

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Respondent*,

v.

SERGIO BOTELLO-RANGEL, *Petitioner*.

No. 1 CA-CR 19-0332 PRPC
FILED 2-25-2020

Petition for Review from the Superior Court in Navajo County
No. CR2008-00718

The Honorable Dale P. Nielson, Judge
The Honorable John Lamb, Judge (retired)

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Navajo County Attorney's Office, Holbrook
By Michael R. Shumway
Counsel for Respondent

Aspey Watkins & Diesel, PLLC, Flagstaff
By Kathryn G. Mahady
Counsel for Petitioner

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OPINION

Judge Paul J. McMurdie delivered the opinion of the Court, in which Presiding Judge Samuel A. Thumma and Jennifer M. Perkins joined.

M c M U R D I E, Judge:

¶1 Petitioner Sergio Botello-Rangel seeks review from the superior court’s dismissal of his petition for post-conviction relief under Arizona Rule of Criminal Procedure (“Rule”) 33.1.¹ We grant review but deny relief, holding: (1) a defendant waives a claim of ineffective assistance of counsel under Rule 33.1(a) by failing to raise the claim in a timely manner; (2) Rule 33.1(e) does not encompass a claim of newly discovered evidence of ineffective assistance of counsel or involuntary guilty plea, and is instead restricted to newly discovered material facts that probably would have changed the judgment or sentence; and (3) a defendant waives a claim of newly discovered evidence by failing to raise it within a reasonable time after discovering the factual predicate for the claim.

FACTS AND PROCEDURAL BACKGROUND

¶2 In 2008, the State charged Botello-Rangel with transportation of marijuana and possession of marijuana for sale of approximately 86 pounds of the drug. In January 2009, Botello-Rangel pled guilty. Under the terms of his plea agreement, Botello-Rangel would plead guilty to an amended count of conspiracy to transport marijuana for sale, and the more serious charges would be dismissed. The plea agreement stipulated that

¹ Effective January 1, 2020, our supreme court amended the post-conviction relief rules. *See* Order Abrogating Current Rule 32 of the Arizona Rules of Criminal Procedure and Adopting New Rule 32 and Rule 33 and Related Provisions, Arizona Court Order No. R-19-0012 (Adopted Aug. 29, 2019). The rules relating to defendants who plead guilty are now codified in Rule 33. The amended rules 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.” Order at 2. Because there were no substantive changes to the respective rules related to this opinion, we apply and cite to the current rules.

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Botello-Rangel would be placed on probation with all terms and conditions of probation to be imposed at the discretion of the court.

¶3 The court engaged Botello-Rangel in a colloquy at the change-of-plea hearing:

THE COURT: When you enter this plea of guilty you'll also be giving up certain Constitutional rights, which [are] listed in paragraph 12 for you.

THE DEFENDANT (through the Interpreter): Yes.

THE COURT: You'll be giving up the right to have a trial by jury. You give up the right for the jury to decide your innocence or guilt. You give up the right for the jury to decide any aggravating factors in your sentence. You give up the right to have the state prove that you are guilty of this crime beyond a reasonable doubt. You give up the right to have an attorney assist you at the trial. You give up the right for you or your attorney to ask questions of the people that are accusing you of this crime. You give up the right to present witnesses or defenses that you might have. You give up the right to testify yourself or to remain silent, and you give up the right to appeal. Do you understand that you have these Constitutional rights and that you are giving them up today when you make this plea of guilty?

THE DEFENDANT (through the Interpreter): Yes.

THE COURT: If you are not a citizen of the United States, pleading guilty to a crime may affect your immigration status and may result in deportation. Do you understand that?

THE DEFENDANT (through the Interpreter): Yes.

The State provided the following factual basis for the guilty plea:

[THE STATE]: On September 22nd, 2008, on Interstate 40 near Holbrook, Mr. Rangel was stopped in a pickup truck which he was driving. The pickup truck was, what is commonly referred to as a lifted truck, one that sits up high, and it did not have mud flaps in compliance with Arizona law. A subsequent search of the pickup revealed 86 pounds of hydroponic marijuana concealed in a false compartment in a freshly added auxiliary gas tank. The value of the marijuana, according to the drug interdiction Officer Dean McMains, was

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in excess of—wholesale in excess of \$172,000, and retail in excess of \$344,000. Based on the value of the drugs it's the state's position that Mr. Rangel was working for other people when he was transporting this marijuana through Navajo County, and that they had conspired to do so

THE COURT: And it's based on the amount also that it's for sale, right?

[THE STATE]: Yes, sir.

THE COURT: Mr. Rangel, is this true, and is this why you are pleading guilty to this crime?

THE DEFENDANT (through the Interpreter): Yes.

