

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

ISRAEL CHRISTOPHER MENDOZA JR.,
Petitioner.

No. 2 CA-CR 2019-0281-PR
Filed June 9, 2020

Petition for Review from the Superior Court in Pima County
No. CR20163280001
The Honorable James E. Marner, Judge

**REVIEW GRANTED; RELIEF GRANTED IN PART
AND DENIED IN PART**

Israel Mendoza, Tucson
In Propria Persona

OPINION

Judge Eckerstrom authored the opinion of the Court, in which Presiding Judge Eppich and Judge Espinosa concurred.

ECKERSTROM, Judge:

¶1 Israel Mendoza Jr. seeks review of the trial court's rulings denying his first petition for and second notice of post-conviction relief, both filed pursuant to Rule 33, Ariz. R. Crim. P.¹ We will not disturb those

¹ Effective January 1, 2020, our supreme court amended the post-conviction relief rules. Ariz. Sup. Ct. Order R-19-0012 (Aug. 29, 2019).

STATE v. MENDOZA
Opinion of the Court

rulings unless the court has abused its discretion. *See State v. Martinez*, 226 Ariz. 464, ¶ 6 (App. 2011). For the following reasons, we grant review and relief in part.

¶2 Pursuant to a plea agreement, Mendoza was convicted of second-degree murder. The trial court sentenced him to a partially aggravated, twenty-year prison term. Mendoza initiated a proceeding for post-conviction relief, and appointed counsel filed a notice, also known as a *Montgomery* notice,² stating that she could find no colorable claims to raise in a Rule 33 petition. The court allowed Mendoza to proceed pro se, and, in his petition, Mendoza asserted that his trial counsel had been ineffective in advising him to plead guilty to second-degree murder rather than convincing the state to offer a plea to manslaughter, failing to inform him that the prison sentence under the plea agreement was for flat time, and not objecting to the court's use of his misdemeanor convictions as aggravating factors at sentencing. In addition, Mendoza argued that his Rule 33 counsel had been ineffective in filing a *Montgomery* notice when she should have raised the claims he identified in his pro se petition. In his reply to the state's response, Mendoza also maintained that trial counsel was ineffective in failing to protect his speedy trial rights.

¶3 The trial court summarily denied Mendoza's petition. It concluded that his claim of ineffective assistance of trial counsel regarding the plea agreement was not colorable, in part because Mendoza "had, by his own statements, provided compelling evidence of premeditation," suggesting that, contrary to Mendoza's assertion otherwise, the state could have established the elements of first-degree murder at trial. As to Mendoza's arguments about his flat-time sentence and his misdemeanor convictions, the court explained they were not supported by the record. And because Mendoza had "failed to raise any colorable claims that would afford him relief," the court also reasoned that Rule 33 counsel "was well within the parameters of professional competence" in filing a *Montgomery* notice. Finally, the court declined to address Mendoza's speedy trial rights argument because he had failed to timely raise it in his petition.

The amendments 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." *Id.* Because it is neither infeasible nor works an injustice here, we cite to and apply the current version of the rules.

²*Montgomery v. Sheldon*, 181 Ariz. 256, *supp. op.*, 182 Ariz. 118 (1995).

STATE v. MENDOZA
Opinion of the Court

¶4 Shortly thereafter, Mendoza filed a second notice of post-conviction relief, asserting ineffective assistance of Rule 33 counsel and requesting the appointment of counsel. The trial court denied the notice and the request for counsel, explaining that Mendoza had raised the claim in his first proceeding and the court had denied it. Mendoza now seeks review of the denials in both his first and second proceedings.³

¶5 On review, Mendoza reasserts his claims of ineffective assistance of trial counsel raised in his first proceeding. In its thorough, well-reasoned ruling, the trial court clearly identified those claims and correctly resolved them in a manner that will allow any court in the future to understand. Because the court's findings and conclusions are supported by the record before us, we need not repeat that analysis here and, instead, adopt it.⁴ See *State v. Whipple*, 177 Ariz. 272, 274 (App. 1993). In addition, however, we note that as a pleading defendant, Mendoza waived "all non-jurisdictional defects and defenses, including claims of ineffective assistance of counsel, except those that relate to the validity of a plea." *State v. Banda*, 232 Ariz. 582, ¶ 12 (App. 2013).

¶6 Mendoza also challenges the trial court's denial of his claim of ineffective assistance of Rule 33 counsel. He seems to suggest he only intended to raise the ineffectiveness of Rule 33 counsel in his second proceeding, but the court denied that notice without appointing counsel.⁵

³Mendoza's petition for review is timely as to both proceedings. See Ariz. R. Crim. P. 33.16(a)(1).

