 1997), was a significant change in the law and a newly discovered material fact that would probably change his sentences. In *Brown*, this court determined that, under the sentencing statute for dangerous crimes against children, a defendant's sentences could be enhanced for convictions entered in a prior case. 191 Ariz. at 104. Hernandez further maintained that his trial and appellate counsel were ineffective in failing to raise the *Brown* sentencing issue.

¶4 The trial court summarily dismissed Hernandez's petition. It concluded that Hernandez's ineffective assistance of counsel claims were untimely and precluded. It also determined that Hernandez's *Brown* sentencing argument more appropriately fell under Rule 32.1(c), as a claim that his sentences were not authorized by law, which would also be untimely and precluded. Because the statutory amendments to §§ 13-1401 and 13-1407 did not apply retroactively to Hernandez's case, the court found that H.B. 2283 was not a significant change in the law that would probably overturn any of his convictions or sentences. *See* A.R.S. § 1-244. The court similarly concluded that *Brown* was not a significant change in the law that would probably change his sentences because, although the court "improperly enhanced his sentence under A.R.S. § 13-604, rather than applying the then-current sentencing law pertaining to convictions of offenses not committed on the same occasion but consolidated for trial under A.R.S. § 13-702.02," other courts making the same error does not constitute a significant change in the law. *See State v. Shrum*, 220 Ariz. 115, ¶ 21 (2009). Finally, the court observed that Hernandez's "discovery" of H.B. 2283 and *Brown* did not constitute new "facts" under Rule 32.1(e). Hernandez filed a motion for reconsideration, which the court denied. This petition for review followed.

[2]H.B. 2283 modified the definition of sexual conduct to exclude "direct or indirect touching or manipulating" in certain circumstances. § 13-1401(A)(3)(b). It also removed the defense that "the defendant was not motivated by sexual interest" from sexual abuse and child molestation. *See* § 13-1407; *see also* 2018 Ariz. Sess. Laws, ch. 266, § 2.

¶5 On review, Hernandez reasserts his argument that H.B. 2283 was a significant change in the law.[3] Citing several cases, including *State v. Slemmer*, 170 Ariz. 174 (1991), and *State v. Towery*, 204 Ariz. 386 (2003), he also contends that H.B. 2283 applies retroactively to his case. But those cases deal with the retroactivity of other cases and procedural rules, not statutory amendments. *See Towery*, 204 Ariz. 386, ¶ 7 (whether new rule applies retroactively involves three-part analysis); *Slemmer*, 170 Ariz. at 179 (new decisions applying well-established constitutional principles closely analogous to those previously considered in prior cases generally applied retroactively, even to final cases that have become final in collateral proceedings). They are therefore not instructive here.

¶6 As the trial court found, Hernandez's claim that the amendments to §§ 13-1401 and 13-1407 constitute "a significant change in the law that . . . would probably overturn the defendant's judgment or sentence" is unavailing. Ariz. R. Crim. P. 32.1(g). "No statute is retroactive unless expressly declared therein." § 1-244. Thus, absent a clear statement of retroactivity, a newly enacted law only applies prospectively. *State v. Gum*, 214 Ariz. 397, ¶ 22 (App. 2007). H.B. 2283 contains no statement of retroactivity. *See* 2018 Ariz. Sess. Laws, ch. 266, §§ 1-3. The statutory changes therefore do not apply to Hernandez.

¶7 Hernandez also contends that he "only now discovered" his "illegal sentence" under *Brown* and that such error is "appealable upon discovery."[4] He maintains that A.R.S. § 13-4231(1) allows "a defendant to appeal an illegal sentence at any time, because the rule of preclusion does not bar review of any constitutional claim raised on collateral review." That statute, however, is the corollary of Rule 32.1(a), which is subject to

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[3] Hernandez does not argue that H.B. 2283 constitutes a newly discovered material fact. We therefore do not address this issue. To the extent Hernandez challenges the prior versions of §§ 13-1401 and 13-1407 as "unconstitutionally vague and overbroad," we do not address this argument because it was not raised in his petition below. *See State v. Ramirez*, 126 Ariz. 464, 468 (App. 1980).

[4] Because he does not reassert his claim that *Brown* was a significant change in the law, we do not address it. Hernandez, however, suggests that the failure to raise this issue "was not the defendant's fault." To the extent he attempts to raise a claim under Rule 32.1(f), we will not address it for the first time on review. *See Ramirez*, 126 Ariz. at 468.

preclusion under Rule 32.2(a) and the timeliness requirement of Rule 32.4(b)(3)(A). *See also* A.R.S. §§ 13-4232(A), 13-4234(C).

¶8 Moreover, under Rule 32.1(e), Hernandez's discovery of *Brown* does not constitute newly discovered material facts warranting relief. *See State v. Amaral*, 239 Ariz. 217, ¶ 9 (2016) (listing five requirements for colorable Rule 32.1(e) claim: (1) evidence must appear to have existed at time of trial but be discovered afterward; (2) petition must allege facts from which court could conclude defendant was diligent in discovering facts and bringing them forward; (3) evidence must not simply be cumulative or impeaching; (4) evidence must be relevant; and (5) evidence must be such that it would likely have altered verdict or sentence). *Brown* is an appellate opinion—not evidence—that was issued in August 1997, more than a year after Hernandez was convicted and sentenced.

¶9 Hernandez lastly asserts that his claim of ineffective assistance of counsel is not precluded because it was "brought under a newly discovered claim that trial and/or appellate counsel should have either objected at sentencing or on appeal." But Rule 32.1(e) does not contemplate a claim of newly discovered evidence of ineffective assistance of counsel. Instead, that rule is limited to "newly discovered material facts . . . [that] probably would have changed the judgment or sentence." Ariz. R. Crim. P. 32.1(e); *see Amaral*, 239 Ariz. 217, ¶ 9. A claim of ineffective assistance of counsel falls under Rule 32.1(a), *see State v. Petty*, 225 Ariz. 369, ¶ 11 (App. 2010), which, as the trial court noted, is precluded and untimely in this successive proceeding, *see* Ariz. R. Crim. P. 32.2(a), 32.4(a)(3)(A).

¶10 Accordingly, although the petition for review is granted, relief is denied.