

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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THE STATE OF ARIZONA,  
*Respondent,*

*v.*

ANTHONY L. WYATT,  
*Petitioner.*

No. 2 CA-CR 2019-0150-PR  
Filed April 21, 2020

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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NOT FOR PUBLICATION  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).*

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Petition for Review from the Superior Court in Pinal County  
No. S1100CR201501002  
The Honorable Joseph R. Georgini, Judge

**REVIEW GRANTED; RELIEF DENIED**

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COUNSEL

Mark Brnovich, Arizona Attorney General  
By Kimberly Nye, Assistant Attorney General, Phoenix  
*Counsel for Respondent*

Anthony Wyatt, Florence  
*In Propria Persona*

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MEMORANDUM DECISION

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

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V Á S Q U E Z, Chief Judge:

¶1 Anthony Wyatt seeks review of the trial court’s ruling summarily denying his petition for post-conviction relief filed pursuant to Rule 33, Ariz. R. Crim. P.<sup>1</sup> We will not disturb that ruling unless the court has abused its discretion. *See State v. Martinez*, 226 Ariz. 464, ¶ 6 (App. 2011). Wyatt has not met his burden of establishing such abuse here.

¶2 Pursuant to a plea agreement, Wyatt was convicted of three counts of sexual exploitation of a minor. The trial court sentenced him to fourteen years’ imprisonment for one count and, for the remaining two, suspended the imposition of sentence and placed Wyatt on concurrent terms of lifetime probation. Wyatt initiated a proceeding for post-conviction relief, and appointed counsel filed a notice that she could find no colorable claims to assert in a Rule 33 petition. The court gave Wyatt leave to file a pro se petition, but he failed to do so, and the court dismissed the proceeding.

¶3 Wyatt subsequently filed a notice of and petition for post-conviction relief, asserting claims of insufficient evidence, prosecutorial misconduct, and ineffective assistance of counsel. The trial court denied the petition, finding the claims “precluded as having been previously ruled upon,” “untimely filed,” or lacked “sufficient basis in law

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<sup>1</sup> Effective January 1, 2020, our supreme court amended the post-conviction relief rules. Ariz. Sup. Ct. Order R-19-0012 (Aug. 29, 2019). 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.* at 2. Because it is neither infeasible nor works an injustice here, we cite to and apply the current version of the rules.

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and fact to warrant further proceedings.”<sup>2</sup> Wyatt filed a “Motion in Arrest of Judgement,” asserting he had not received a copy of the state’s response and was not afforded an opportunity to respond. The court treated it as a motion for reconsideration, provided Wyatt a copy of the state’s response, and gave Wyatt leave to file a reply. Wyatt then filed an “Omnibus Motion for Rehearing on Dismissal of Petition for Post-Conviction Relief and to Reply Ex Post Facto to State’s Response,” suggesting, in part, that his guilty plea lacked a factual basis. The court denied that motion and affirmed its prior ruling denying the petition for post-conviction relief. This petition for review followed.

¶4 On review, Wyatt contends his plea agreement is “null and void” because there was no factual basis to support the essential elements of the offenses to which he pleaded guilty.<sup>3</sup> In support of that assertion, he argues that Immigration and Customs Enforcement conducted an illegal investigation, arrested him without probable cause or a warrant, and “threw its record into concealment.” Wyatt further maintains that the trial court’s failure to comply with Rule 17.3(b), Ariz. R. Crim. P., requiring a factual basis to support his plea, constitutes a due process violation.

¶5 Although a challenge to the factual basis supporting a plea is properly raised in a proceeding for post-conviction relief, *see Wilson v. Ellis*, 176 Ariz. 121, 123 (1993), Wyatt failed to raise this claim in his petition below. Accordingly, it is waived on review. *See State v. Ramirez*, 126 Ariz. 464, 468 (App. 1980) (issue raised in motion for rehearing raised too late); *see also State v. Oakley*, 180 Ariz. 34, 36 n.1 (App. 1994) (issue raised in reply brief too late).

¶6 Even assuming the argument were not waived, however, Wyatt is not entitled to relief. Although Wyatt does not indicate what subsection of Rule 33.1 his claim is based on, he seems to be arguing his

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<sup>2</sup>The trial court’s ruling, filed October 9, 2018, is not a part of our record. However, pursuant to this court’s order, Wyatt provided a copy of that ruling.

<sup>3</sup>In his reply below, Wyatt conceded that he could not “challenge [the] sufficiency of evidence in [a] plea agreement.” On review, he does not argue the trial court otherwise erred in rejecting his claims of prosecutorial misconduct or ineffective assistance of counsel. We therefore do not address them.

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plea was obtained in violation of the state or federal constitution.<sup>4</sup> *See* Ariz. R. Crim. P. 33.1(a). Any such claim is precluded and untimely in this successive proceeding. *See* Ariz. R. Crim. P. 33.2(a)(3), 33.4(b)(3)(A). Moreover, to the extent he is challenging the validity of any search or seizure, by pleading guilty, Wyatt waived all nonjurisdictional defects unrelated to the validity of the plea, including constitutional challenges. *See State v. Flores*, 218 Ariz. 407, ¶ 6 (App. 2008); *see also State v. Lerner*, 113 Ariz. 284, 284 (1976) (guilty plea forecloses inquiry into alleged illegal search and seizure).

¶7 Accordingly, although we grant the petition for review, we deny relief.

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<sup>4</sup>A claim that the factual basis for a plea is insufficient might arguably be raised as a claim of actual innocence pursuant to Rule 33.1(h). *See State v. Johnson*, 181 Ariz. 346, 348-51 (App. 1995). Under that rule, “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.” Ariz. R. Crim. P. 33.2(b)(1); *see also* Ariz. R. Crim. P. 33.4(b)(3)(B) (defendant must file notice of claim under Rule 33.1(h) “within a reasonable time after discovering the basis for the claim”). Wyatt, however, has made no such showing here.