

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Respondent*,

v.

CODY JAMES SUTLIFF, *Petitioner*.

No. 1 CA-CR 20-0429 PRPC
FILED 9-23-2021

Petition for Review from the Superior Court in Mohave County

No. S8015CR2015-00232

No. S8015CR2015-01193

The Honorable Richard D. Lambert, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Mohave County Attorney's Office, Kingman

By Matthew J. Smith

Counsel for Respondent

Cody James Sutliff, Douglas

Petitioner

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MEMORANDUM DECISION

Presiding Judge David B. Gass, Judge Michael J. Brown and Judge David D. Weinzweig delivered the decision of the Court.

PER CURIAM:

¶1 Cody James Sutliff petitions this court for review from the dismissal of his petition for post-conviction relief, filed pursuant to Arizona Rule of Criminal Procedure (“Rule”) 33. We grant review and deny relief.

¶2 The State indicted Sutliff, in two separate causes of action, for drug-related crimes committed on various dates in 2015. In July 2015, Sutliff pleaded guilty in Cause No. CR2015-00232 to possessing dangerous drugs for sale, possessing narcotic drugs for sale and driving while under the influence of drugs. The superior court sentenced him to concurrent terms, the longest of which was five years’ imprisonment, and awarded him 20 days of presentence incarceration credit. In June 2016, Sutliff pleaded guilty in Cause No. CR2015-01193 to the attempted sale of narcotic drugs. The superior court sentenced him to three and one-half years’ imprisonment, to begin after completion of his sentence in the -00232 case, and awarded him 13 days of presentence incarceration credit.

¶3 In June 2020, approximately four years after Sutliff was sentenced in the second case, he filed his first notice and petition requesting post-conviction relief in both cases. Sutliff asserted the superior court had awarded him too little presentence incarceration credit, which would result in him being held in custody beyond the expiration of his sentences. *See* Ariz. R. Crim. P. 33.1(d).¹ Sutliff asked that the untimeliness of his notice be excused because he had only recently learned his credit was deficient. *See* Ariz. R. Crim. P. 33.2(b)(1).

¹ The rules of procedure applicable to Sutliff’s proceedings for post-conviction relief were amended as of January 1, 2020. The current rules apply to all actions “pending on January 1, 2020, except to the extent that the court in an affected action determines that applying the rule or amendment would be infeasible or work an injustice, in which event the former rule or procedure applies.” Ariz. S. Ct. Order R-19-0012 (Aug. 29, 2019). We cite the current rules unless otherwise indicated.

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¶4 The superior court dismissed Sutliff’s petition on the ground it had not been filed within 90 days after Sutliff was sentenced in the -00232 case (i.e., the first of the two cases). The court made no reference to Sutliff’s second case in its ruling. Approximately one week after the court’s dismissal, the State responded to Sutliff’s petition on the merits, arguing he had received the correct amount of presentence incarceration credit in both cases. Sutliff filed a motion for rehearing, which the superior court denied – again referring to the ninety-day deadline to file a notice for post-conviction relief.

¶5 Sutliff petitioned this court for review of the superior court’s decision. He argues he is entitled to 260 days of additional presentence incarceration credit toward his sentence in the second case (-01193) and that the superior court abused its discretion by not addressing the issue on the merits. We review the court’s dismissal of Sutliff’s petition for an abuse of discretion, and we will not upset its decision “if it is legally correct for any reason.” *See State v. Roseberry*, 237 Ariz. 507, 508, ¶ 7 (2015). We consider a petitioner’s entitlement to presentence incarceration credit *de novo*. *State v. Lambright*, 243 Ariz. 244, 249, ¶ 9 (App. 2017).

¶6 Sutliff’s claim for relief falls under Rule 33.1(d), which required him to file a notice requesting post-conviction relief “within a reasonable time after discovering the basis for the claim.” Ariz. R. Crim. P. 33.4(b)(3)(B). By contrast, claims based on constitutional violations under Rule 33.1(a) must be filed “within 90 days after the oral pronouncement of sentence.” Ariz. R. Crim. P. 33.4(b)(3)(A). The superior court here appears to have treated Sutliff’s claim as though it were brought under Rule 33.1(a) rather than Rule 33.1(d). But we need not remand the matter for a determination on whether Sutliff provided “sufficient reasons” for not raising the claim sooner, *see* Ariz. R. Crim. P. 33.2(b)(1), because our *de novo* review of Sutliff’s presentence incarceration credit reveals no basis for relief.

¶7 A defendant sentenced to prison shall be credited with “[a]ll time actually spent in custody pursuant to an offense until the prisoner is sentenced to imprisonment for such offense.” A.R.S. § 13-712(B). The record shows Sutliff was arrested pursuant to the first case (-00232) on February 27, 2015, and that he posted bond in that case on March 18, 2015. On September 30, 2015, while Sutliff was out on bond, he was arrested pursuant to the second case (-01193). On October 13, 2015, Sutliff was arraigned in the second case and sentenced in the first case. At that point, the bond was discharged. Sutliff was incarcerated for his convictions in the first case during his subsequent proceedings in the second case.

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¶8 Sutliff fails to show he is entitled to additional presentence incarceration credit. *Cf. State v. Cecena*, 235 Ariz. 623, 625, ¶ 10 (App. 2014) (defendant bears burden to establish entitlement to credit at time of sentencing). In the first case (-00232), the superior court correctly awarded him 20 days of credit – which corresponded to Sutliff’s time in custody from the date of his arrest in that case to the date he posted bond. In the second case (-01193), the court correctly awarded Sutliff 13 days of credit – which corresponded to the time from his arrest in that case to his sentencing in the first case. *See State v. Hamilton*, 153 Ariz. 244, 246 (App. 1987) (presentence incarceration credit does not include date of sentencing where that date serves as the first day of defendant’s prison sentence).

¶9 Sutliff argues he is entitled to credit toward his sentence in the second case (-01193) from October 13, 2015 – the date he was sentenced in the first case – to June 29, 2016 – the date he was sentenced in the second case. He is incorrect. Because the superior court ordered, consistent with Sutliff’s plea agreement, that the sentence in the second case run consecutive to the sentence in the first case, Sutliff may not receive credit in his second case for time spent incarcerated in the first case. *See State v. McClure*, 189 Ariz. 55, 57 (App. 1997) (by agreeing in plea deal to serve one sentence consecutive to another, defendant was not entitled to credit on second sentence for time served during first sentence even if some of that time was “pursuant to” the second offense); *see also State v. Whitney*, 159 Ariz. 476, 487 (1989) (concluding the trial court did not err by refusing to award “double credit” toward consecutive sentences); *State v. Sodders*, 130 Ariz. 23, 30 (App. 1981) (“We do not believe . . . that the legislature intended that a criminal defendant would receive compounded credit time when consecutive sentences are imposed.”).

¶10 We therefore grant review but deny relief.



AMY M. WOOD • Clerk of the Court
FILED: AA