⁴In regard to Mendoza's misdemeanor convictions and his claim of "mistakes made by the court," the trial court explained that the presentence report "included a detailed history of [Mendoza]'s domestic violence convictions, complete with dates, locations, cause numbers and courts." We note that the report does not appear to include cause numbers or courts, but we fail to see how this alters the analysis given that the report otherwise thoroughly documents Mendoza's criminal history. Moreover, as the court observed, because it had found multiple aggravators at sentencing, even disregarding Mendoza's misdemeanor history, "an aggravated sentence was warranted." See *State v. Roseberry*, 237 Ariz. 507, ¶ 10 (2015) (to prevail on claim of ineffective assistance of counsel, defendant must establish prejudice).

⁵In his pro se petition in the first proceeding, although Mendoza suggested that Rule 33 counsel was "deficient" in failing to identify "the court's error" in accepting his plea, not informing him about the flat-time

STATE v. MENDOZA
Opinion of the Court

Although Mendoza's argument is not particularly clear, we agree that the court erred in its treatment of this claim.

¶7 A pleading defendant is entitled to effective assistance of counsel in his first proceeding for post-conviction relief. *Osterkamp v. Browning*, 226 Ariz. 485, ¶¶ 17-20 (App. 2011). To effectuate that right, a pleading, indigent defendant is also entitled to counsel—"a different attorney than the one who represented [him] in the first proceeding"—in a timely filed second proceeding. *Id.* ¶ 20. Otherwise, the right would be "meaningless" because a defendant without legal training or expertise cannot be expected to properly raise and argue claims of ineffective assistance of counsel. *Id.*; see also *Galaz v. Carruth*, 129 Ariz. 368, 370 (1981) ("Not knowing the subtleties of the law or the pleadings under the Rule, defendant is at a definite disadvantage in presenting his case.").

¶8 Consistent therewith, Rule 33.4(b)(3)(C) provides:

A defendant may raise a claim of ineffective assistance of Rule 33 counsel in a successive Rule 33 proceeding if the defendant files a notice no later than 30 days after the trial court's final order in the first post-conviction proceeding, or, if the defendant seeks appellate review of that order, no later than 30 days after the appellate court issues its mandate in that proceeding.

And Rule 33.5(a) explains that the trial court "must appoint counsel for the defendant" if he files a timely notice under Rule 33.4(b)(3)(C) and meets certain requirements.⁶

requirement, and aggravating his sentence, Mendoza also asserted that he was "preserv[ing] this claim for future use."

⁶The other requirements include that the defendant requests counsel, that he is entitled to counsel under Rule 6.1(b), Ariz. R. Crim. P., and that "there has been a previous determination that the defendant is indigent, or the defendant has completed a declaration of indigency and the court finds that the defendant is indigent." Ariz. R. Crim. P. 33.5(a). Here, Mendoza requested counsel as part of the second proceeding and presumably met the other two requirements because the court appointed counsel during the first proceeding.

STATE v. MENDOZA
Opinion of the Court

¶9 The question presented here is whether a defendant can assert a claim of ineffective assistance of Rule 33 counsel in his first proceeding for post-conviction relief or whether he must do so in a successive proceeding. When interpreting a court rule, we strive to effectuate our supreme court’s intent in promulgating the rule, bearing in mind that the best indicator of that intent is the plain language of the rule. *State v. Harden*, 228 Ariz. 131, ¶ 6 (App. 2011). In determining a rule’s plain language, we read the words in context and consider the scheme as a whole. *State v. Mendoza*, 248 Ariz. 6, ¶ 12 (App. 2019).

¶10 As our starting point, Rule 33 expressly neither requires nor precludes a defendant from raising a claim of ineffective assistance of Rule 33 counsel in his first proceeding for post-conviction relief. However, Rule 33.4(b)(3)(C) suggests that such a claim should be brought in a second proceeding: “A defendant may raise a claim of ineffective assistance of Rule 33 counsel in a successive Rule 33 proceeding.” Although the rule is permissive, the “may” refers to the defendant’s choice to raise a claim of ineffective assistance of Rule 33 counsel. Assuming the defendant chooses to raise such a claim, it seems he must do so in a successive proceeding. Rule 33.2(b)(2) supports this conclusion: “A defendant is not precluded from filing a timely second notice requesting post-conviction relief claiming ineffective assistance of counsel in the first Rule 33 post-conviction proceeding.”

¶11 Other provisions of Rule 33—and the caselaw discussing the former rule—also reinforce the conclusion that a defendant should bring a claim of ineffective assistance of Rule 33 counsel in a successive proceeding.⁷ Generally, when Rule 33 counsel files a *Montgomery* notice, she does not withdraw from representing the defendant but rather continues as the defendant’s advisory counsel until the trial court’s final order in that proceeding. *See* Ariz. R. Crim. P. 33.6(c), (e); *see also State v. Chavez*, 243 Ariz. 313, ¶ 8 (App. 2017). Yet, Rule 33 counsel cannot properly advise the defendant of her own ineffectiveness, in part, because “the ‘standard for determining whether counsel was reasonably effective is an objective standard which . . . can best be developed by someone other than

⁷Former Rule 32.1 also suggested that these claims of ineffective assistance of counsel should be brought in a successive proceeding. In relevant part, that rule provided, “After the court’s final order or mandate in a Rule 32 of-right proceeding, the defendant also may file an of-right notice challenging the effectiveness of Rule 32 counsel in the first of-right proceeding.” Ariz. Sup. Ct. Order R-17-0002 (Aug. 31, 2017).

