

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

ROBERT GEORGE ROPER,
Petitioner.

No. 2 CA-CR 2022-0028-PR
Filed May 3, 2022

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NOT FOR PUBLICATION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 Pima County
No. CR052077
The Honorable Renee T. Bennett, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Arizona Capital Representation Project, Tucson
By Amy Armstrong, Director/Staff Counsel and
Sam Kooistra, Staff Counsel
Counsel for Petitioner

MEMORANDUM DECISION

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

ESPINOSA, Judge:

¶1 Robert Roper seeks review of the trial court's orders dismissing his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P., and simultaneously denying his motion for rehearing and dismissing his amended petition for post-conviction relief.¹ Roper argues that his de facto life without parole sentence (LWOP) is unconstitutional, we should not follow our supreme court's holding in *State v. Soto-Fong*, 250 Ariz. 1 (2020), and the imposition of the felony murder rule to a then-juvenile like him is unconstitutional. We will not disturb a trial court's order in a Rule 32 proceeding absent an abuse of discretion. See *State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). Roper has shown no such abuse here.

Factual and Procedural History

¶2 Roper was convicted after a jury trial of first-degree murder, armed robbery, and theft, offenses he committed in 1995 when he was fifteen years old. The trial court sentenced him to a prison term of natural life without the possibility of release for the murder conviction, followed by concurrent prison terms, the longer of which is twenty-one years. We affirmed Roper's convictions and sentences on appeal. *State v. Roper*, No. 2 CA-CR 97-0113 (Ariz. App. Dec. 23, 1999) (mem. decision).

¶3 Roper then sought post-conviction relief. The trial court granted partial relief, vacating his natural life sentence and imposing a life sentence with the possibility of release in twenty-five years.² In 2005, we

¹Roper filed an amended Rule 32 petition and a supplemental brief after his Rule 32 proceeding was twice stayed while the petition for review was pending in the supreme court in *State v. Helm*, 245 Ariz. 560 (App. 2018), which was denied given that court's rulings in *Soto-Fong*. The trial court dismissed the amended petition when it denied Roper's motion for rehearing.

²According to the trial court, following his resentencing, Roper was eligible for parole for the murder count on or about January 1, 2021, and

consolidated Roper's appeal from his resentencing and his petition for review of the denial of relief on his claim of ineffective assistance of counsel, affirmed his murder and armed robbery convictions and sentences, vacated his conviction and sentence for theft, and denied relief on his petition for review. *State v. Roper*, Nos. 2 CA-CR 2005-0399, 2 CA-CR 2005-0421-PR, ¶¶ 5, 10-12 (Ariz. App. Oct. 31, 2006) (consol. mem. decision).

¶4 Roper again sought post-conviction relief in 2013. He asserted claims based on a significant change in the law and actual innocence, and maintained "[t]he U.S. Supreme Court has ruled that mand[a]tory life without parole sentences for juveniles is unconstitutional," citing *Miller v. Alabama*, 567 U.S. 460, 465 (2012) (Eighth Amendment prohibits mandatory sentences of life without parole for juvenile homicide offenders). On review, we vacated the trial court's ruling summarily dismissing Roper's notice of post-conviction relief, which it had treated as his petition, and remanded for additional proceedings. *State v. Roper*, No. 2 CA-CR 2013-0462-PR, ¶¶ 4, 8 (Ariz. App. Apr. 18, 2014) (mem. decision).³

¶5 Roper initiated the post-conviction proceeding now before us in 2017, asserting in his petition that his aggregate sentences collectively constitute a de facto sentence of LWOP, and all sentences of LWOP for juvenile offenders are unconstitutional. He maintained *Soto-Fong* should not be followed because it was wrongly decided and is contrary to binding precedent set forth in *Graham v. Florida*, 560 U.S. 48 (2010), *Miller*, and *Montgomery v. Louisiana*, 577 U.S. 190 (2016). Last, he argued that applying the felony murder rule to juveniles violates the Eighth Amendment's prohibition against cruel and unusual punishment and due process. The trial court summarily dismissed Roper's petition and denied his motion for rehearing, finding, in relevant part, that it had "no authority to refuse to follow the decisions of the Arizona Supreme Court," which held, in *Soto-Fong*, "that the Eighth Amendment does not prohibit de facto juvenile life sentences." 250 Ariz. 1, ¶ 40. The court also dismissed Roper's claim, raised in his amended petition and supplemental brief, that felony murder as applied to juveniles violates the Eighth Amendment and due process,

had that been granted, he would be released on the armed robbery count in approximately January 2042, when he would be sixty-one years old.