The court accepted the plea and later placed Botello-Rangel on five years of supervised probation. He completed his probation in February 2014.

¶4 Before he finished his probation, in December 2013, the federal government served a notice of removal from the United States on Botello-Rangel because of the criminal conviction in this case. The notice stated his criminal conviction was an aggravated felony conviction under federal law, meaning he was not eligible for any form of relief from deportation. In June 2018, more than four years after his probation terminated, Botello-Rangel filed a notice of post-conviction relief. Although he initially only raised a claim for failing to file a timely notice without fault under Rule 33.1(f), eventually Botello-Rangel raised three substantive claims: (1) ineffective assistance of counsel because counsel “did not advise him that there would be immigration consequences to his guilty plea”; (2) involuntary guilty plea because he “entered a guilty plea without any knowledge that his plea would directly affect his immigration status”; and (3) the existence of newly discovered material facts that supported claims 1 and 2. Botello-Rangel requested that his conviction be vacated. The newly discovered material facts alleged were the December 2013 notice of removal and the initiation of removal proceedings against him because of his conviction. After an evidentiary hearing on the petition, the court denied relief. Botello-Rangel petitioned for review, and we have jurisdiction under Arizona Revised Statutes (“A.R.S.”) section 13-4239(C) and Rule 33.16.

DISCUSSION

¶5 We review the superior court's denial of post-conviction relief for an abuse of discretion, *State v. Gutierrez*, 229 Ariz. 573, 577, ¶ 19 (2012), but review the interpretation of the Arizona Rules of Criminal Procedure *de novo*, *State v. Mendoza*, 248 Ariz. 6, 14–15, ¶ 12 (App. 2019). Post-conviction

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relief “is applied quite restrictively to overturn guilty pleas,” primarily because by pleading guilty, a defendant waives all non-jurisdictional defenses. *State v. Fritz*, 157 Ariz. 139, 140 (App. 1988). To be eligible for post-conviction relief, a defendant must strictly comply with the post-conviction rules. *Canion v. Cole*, 210 Ariz. 598, 600, ¶ 11 (2005); *State v. Carriger*, 143 Ariz. 142, 146 (1984) (“Petitioners must strictly comply with Rule 32 or be denied relief.”).

¶6 In his petition for review, Botello-Rangel raises the same three claims he raised in his petition for post-conviction relief. But Botello-Rangel has not complied with the applicable post-conviction relief procedures to obtain relief.

A. Botello-Rangel Waived the Right to Raise Claims Regarding the Effectiveness of His Attorney and the Voluntariness of His Plea by Failing to File Timely for Post-Conviction Relief.

¶7 Under Rules 33.1(a) and 33.4, a defendant must file a notice of post-conviction relief within 90 days of the sentence to assert a claim that the plea was obtained in violation of the United States or Arizona constitutions. *See* A.R.S. § 13-4234(G) (time limits for filing a notice and petition “are jurisdictional, and an untimely filed notice or petition shall be dismissed with prejudice”); *State v. Lopez*, 234 Ariz. 513, 515, ¶ 8 (App. 2014) (time requirement to bring a claim “is not based on waiver, but instead on the defendant’s timeliness in seeking relief”); *accord State v. Spreitz*, 202 Ariz. 1, 2, ¶ 4 (2002) (as a general rule, when “ineffective assistance of counsel claims . . . could have been raised, *in a Rule 32 post-conviction relief proceeding*, subsequent claims of ineffective assistance will be deemed waived and precluded” (emphasis added)).

¶8 If a defendant fails to file a timely notice, he or she is precluded from raising claims under Rule 33.1(a) and may *only* raise claims under Rule 33.1(b) through (h). Ariz. R. Crim. P. 33.4(b)(3)(B) (non-precluded claims must be brought within a reasonable time after discovering the basis for the claim); Ariz. R. Crim. P. 33.2(b)(1) (defendant must explain why non-precluded claims were raised in an untimely manner); A.R.S. § 13-4232(B) (listing claims that are not precluded); A.R.S. § 13-4234(G). Here, the parties agree that Botello-Rangel filed for post-conviction relief in an untimely manner. Therefore, he may only raise non-precluded claims. Ariz. R. Crim. P. 33.4(b)(3)(A); A.R.S. § 13-4232(B).

¶9 Under the statute and rule, Botello-Rangel is precluded from raising his claims for ineffective assistance of counsel and involuntary

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guilty plea. Ariz. R. Crim. P. 33.1(a); Ariz. R. Crim. P. 33.4(b)(3)(A); A.R.S. § 13-4234(G). Botello-Rangel attempts to avoid preclusion of these two claims by arguing that he has “newly discovered evidence” of his counsel’s ineffective assistance during the plea proceedings that rendered his “plea involuntary.” Botello-Rangel cannot use these grounds to escape the rule barring his ineffective assistance and involuntary guilty plea claims.