STATE v. MENDOZA
Opinion of the Court

the person responsible for the conduct.” *State v. Bennett*, 213 Ariz. 562, ¶ 14 (2006) (quoting *State v. Marlow*, 163 Ariz. 65, 68 (1989)). Moreover, claims of ineffective assistance of counsel are often fact intensive, requiring, for example, evidence concerning the reason counsel may have acted or declined to act, or what counsel may have told a defendant. *See State v. Wood*, 180 Ariz. 53, 61 (1994). Asserting claims of ineffective assistance of Rule 33 counsel in the same proceeding in which that counsel is serving as the defendant’s advisor may thus create conflicts. *See Ariz. R. Sup. Ct. 42, ER 3.7* (except in limited circumstances, lawyer shall not act as advocate at trial in which lawyer likely to be witness); *see also Ariz. R. Crim. P. 33.13(a)* (defendant entitled to hearing to determine issues of material fact and has right to subpoena witnesses).

¶12 Accordingly, we conclude that claims of ineffective assistance of Rule 33 counsel in a defendant’s first proceeding for post-conviction relief must be asserted in a timely, successive proceeding. *Cf. State v. Rosales*, 205 Ariz. 86, ¶ 8 (App. 2003) (claim that counsel was ineffective at resentencing constitutes separate claim, independent of any claim of ineffective assistance of appellate counsel, which must be litigated in different proceeding initiated by timely filing separate notice of post-conviction relief). Indeed, a defendant could not establish prejudice from Rule 33 counsel’s purported ineffectiveness without the trial court’s ruling in his first proceeding. *See State v. Roseberry*, 237 Ariz. 507, ¶ 10 (2015) (to prevail on claim of ineffective assistance of counsel, defendant must show counsel’s performance fell below reasonable standards, causing him prejudice).⁸

¶13 Here, Mendoza attempted to raise a claim of ineffective assistance of Rule 33 counsel in his first proceeding. However, raising the claim at that stage was premature. Accordingly, the trial court’s denial of that claim was also premature and, therefore, inappropriate. *Cf. Ariz. R. Crim. P. 33.11(a)* (discussing summary dismissal); *State v. Spreitz*, 202 Ariz. 1, ¶ 9 (2002) (improvidently raised claims of ineffective assistance of counsel brought in direct appeal not addressed by appellate courts regardless of merit).

⁸ Because prejudice is a requirement of any claim of ineffective assistance of counsel, a petitioner risks summary dismissal when reframing, without more, a claim that has previously been rejected on its underlying merits in prior post-conviction proceedings. *See Ariz. R. Crim. P. 33.11(a)*.

STATE v. MENDOZA
Opinion of the Court

¶14 Thereafter, Mendoza filed a second notice of post-conviction relief, seeking to raise a claim of ineffective assistance of Rule 33 counsel and requesting counsel for that proceeding. At the time he filed his notice, it was timely because Mendoza had not sought review of the trial court's ruling in his first proceeding. *See* Ariz. R. Crim. P. 33.4(b)(3)(C). The court's denial of the notice and of the request for counsel was therefore improper because, as explained above, the ineffectiveness of Rule 33 counsel should not have been raised or addressed in the first proceeding. Instead, the court had no discretion to deny Mendoza's request for counsel in his second proceeding in which he sought to raise a claim of ineffective assistance of Rule 33 counsel. *See* Ariz. R. Crim. P. 33.5(a); *Osterkamp*, 226 Ariz. 485, ¶¶ 17-20.

¶15 However, because Mendoza has since filed a petition for review of the trial court's ruling on his first Rule 33 proceeding, his second notice of post-conviction relief is now a nullity. *Cf. AU Enters. Inc. v. Edwards*, 248 Ariz. 109, ¶ 11 (App. 2020) ("A premature notice of appeal is a nullity."). Accordingly, upon the issuance of our mandate in this matter, Mendoza can file a notice initiating a second proceeding for post-conviction relief in which he may assert a claim of ineffective assistance of Rule 33 counsel and request the appointment of counsel.

¶16 For the foregoing reasons, we grant review and relief in part. We vacate that portion of the trial court's ruling in Mendoza's first proceeding denying his claim of ineffective assistance of Rule 33 counsel and vacate the ruling in his attempted second proceeding denying Mendoza's notice and request for counsel. We otherwise deny relief on Mendoza's claims of ineffective assistance of trial counsel raised in his first proceeding.