

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

ROBERT GEORGE ROPER,
Petitioner.

No. 2 CA-CR 2013-0462-PR
Filed April 18, 2014

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NOT FOR PUBLICATION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); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Pima County

No. CR052077

The Honorable Richard D. Nichols, Judge

REVIEW GRANTED; RELIEF GRANTED IN PART

COUNSEL

Barbara LaWall, Pima County Attorney
By Jacob R. Lines, Deputy County Attorney, Tucson
Counsel for Respondent

Robert G. Roper, Florence
In Propria Persona

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MEMORANDUM DECISION

Chief Judge Howard authored the decision of the Court, in which Presiding Judge Vásquez and Judge Miller concurred.

H O W A R D, Chief Judge:

¶1 Robert Roper petitions this court for review of the trial court's order summarily dismissing his post-conviction relief proceeding brought pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that ruling unless the court clearly has abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 After a jury trial, Roper was convicted of first-degree murder, armed robbery, and theft. For the murder conviction, the trial court sentenced him to a prison term of natural life without the possibility of release, and imposed a twenty-one year prison term for armed robbery and a 1.5-year prison term for theft. The terms for armed robbery and theft were to be served concurrently with each other but consecutively to Roper's sentence for murder. We affirmed those convictions and sentences on appeal. *State v. Roper*, No. 2 CA-CR 97-0113 (memorandum decision filed Dec. 23, 1999).

¶3 Roper sought post-conviction relief claiming that *State v. Viramontes*, 204 Ariz. 360, 64 P.3d 188 (2003), was a significant change in the law entitling him to be resentenced to life imprisonment with the possibility of release after twenty-five years and that his trial counsel had been ineffective for failing to present purportedly exculpatory evidence. The trial court granted relief on Roper's sentencing claim, vacating his natural life sentence and imposing a life sentence with the possibility of release in twenty-five years. *See* 1993 Ariz. Sess. Laws, ch. 153, § 1 (providing as sentences for first-degree murder life without "release[] on any basis until the completion of the service of twenty-five calendar years" or "natural life" without possibility of "release[] on any basis"). It denied his

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claim of ineffective assistance of counsel. We consolidated Roper's appeal from his resentencing and his petition for review; we affirmed his life sentence, 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 (consolidated) (memorandum decision filed Oct. 31, 2006).

¶4 Roper filed a notice of post-conviction relief in June 2013 stating that he was raising claims of a significant change in the law and actual innocence. The only explanation Roper offered for his claims was that “[t]he U.S. Supreme Court has ruled that mand[a]tory life without parole sentences for juveniles is unconstitutional,” citing *Miller v. Alabama*, ___ U.S. ___, 132 S. Ct. 2455 (2012). Treating Roper's notice as a petition for post-conviction relief, the trial court summarily dismissed it.¹ It concluded that *Miller* did not apply to Roper because it had not been required to impose a life term without the possibility of release. The court noted the governing statutes gave it the option of imposing a natural life without any possibility of release or a life sentence with eligibility for release after twenty-five years after considering mitigating circumstances, including Roper's age. It further concluded Roper had not identified any facts supporting his claim of actual innocence nor his reasons for not raising that claim “in any of his previous petitions.”

¶5 Roper filed a motion for rehearing, arguing the trial court had used “non-applicable aggravating circumstances,” thereby “all but guarantee[ing]” the imposition of a natural life sentence. He

¹Although Rule 32.2(b) permits a trial court to summarily dismiss a notice of post-conviction relief, the court did not expressly rely on that provision here and instead appears to have dismissed Roper's notice based on Rule 32.6(c). Rule 32.6(c) permits a court to summarily dismiss a petition that presents no “material issue of fact or law which would entitle the defendant to relief.” Pursuant to Rule 32.4(c)(2), however, “[a] defendant proceeding without counsel shall have sixty days to file a petition from the date the notice is filed or from the date the request for counsel is denied.”

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further asserted the court had improperly considered his “‘age’ and not [his] ‘youth’” in determining his sentence, thereby ignoring his “impulsivity, recklessness and vulnerability” in violation of *Miller* as well as *Roper v. Simmons*, 543 U.S. 551 (2005), and *Graham v. Florida*, 560 U.S. 48 (2010). The court denied the motion, repeating that Roper’s life sentence “was not mandatory.” This petition for review followed.

¶6 On review, Roper repeats his claim that *Miller* is a significant change in the law applicable to his case. See Ariz. R. Crim. P. 32.1(g). Many of the arguments he raises, however, were not raised below. Furthermore, the Arizona Justice Project (“AJP”) requested permission to file an amicus curiae brief that raises facts and arguments not presented below. But this court does not review arguments not made below. See *State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (appellate court will not consider on review claims not raised below); see also Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review must contain “issues which were decided by the trial court and which the defendant wishes to present to the appellate court for review”). Nor will we consider evidence not first presented to the trial court. Cf. *Brookover v. Roberts Enters., Inc.*, 215 Ariz. 52, ¶ 8, 156 P.3d 1157, 1160 (App. 2007). Nevertheless, taking into account Roper’s self-represented status, he adequately raised the *Miller* issue. But the trial court should have the first opportunity to evaluate the facts in the AJP’s amicus brief, if presented there, and to apply the law to those facts. Accordingly, we vacate the portion of the trial court ruling pertaining to Roper’s *Miller* claim and remand.

¶7 Roper did argue below that the trial court did not properly evaluate his youth in imposing the sentence it did. But that argument was raised for the first time in his motion for rehearing. A trial court need not address arguments made for the first time in a motion for rehearing. See *Ramirez*, 126 Ariz. at 467, 616 P.2d at 927. In any event, Roper is not entitled to relief even if we assume that *Miller* could reasonably be construed as a significant change in the law supporting a claim that a trial court must give special weight to a defendant’s lack of maturity in determining whether to impose a life or natural life sentence. Roper’s argument is grounded in his

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mistaken belief that he has been sentenced to natural life in prison. Given that the court imposed the least severe sentence available to it, whether it properly considered the various mitigating factors in imposing that sentence is immaterial.

¶8 Accordingly, we grant review and relief concerning Roper's *Miller* claim. We vacate the portion of the trial court's ruling relating to that claim and remand the case for additional proceedings. The trial court may order additional briefing or hold hearings, if it determines that to be necessary. As to Roper's claim that the trial court improperly failed to consider sentencing factors, we grant review but deny relief.