IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

FRED ALLEN YOUNG,
Petitioner.

No. 2 CA-CR 2020-0220-PR
Filed December 15, 2020

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NOT FOR PUBLICATION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. 31.19(e).

Petition for Review from the Superior Court in Mohave County
No. S8015CR20100360
The Honorable Derek Carlisle, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Matthew J. Smith, Mohave County Attorney
By James M. Schoppmann, Chief Deputy County Attorney, Kingman
Counsel for Respondent

Fred Allen Young, Florence
In Propria Persona

MEMORANDUM DECISION

Judge Brearcliffe authored the decision of the Court, in which Presiding Judge Staring and Chief Judge Vásquez concurred.

B R E A R C L I F F E, Judge:

¶1 Fred Young seeks review of the trial court's ruling summarily dismissing his petition for post-conviction relief 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). Young has not shown such abuse here.

¶2 After a jury trial in 2013, Young was convicted of sexual exploitation of a minor, voyeurism, surreptitious videotaping, and two counts each of child molestation and sexual abuse of a minor. The trial court sentenced Young to consecutive and concurrent sentences totaling thirty-four years. We affirmed Young's convictions and sentences on appeal, *State v. Young*, No. 1 CA-CR 13-0429 (Ariz. App. Dec. 2, 2014) (mem. decision), and denied relief on his petition for review of the court's dismissal of his first petition for post-conviction relief, *State v. Young*, No. 1 CA-CR 17-0317 PRPC (Ariz. App. Jan. 4, 2018) (mem. decision).

¶3 In August 2018, Young initiated his second Rule 32 proceeding, arguing the statutory amendments to A.R.S. §§ 13-1401 and 13-1407 under House Bill (H.B.) 2283 constituted a significant change in the

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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). "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.'" *State v. Mendoza*, 249 Ariz. 180, n.1 (App. 2020) (quoting Ariz. Sup. Ct. Order R-19-0012). "Because it is neither infeasible nor works an injustice here, we cite to and apply the current version of the rules." *Id.*

law that would probably overturn his convictions or sentences.[2] *See* 2018 Ariz. Sess. Laws, ch. 266, §§ 1-2.[3] Young also claimed that *May v. Ryan*, 245 F. Supp. 3d 1145 (D. Ariz. 2017), and the changes to the applicable statutes were retroactively applicable to his case. And although he argued these changes constituted a significant change in the law, he also asserted they did not constitute "new rules," but instead "establish[ed] bedrock principles."

¶4 The trial court summarily dismissed his petition. The court explained that the holding in *May* is not binding on Arizona courts and that the amendments to the statutes, which were substantive, did not apply retroactively to Young's case. *See* A.R.S. § 1-244. The court subsequently denied Young's "petition for reconsideration."[4] This petition for review followed.

¶5 On review, Young essentially repeats his claims, reasserting that the amendments to §§ 13-1401 and 13-1407 under H.B. 2283 apply retroactively to his case. Insofar as Young cites cases dealing with the retroactivity of other cases and procedural rules, rather than statutory amendments, they are not instructive here and we do not address them. Rather, we are concerned with the retroactivity of a statutory amendment which, by state statute, *see* § 1-244, is not retroactive unless so declared. *See DeVries v. State*, 219 Ariz. 314, ¶ 9 (App. 2008). 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 trial court thus correctly found that the statutory changes do not apply to Young.

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[2]Young filed a pro se Rule 32 petition, and after appointed counsel filed a notice stating she was "unable to find any colorable claims" to raise, Young filed a supplemental, pro se petition, which the court considered along with his original petition.

[3]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.

[4]It appears the trial court treated Young's petition as a motion for rehearing pursuant to Rule 32.14.

¶6 Relying on *May*, Young also argues the state should have borne the burden to prove sexual intent rather than requiring him to show lack of sexual intent as an affirmative defense. In *May*, a federal trial court determined that A.R.S. §§ 13-1407(E) and 13-1410 unconstitutionally shifted the burden of proof to the defendant because, by making the lack of sexual motivation an affirmative defense to child molestation, they required him to disprove an element of the offense, namely "sexual intent." 245 F. Supp. 3d at 1154-56, 1164. But the court's conclusion in *May* is flatly contradicted by Arizona law, and we are not bound by federal district court decisions. *See State v. Holle*, 240 Ariz. 300, ¶¶ 17-19, 40 (2016) (§§ 13-1407(E) and 13-1410 do not violate due process); *State v. Smyers*, 207 Ariz. 314, n.4 (2004) ("The courts of this state are bound by the decisions of [our supreme] court and do not have the authority to modify or disregard [its] rulings."); *Arpaio v. Figueroa*, 229 Ariz. 444, ¶ 11 (App. 2012) (federal district court decisions concerning state law not binding on this court).

¶7 Finally, Young argues that because the state did not respond to his petition below, "there was no issue in dispute." He contends, therefore, that the trial court abused its discretion by failing to grant a default judgment in his favor. Young is correct that the state did not respond to his request for Rule 32 relief. But he cites no authority, and we find none, suggesting the state's failure to respond entitles him to relief. Pursuant to Rule 32.11(a), a trial court must summarily dismiss a proceeding after it reviews the defendant's claims to determine whether any are precluded or untimely and then, of any remaining claims, whether they "present[] a material issue of fact or law." The court properly followed that procedure here.

¶8 Accordingly, we grant review but deny relief.