¶10 A claim of ineffective assistance of counsel is not cognizable as a non-precluded claim because it is recognized under Rule 33.1(a). *See State v. Petty*, 225 Ariz. 369, 373, ¶ 11 (App. 2010); *see also* Ariz. R. Crim. P. 33.1(a) cmt. (noting claims of ineffectiveness of counsel and violations of other constitutional rights fall under this subsection). This court has consistently found that claims of ineffective assistance of counsel cannot be raised in an untimely proceeding. *See, e.g., Petty*, 225 Ariz. at 373, ¶ 11; *State v. Miranda*, 2 CA-CR 2017-0143-PR, 2017 WL 4422408, at *2, ¶ 5 (Ariz. App. Oct. 4, 2017) (mem. decision) (“Claims of ineffective assistance of counsel fall within Rule [33.1(a)] and thus cannot be raised in an untimely proceeding like this one.”); *State v. Ventura*, 1 CA-CR 16-0562 PRPC, 2017 WL 3082040, at *1, ¶ 7 (Ariz. App. July 20, 2017) (mem. decision); *State v. Hoyos*, 1 CA-CR 13-0789 PRPC, 2015 WL 3473011, at *1, ¶ 5 (Ariz. App. May 28, 2015) (mem. decision).

¶11 Likewise, this court has consistently held that Rule 33.1(e), which governs claims of newly discovered evidence, does not encompass a claim of newly discovered evidence of ineffective assistance of counsel, and is instead restricted to newly discovered material facts that probably would have changed the judgment or sentence. *See, e.g., State v. Worley*, 2 CA-CR 2019-0057-PR, 2019 WL 1958325, at *2, ¶ 7 (Ariz. App. Apr. 30, 2019) (mem. decision) (“Rule [33.1(e)] does not contemplate a claim of newly discovered evidence of ineffective assistance of counsel, and is instead restricted to ‘newly discovered material facts . . . [that] probably would . . . change[] the verdict or sentence.’” (second and third alterations in original) (quoting *State v. Serna*, 167 Ariz. 373, 374 (1991))); *State v. Beverett*, 2 CA-CR 2018-0273-PR, 2018 WL 6200319, at *1, ¶ 5 (Ariz. App. Nov. 28, 2018) (mem. decision); *State v. Hauss*, 2 CA-CR 2018-0146-PR, 2018 WL 4492837, at *1, ¶ 5 (Ariz. App. Sept. 18, 2018) (mem. decision); *State v. Slyter*, 2 CA-CR 2018-0029-PR, 2018 WL 3213702, at *1, ¶ 5 (Ariz. App. June 29, 2018) (mem. decision); *State v. Mocco*, 2 CA-CR 2017-0426-PR, 2018 WL 2113788, at *1, ¶ 4 (Ariz. App. May 8, 2018) (mem. decision); *State v. Owens*, 2 CA-CR 2017-0302-PR, 2018 WL 1136042, at *2, ¶ 6 (Ariz. App. Mar. 2, 2018) (mem. decision). Botello-Rangel’s failure to file timely for post-conviction relief precludes him from raising his claim of ineffective assistance of counsel.

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¶12 A claim of an involuntary guilty plea also is a constitutional claim raised under Rule 33.1(a); therefore, a defendant may not present an untimely claim that he or she involuntarily entered into a plea agreement. *State v. Correa*, 1 CA-CR 16-0107 PRPC, 2017 WL 3712147, at *1, ¶ 3 (Ariz. App. Aug. 29, 2017) (mem. decision) (“[V]oluntariness of [the] plea [is a] constitutional claim[] under Rule [33.1(a)] and cannot be raised in an untimely post-conviction proceeding.”). Like his claim for ineffective assistance of counsel, Botello-Rangel’s failure to file timely for post-conviction relief precludes him from raising the claim that his guilty plea was involuntary.

B. Botello-Rangel’s Claim of Newly Discovered Evidence is Untimely.

¶13 A court may vacate a conviction if newly discovered material facts exist. A defendant asserting newly discovered evidence in a post-conviction petition must prove:

- (1) [t]hat the evidence relied on is, in fact, newly discovered;
- (2) the motion must allege facts from which the court can infer due diligence;
- (3) the evidence relied on must not be merely cumulative or impeaching;
- (4) the evidence must be material to the issue involved; and
- (5) it must be evidence which, if introduced, would probably change the verdict if a new trial were ordered.

