IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

ADAM ALCANTAR,
Petitioner.

No. 2 CA-CR 2020-0039-PR
Filed August 24, 2020

Petition for Review from the Superior Court in Pinal County
No. S1100CR200601723
The Honorable Christopher J. O'Neil, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Kent P. Volkmer, Pinal County Attorney
By Thomas C. McDermott, Deputy County Attorney, Florence
Counsel for Respondent

Adam Alcantar, 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 Adam Alcantar 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). Alcantar has not met his burden of establishing such abuse here.

¶2 After a jury trial, Alcantar was convicted of indecent exposure, two counts of child molestation, three counts of attempted sexual conduct with a minor, and four counts of sexual conduct with a minor. He was sentenced to concurrent and consecutive prison terms totaling 144 years. This court affirmed his convictions and sentences on appeal. *State v. Alcantar*, No. 2 CA-CR 2009-0109 (Ariz. App. Apr. 30, 2010) (mem. decision). Alcantar has sought and been denied post-conviction relief on several occasions. *State v. Alcantar*, No. 2 CA-CR 2017-0211-PR (Ariz. App. Oct. 26, 2017) (mem. decision); *State v. Alcantar*, No. 2 CA–CR 2016–0361-PR (Ariz. App. Jan. 25, 2017) (mem. decision); *State v. Alcantar*, No. 2 CA–CR 2013–0077–PR (Ariz. App. June 10, 2013) (mem. decision).

¶3 In July 2019, Alcantar filed the current petition for post-conviction relief, asserting "[t]here has been a significant change in the law that would probably overturn [his] judgment or sentence" under Rule 32.1(g). Specifically, he argued that his child molestation convictions and sentences "must . . . be vacated" because, in response to *May v. Ryan*, 245 F.

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[1] Our supreme court amended the post-conviction relief rules, effective January 1, 2020. Ariz. Sup. Ct. Order R-19-0012 (Aug. 29, 2019). "Because it is neither infeasible nor works an injustice here, we cite to and apply the current version of the rules." *State v. Mendoza*, No. 2 CA-CR 2019-0281-PR, n.1, 2020 WL 3055826 (Ariz. Ct. App. June 9, 2020) ("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'" (quoting Ariz. Sup. Ct. Order R-19-0012)).

Supp. 3d 1145 (D. Ariz. 2017), the Arizona Legislature had recently removed as an affirmative defense to child molestation that the defendant was not motivated by a sexual interest.[2] He further maintained that this amendment to A.R.S. § 13-1407 was a "substantive, 'watershed rule' of criminal procedure" that applied retroactively to his case. He additionally contended that his remaining convictions were "taint[ed]" by this error.

¶4 The trial court summarily dismissed the petition, explaining that "[t]he holding in *May* is not binding on Arizona courts" and that the amendment to § 13-1407 is not retroactive. The court relied on A.R.S. § 1-244, which provides that "[n]o statute is retroactive unless expressly declared therein." The court subsequently denied Alcantar's motion for reconsideration. This petition for review followed.

¶5 On review, Alcantar reasserts his claim that the amendment to § 13-1407 applies retroactively to his case.[3] He relies on case law from the United States Supreme Court, specifically, *Whorton v. Bockting*, 549 U.S. 406, 416 (2007), which provides: "A new rule applies retroactively in a collateral proceeding only if (1) the rule is substantive or (2) the rule is a 'watershed rul[e] of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding.'" Alcantar argues the trial court agreed with him that the amendment to § 13-1407 was substantive but improperly concluded that it was not retroactive based on § 1-244.

¶6 Alcantar's reliance on *Whorton* is misplaced. That case addressed the retroactivity of "a rule announced in one of [the United States Supreme Court's] opinions." *Whorton*, 549 U.S. at 416. Here, however, we are concerned with the retroactivity of a statutory amendment. The trial court thus correctly applied § 1-244. *See DeVries v. State*, 219 Ariz. 314, ¶ 9 (App. 2008) (by state statute, no statute retroactive unless declared therein); *see also Arpaio v. Figueroa*, 229 Ariz. 444, ¶ 11 (App. 2012) (federal district

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[2]In 2018, the Legislature removed A.R.S. § 13-1407(E), which, as relevant here, provided: "It is a defense to a prosecution pursuant to [A.R.S. §§] 13-1404 or 13-1410 that the defendant was not motivated by a sexual interest." *See* 2018 Ariz. Sess. Laws, ch. 266, § 2.

[3]Alcantar attempts to incorporate by reference the pleadings filed below as part of this proceeding for post-conviction relief. However, incorporation by reference is not permitted in this context. *See* Ariz. R. Crim. P. 32.16(d) ("The petition or cross-petition must not incorporate any document by reference, except the appendix.").

court decisions concerning state law not binding on this court). And because nothing in the amendment to § 13-1407 declares that it applies retroactively, the court did not abuse its discretion in summarily dismissing this claim. *See* 2018 Ariz. Sess. Laws, ch. 266, §§ 1-3; *see also State v. Fell*, 210 Ariz. 554, ¶¶ 21-22 (2005) (in absence of legislative declaration about retroactivity, procedural enactment may be applied retroactively).

¶7 Alcantar also contends the trial court erred by failing to "address the many ancillary points [he] raise[d] in the footnotes to the petition."[4] To the extent those "ancillary points" depend on his argument that the amendment to § 13-1407 was retroactive, the court did not need to address them after rejecting the underlying premise. And to the extent Alcantar's "ancillary points" raised entirely different claims, they should not have been raised in the footnotes. *See* Ariz. R. Crim. P. 32.7(b) (petition for post-conviction relief "must include a memorandum that contains citations to relevant portions of the record and to relevant legal authorities"). In any event, those purported claims—including that his trial counsel rendered ineffective assistance and that his indictment was "impermissibly overbroad" and "fail[ed] to state a public offense"—appear to be based on Rule 32.1(a) and could not be raised in this untimely, successive proceeding. *See* Ariz. R. Crim. P. 32.2(a)(3), 32.4(b)(3)(A).

¶8 Accordingly, we grant review but deny relief.

[4]To the extent Alcantar raises new arguments for the first time on review, we do not consider them. *See State v. Ramirez*, 126 Ariz. 464, 468 (App. 1980); *see also* Ariz. R. Crim. P. 32.16(c)(2)(B) (appellate court reviews issues presented to trial court).