IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

MARK ANTHONY LUGO,
Petitioner.

No. 2 CA-CR 2019-0285-PR
Filed May 11, 2020

Petition for Review from the Superior Court in Pima County
No. CR035437001
The Honorable Javier Chon-Lopez, Judge

REVIEW GRANTED; RELIEF DENIED

Mark Anthony Lugo, 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 Petitioner Mark Lugo seeks review of the trial court's ruling dismissing what appears to be his tenth petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P.[1] We will not disturb that order unless the court abused its discretion. *See State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). Lugo has not sustained his burden of establishing such abuse here.

¶2 After a jury trial in 1992, Lugo was convicted of sexual conduct with a minor, attempted sexual conduct with a minor, sexual abuse, and child molestation. This court affirmed Lugo's convictions on appeal but remanded the case for resentencing on two of the four counts. *State v. Lugo*, No. 2 CA-CR 92-0561 (Ariz. App. Jan. 31, 1994) (mem. decision). Lugo was resentenced in August 1995. This court granted partial relief on review in Lugo's first post-conviction proceeding. *State v. Lugo*, No. 2 CA-CR 2007-0336-PR (Ariz. App. Apr. 30, 2008) (mem. decision). We denied relief on review in four subsequent proceedings. *State v. Lugo*, No. 2 CA-CR 2014-0092-PR (Ariz. App. Aug. 26, 2014) (mem. decision); *State v. Lugo*, No. 2 CA-CR 2011-0283-PR (Ariz. App. Jan. 12, 2012) (mem. decision); *State v. Lugo*, No. 2 CA-CR 2011-0041-PR (Ariz. App. May 19, 2011) (mem. decision); *State v. Lugo*, No. 2 CA-CR 2009-0201-PR (Ariz. App. Dec. 2, 2009) (mem. decision). Lugo again sought post-conviction relief in 2014, which the trial court denied. Lugo did not seek review of that ruling. In 2019, we denied relief on review of Lugo's successive Rule 32 proceeding. *State v. Lugo,* No. 2 CA-CR 2018-0291-PR (Ariz. App. Jan. 10, 2019) (mem. decision).

[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 feasible and does no injustice, we apply and cite to the current version of the rules.

Lugo apparently filed two more Rule 32 petitions in March[2] and June 2019, which the court summarily dismissed in a single ruling in August 2019. He did not seek review of that ruling.

¶3 In September 2019, Lugo initiated his most recent Rule 32 proceeding, arguing the statutory amendments to A.R.S. §§ 13-1401 and 13-1407 under House Bill (H.B.) 2283[3] constituted a significant change in the law and they applied retroactively to his case.[4] *See* Ariz. R. Crim. P. 32.1(g); *see also* 2018 Ariz. Sess. Laws, ch. 266, §§ 1, 2. The trial court found the statutory amendments not retroactively applicable to Lugo's case, and concluded there was no significant change in the law that would probably overturn any of his convictions or sentences. The court summarily dismissed the petition and denied Lugo's subsequent motion for reconsideration and motion to file an amended Rule 32 petition. This petition for review followed.[5]

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[2]Although the March petition is not part of the record before us, we have no reason to doubt the accuracy of the trial court's reference to it in its ruling below, nor does Lugo appear to dispute that he filed such a pleading.

[3] H.B. 2283 modified the definition of sexual contact under § 13-1401(A)(3)(b) to exclude "direct or indirect touching or manipulating during caretaking responsibilities, or interactions with a minor or vulnerable adult that an objective, reasonable person would recognize as normal and reasonable under the circumstances." It also removed the defense that "the defendant was not motivated by sexual interest" from sexual abuse and child molestation under § 13-1407(E). *See* 2018 Ariz. Sess. Laws, ch. 266, §§ 1, 2.

[4]Although Lugo also indicated he was raising a claim of newly discovered evidence under Rule 32.1(e), it appears that claim was solely based on a significant change in the law under Rule 32.1(g). And, although there is a slight difference between the language under the new and former versions of Rule 32.1(g), the outcome in Lugo's case would be the same under either version of the rule.

[5]We do not consider Lugo's "Reply to No Response and application of newly minted Rules of the Court Re: Rule 32 PCR." Lugo filed that pleading on March 26, 2020, more than three months after he filed the instant petition for review; the state did not file a response to the petition for review. *See* Ariz. R. Crim. P. 32.16(f)(3) (party may file reply to response to petition for review).

¶4 On review, Lugo essentially reasserts his argument that H.B. 2283 was a significant change in the law that applies retroactively to him. Lugo's petition for review has provided no basis for us to disturb the trial court's ruling that the amendments to §§ 13-1401 and 13-1407 do not constitute a significant change in the law under Rule 32.1(g) that applies retroactively to him, nor does our review of the record persuade us otherwise. The court clearly identified Lugo's claims and correctly resolved them on their merits. Because that analysis is thorough and well-reasoned, we adopt it. *See State v. Whipple*, 177 Ariz. 272, 274 (App. 1993) (when trial court has correctly ruled on issues raised "in a fashion that will allow any court in the future to understand the resolution[, n]o useful purpose would be served by this court rehashing the trial court's correct ruling in a written decision").

¶5 Lugo also asserts that because the state did not file a response to his petition below, it waived any objection to his arguments. He contends the trial court erred not only by failing to order "a full briefing," but by becoming "a bidder for the state" by ruling in its favor. Although the state did not respond, Lugo cites no authority, and we find none, suggesting the state's not doing so entitles him to relief. Pursuant to Rule 32.11(a), a trial court must summarily dismiss a proceeding "[i]f after identifying all precluded and untimely claims, [it] determines that no remaining claim presents a material issue of fact or law that would entitle the defendant to relief." The court properly followed that procedure here.

¶6 Finally, Lugo claims the trial court erred by denying his motion to amend his Rule 32 petition to challenge the constitutionality of certain statutes, a motion he filed after the court had dismissed his Rule 32 petition below. The court described Lugo's motion to amend as a request to file a petition based "on a constitutional challenge to the vague and overbroad statutes used to indict, convict, and sentence [him]." The court correctly concluded that any such claim "on the constitutionality of the statutes in effect at the time of [Lugo's] convictions is precluded as waived because it could and should have been raised on appeal or [i]n one of [Lugo's] previous eight or nine Rule 32 petitions." *See* Ariz. R. Crim. P. 32.2(a)(3); *see also* Ariz. R. Crim. P. 32.9(d) (after defendant files Rule 32 petition, court may permit amendments to petition "only for good cause").[6]

[6]While there is a difference between the new and former versions of Rule 32.2(a)(3), and a slight difference between the language of new Rule 32.9(d) and former Rule 32.6(c), the outcome here would be the same under either version of the rules.

Moreover, to the extent Lugo attempts to raise for the first time on review the claims he had intended to present in his amended petition, or to the extent he blends them with the claims he raised below, now suggesting they arise from ineffective assistance of counsel and are based on Rule 32.1(e), (f) and (h), we do not consider them. *Cf. State v. Ramirez*, 126 Ariz. 464, 468 (App. 1980) (appellate court does not consider issues raised for the first time in petition for review).

¶7 Although we grant review, relief is denied.