³ Apparently, after counsel notified the trial court there was no significant change in the law, that proceeding was dismissed.

finding that claim both untimely and without merit. This petition for review followed.

De Facto Sentence of Life without Parole

¶6 On review, Roper argues that because he was a juvenile when he committed the offenses, his de facto sentence of LWOP is subject to “constitutional scrutiny” under *Graham* and *Miller*, and the trial court erred by finding otherwise. He further contends the court erroneously relied on *Soto-Fong*, which as previously noted, he maintains was wrongly decided and is contrary to controlling United States Supreme Court precedent, and requests that we disregard that case and vacate his murder conviction.

¶7 Consistent with our decision in *State v. Helm*, 245 Ariz. 560, ¶ 8 (App. 2018), our supreme court determined in *Soto-Fong* that *Graham* and *Miller* are inapplicable to defendants, like Roper, who received a parole-eligible life sentence, irrespective of whether that defendant had been sentenced to consecutive prison terms for other offenses. 250 Ariz. 1, ¶¶ 2, 4, 28, 31, 47, 49, 50. Although Roper argues *Soto-Fong* was incorrectly decided, we have no authority to reach that question.⁴ See *State v. Smyers*, 207 Ariz. 314, n.4 (2004) (court of appeals cannot disregard established Arizona Supreme Court precedent). Rather, we must follow our supreme court’s decisions, particularly in a case like this, where the court ruled based on decisions issued by the United States Supreme court before *Soto-Fong*. See *State v. Zamora*, 220 Ariz. 63, n.7 (App. 2009) (“On questions of federal constitutional law, we are bound by decisions of our supreme court absent a subsequent decision of the United States Supreme Court on the same subject.”). We thus do not address this argument further.

Felony Murder

¶8 Roper also argues the trial court erroneously dismissed his claim that felony murder cannot constitutionally be applied to juvenile offenders, a claim he raised primarily as one based on a significant change in the law under Rule 32.1(g). As previously noted, the court found this claim time-barred but also rejected it on the merits.⁵ On review, Roper argues that the court erred in finding his claim untimely, in part, because

⁴But see *Helm*, 245 Ariz. 560, ¶¶ 13-22 (Eckerstrom, J., dissenting).

⁵The trial court also rejected Roper’s “derivative” claims that his sentence is no longer authorized by law because of the unconstitutionality of his conviction, see Rule 32.1(c), and that no reasonable factfinder could have found him guilty, see Rule 32.1(h).

the “most recent” of the cases upon which he relied “was decided in 2014,” and that “years had passed” between that time and the filing of his notice in 2017.⁶ He asserts, instead, that his notice “was timely initiated” following the 2016 filing of *Montgomery*, the case that determined *Miller* applied retroactively. *Montgomery*, 577 U.S. at 206.

¶9 Under the circumstances here, we cannot say the trial court erred in finding Roper’s notice and petition untimely. Claims arising under Rule 32.1(b) through (h) must be filed “within a reasonable time after discovering the basis of the claim.” Ariz. R. Crim. P. 32.4(b)(3)(B). And, when a defendant raises a claim under Rule 32.1(g) in a successive or untimely post-conviction proceeding, “the defendant must explain the reasons for not raising the claim in a previous notice or petition, or for not raising the claim in a timely manner.” Ariz. R. Crim. P. 32.2(b). A notice lacking “sufficient” reasons is subject to summary dismissal. *Id.* Notably, Roper has failed on review to proffer any persuasive argument explaining how the court abused its discretion by concluding he failed to file his notice and petition within a reasonable time, a finding well within the court’s discretion to make. Accordingly, because Roper has not established the court abused its discretion in summarily dismissing his claim as untimely, we need not address his argument that the court improperly dismissed it on the merits.⁷

Disposition

¶10 Although we grant review, relief is denied.

⁶We presume the trial court was referring to *Hall v. Florida*, 572 U.S. 701 (2014).

⁷Additionally, as mentioned by the state in its response to Roper’s supplemental brief below, and also noted in the trial court’s ruling, Roper did “not cite . . . any binding authority indicating that juveniles are exempt from prosecution for felony murder in Arizona.” *Cf. Bear Cloud v. State*, 334 P.3d 132, ¶ 47 (Wyo. 2014) (noting Supreme Court’s unwillingness in *Miller*, a felony murder case, to extend Eighth Amendment’s protections to accomplices).