

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

MARK ANTHONY LUGO,
Petitioner.

No. 2 CA-CR 2022-0037-PR
Filed June 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NOT FOR PUBLICATION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. CR035437001
The Honorable Javier Chon-López, Judge

REVIEW GRANTED; RELIEF DENIED

Mark Anthony Lugo, Florence
In Propria Persona

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MEMORANDUM DECISION

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

E P P I C H, Presiding Judge:

¶1 Mark Lugo seeks review of the trial court’s ruling dismissing what appears to be his eleventh petition for post-conviction relief and denying his motion for rehearing, filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb those orders unless the court abused its discretion. *See State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). Lugo has shown no 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. We 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 six subsequent proceedings. *State v. Lugo*, No. 2 CA-CR 2019-0285-PR (Ariz. App. May 11, 2020) (mem. decision); *State v. Lugo*, No. 2 CA-CR 2018-0291-PR (Ariz. App. Jan. 10, 2019) (mem. decision); *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).¹

¶3 In September 2020, Lugo initiated his most recent Rule 32 proceeding. He argued the statutes under which he was convicted are unconstitutional, asserting that the legislative history materials related to A.R.S. §§ 13-1401 and 13-1407, which he obtained in 2020, constitute newly

¹In addition, Lugo sought and was denied post-conviction relief in 2014 and twice in 2019. He did not seek review of those rulings.

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discovered material evidence.² *See* Ariz. R. Crim. P. 32.1(e); *see also* 2018 Ariz. Sess. Laws, ch. 266, §§ 1, 2. Lugo also asserted the statutes are vague and overbroad, and asked that his convictions be set aside and that the court “[i]nvite” the legislature to “go back and try again and make the sex offense laws 100% in conformity with our Constitutions.” In October 2021, the trial court summarily dismissed Lugo’s petition, finding his claims precluded because they had “been or could have been raised in prior post-conviction petitions or on appeal” and because he had failed to present sufficient reasons why he did not raise them in a previous notice or petition or in a timely manner, and that they were, in any event, meritless. The court also denied Lugo’s motion for rehearing. This petition for review followed.³

¶4 On review, Lugo reasserts that his 2020 discovery of the video recording of a legislative committee meeting regarding proposed amendments to the statutes under which he was convicted constitutes newly discovered evidence that renders his convictions unconstitutional. He also repeats his claim that the relevant statutes are further rendered unconstitutional because they are vague and overbroad. Importantly, Lugo does not explain how the trial court abused its discretion by summarily dismissing his petition. *See* Ariz. R. Crim. P. 32.16(c)(2)(D). Rather, other than pointing out that he has standing to raise his claims because “he was harmed by the particular features of these statutes,” and stating he has “always” maintained he did not raise his claims in a previous petition

²However, as the trial court pointed out, Lugo “appears to again claim” there has been a significant change in the law in the statutes related to sexual crimes against children under which he was convicted. *See* Ariz. R. Crim. P. 32.1(g). And, as the court further noted, this court previously rejected that very claim on review. *See Lugo*, No. 2 CA-CR 2019-0285-PR, ¶ 4.

³Insofar as Lugo is attempting on review to challenge the trial court’s denial of three additional motions he filed after the court denied the underlying Rule 32 petition and motion for rehearing, we do not consider those arguments. *See State v. Ramirez*, 126 Ariz. 464, 468 (App. 1980) (appellate court does not consider issues raised for the first time in petition for review). Nor do we consider Lugo’s requests and motions filed in March, April, and May 2022, which he filed after filing the instant petition for review. *See id.*

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because he did not have access to the necessary transcripts,⁴ Lugo essentially reasserts on review the arguments he raised below.

¶5 As previously noted, the trial court determined that Lugo failed to present sufficient reasons why he had not raised his claims in a previous notice or petition or in a timely manner. *See* Ariz. R. Crim. P. 32.2(b) (when defendant raises claim under Rule 32.1(b) through (h) “in a successive or untimely post-conviction notice, 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”). “If the notice does not provide sufficient reasons why the defendant did not raise the claim in a previous notice or petition, or in a timely manner, the court may summarily dismiss the notice.” *Id.*; *see also* Ariz. R. Crim. P. 32.4(b)(3)(B) (defendant must file notice for claim under Rule 32.1(b) through (h) within reasonable time after discovering basis for claim).

¶6 Moreover, the trial court further concluded that Lugo had, in fact, “ma[d]e a previous claim that House Bill (H.B.) 2283 constituted a retroactive significant change in the law that applied to his case in a previous petition which this Court and the Court of Appeals reviewed and denied.” Additionally, this court previously found that the trial court correctly denied Lugo’s motion to amend his Rule 32 petition in a prior proceeding to raise “a constitutional challenge to the vague and overbroad statutes used to indict, convict, and sentence [him],” noting that such a claim was precluded as waived. *Lugo*, No. 2 CA-CR 2019-0285-PR, ¶ 6.

¶7 The trial court also rejected Lugo’s claim based on newly discovered evidence on the merits. *See State v. Amaral*, 239 Ariz. 217, ¶ 9 (2016) (newly discovered material facts under Rule 32.1(e) require, in part, that the newly discovered material evidence “must appear on its face to have existed at the time of trial but be discovered after trial”). The court additionally noted that our supreme court’s ruling in *State v. Holle*, 240 Ariz. 300, ¶ 40 (2016), in which it determined that “[t]reating lack of sexual motivation under [former] § 13-1407(E) as an affirmative defense which a

⁴In support of this argument, Lugo refers to a 2008 trial court order directing the preparation of the post-conviction record, including the preparation of transcripts, apparently asserting that order was not complied with.

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defendant must prove does not offend due process,”⁵ bars Lugo’s challenge that the statutes under which he was convicted are unconstitutionally vague and violate due process.

¶8 Once the trial court correctly found Lugo’s claims precluded, it was not required to address the merits of those claims, although it did so as to some of them. Because we agree with the court that Lugo’s claims are precluded, to the extent he asserts the court erred by rejecting his claims on the merits, we need not address that argument. *See Roseberry*, 237 Ariz. 507, ¶ 7 (we will affirm if trial court’s ruling is legally correct for any reason). Finally, insofar as Lugo attempts to raise for the first time on review claims of ineffective assistance of counsel regarding the performance of his attorneys in 1992 to 1995, and in 2008 and 2009, noting it “might be too late” to raise such claims, we do not consider them. *See State v. Ramirez*, 126 Ariz. 464, 468 (App. 1980).

¶9 We grant review but deny relief.

⁵Although this defense was available at the time of Lugo’s offenses in 1990, *see* 1988 Ariz. Sess. Laws, ch. 301, § 2, our legislature eliminated this defense in 2018, *see* 2018 Ariz. Sess. Laws, ch. 266, § 2.