State v. Acuna Valenzuela, 245 Ariz. 197, 214–15, ¶ 58 (2018); *State v. Serna*, 167 Ariz. at 374. “[E]vidence is material if it is relevant and goes to substantial matters in dispute or has a legitimate and effective influence or bearing on the decision of the case.” *State v. Orantez*, 183 Ariz. 218, 221–22 (1995).

¶14 Before we can evaluate Botello-Rangel’s newly discovered evidence claim as a stand-alone claim for relief under Rule 33.1(e), we must determine if it was raised in a procedurally appropriate manner. *Carriger*, 143 Ariz. at 146. Claims not typically subject to preclusion (Rule 33.1(b) through (h)), nonetheless, must be raised within a reasonable time once the discovery of the factual predicate for the claim is known. Ariz. R. Crim. P. 33.4(b)(3)(B) (for non-precluded claims the “defendant must file the notice . . . within a reasonable time after discovering the basis for the claim”). Rule 33.2(b) also requires that for such non-precluded claims, a defendant must explain “the reasons for not raising the claim . . . in a timely manner.” If the defendant’s explanation for the untimely filing is lacking, a court may

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“summarily dismiss” the claim. *See* Ariz. R. Crim. P. 33.2(b)(1) (“At any time, a court may determine . . . that an issue is precluded, even if the State does not raise preclusion.”); *State v. Quijada*, 246 Ariz. 356, 362, ¶ 13, n.1 (App. 2019) (appellate court has the discretion to dismiss a claim based on untimeliness). Here, Botello-Rangel’s explanation for his untimely petition requires the claim to be denied without addressing the merits of his claim.

¶15 Botello-Rangel asserts that the reason he waited more than four years after his probation terminated to file his claim was the complicated nature of his challenge to the removal notice. Botello-Rangel argues that while he received the removal notice in December 2013, the “Immigration Court did not definitively rule [that his] conviction constitutes an aggravated felony until March 2018.” The immigration court’s delayed final ruling on Botello-Rangel’s legal challenge to the removal notice does not excuse his failure to bring a timely challenge to his criminal conviction once he was aware that he might be removed as a result of the conviction. *See State v. Hess*, 231 Ariz. 80, 82–83, ¶ 8 (App. 2012) (defendant’s claim of newly discovered evidence based on DNA results did not justify relief because he did not explain why he took ten years to request the testing).

¶16 The removal notice alerted Botello-Rangel that his conviction could result in his deportation, despite what he now alleges he was told during the plea proceedings. The notice provided as follows:

ON THE BASIS OF THE FOREGOING, IT IS CHARGED THAT YOU ARE SUBJECT TO REMOVAL FROM THE UNITED STATES PURSUANT TO THE FOLLOWING PROVISION(S) OF LAW:

Section 237(a)(2)(B)(i) of the Immigration and Nationality Act, as amended, in that, at any time after admission, you have been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State . . . relating to a controlled substance (as defined in Section 102 of the Controlled Substances Act, 21 U.S.C. 802)

Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, as amended, in that, at any time after admission, you have been convicted of an aggravated felony as defined in section 101(a)(43)(U) of the Act, a law relating to an attempt or conspiracy to commit an offense described in

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section 101(a)(43)(B) of the Act, an offense relating to the illicit trafficking in a controlled substance, as described in section 102 of the Controlled Substances Act, including a drug trafficking crime, as defined in section 924(c) of Title 18, United States Code.

Upon receiving the removal notice, Botello-Rangel was alerted to the factual predicate of his newly discovered evidence claim.

¶17 Botello-Rangel’s four-year delay before filing his petition is not justified under the facts of this case. The removal notice was based on his state conviction. If he had grounds to do so, Botello-Rangel could have circumvented the removal proceeding by having his state conviction vacated. *See Poblete Mendoza v. Holder*, 606 F.3d 1137, 1141 (9th Cir. 2010) (a conviction vacated for reasons unrelated to the merits of the underlying criminal proceedings may be used as a conviction in a removal proceeding, whereas a conviction vacated because of a procedural or substantive defect in the criminal proceeding may not). Once the predicate was known to him in late 2013, the post-conviction relief rules required Botello-Rangel to pursue diligently any claim for relief in state court. *Hess*, 231 Ariz. at 82, ¶ 7 (“[T]he defendant must show he or she ‘was diligent in pursuing’ a remedy under Rule 32.” (quoting *State v. Bilke*, 162 Ariz. 51, 53 (1989))). He could not wait and see how the removal proceeding progressed before filing his petition here. Botello-Rangel’s claim is not timely given the four-year delay before he brought the claim in this post-conviction proceeding. The petition was properly dismissed. *State v. Perez*, 141 Ariz. 459, 464 (1984) (appellate court obliged to affirm the superior court’s ruling if the result is legally correct for any reason).

CONCLUSION

¶18 We grant the petition for review but deny relief.



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