

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

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THE STATE OF ARIZONA,  
*Respondent,*

*v.*

JEFFERY S. DAVIS,  
*Petitioner.*

No. 2 CA-CR 2019-0239-PR

Filed March 27, 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NOT FOR PUBLICATION  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 Greenlee County  
No. CR201000042  
The Honorable Michael Latham, Judge

**REVIEW GRANTED; RELIEF DENIED**

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COUNSEL

Greenlee County Attorney, Clifton  
By Jeremy O. Ford, County Attorney  
*Counsel for Respondent*

Jeffery S. Davis, Kingman  
*In Propria Persona*

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MEMORANDUM DECISION

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

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ESPINOSA, Judge:

¶1 Jeffery Davis seeks review of the trial court's ruling summarily dismissing his petition for post-conviction relief filed pursuant to Rule 33, Ariz. R. Crim. P.<sup>1</sup> We will not disturb that order unless the court abused its discretion. *See State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). Davis has shown no such abuse here.

¶2 Pursuant to a plea agreement in 2010, Davis pled no contest to and was convicted of sexual conduct with a minor and attempted molestation of a child. The trial court sentenced him to a presumptive prison term of twenty years, to be followed by lifetime probation. Over a year and a half later, Davis sought leave to file a delayed Rule 32 petition, which the court denied after an evidentiary hearing. This court denied relief on review.<sup>2</sup> *State v. Davis*, No. 2 CA-CR 2013-0131-PR (Ariz. App. Jul. 31, 2013) (mem. decision). In 2014, we dismissed Davis's petition for review of the trial court's denial of his motions to compel evidence and his related motion for rehearing. *State v. Davis*, No. 2 CA-CR 2014-0336-PR (Ariz. App. Dec. 29, 2014) (mem. decision).

¶3 Davis filed another petition for review in 2015, challenging the trial court's summary dismissal of his motion for clarification, which we

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<sup>1</sup> Effective January 1, 2020, our supreme court amended the post-conviction rules. *See* Ariz. Sup. Ct. Order R-19-0012 (Aug. 29, 2019). The rules relating to defendants who plead guilty are now codified in Rule 33. *Id.* 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." *Id.* Because it is feasible and does no injustice, we apply and cite to the current version of the rule.

<sup>2</sup>In our memorandum decision, we noted that on review Davis appeared to raise claims of ineffective assistance of trial counsel and actual innocence. *Davis*, No. 2 CA-CR 2013-0131-PR, ¶ 4.

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treated as an untimely post-conviction claim and denied relief. *State v. Davis*, No. 2 CA-CR 2015-0027-PR (Ariz. App. Aug. 31, 2015) (mem. decision). In September 2016, Davis filed a motion to withdraw from his no contest guilty plea and to vacate the judgment of conviction.<sup>3</sup> The trial court denied his motion and the related motion to reconsider. This court treated Davis's challenge to the trial court's denials as a petition for review of the denial of post-conviction relief, which we likewise denied. *State v. Davis*, No. 2 CA-CR 2017-0213-PR (Ariz. App. Dec. 29, 2017) (mem. decision).

¶4 In August 2019, Davis filed a Rule 33 petition, asserting he was actually innocent pursuant to Rule 33.1(h), incorporating claims of prosecutorial misconduct and ineffective assistance of counsel, and challenging whether his plea was knowingly, voluntarily and intelligently entered. He also requested counsel be appointed to represent him at an evidentiary hearing. The trial court summarily dismissed Davis's petition, finding he had "failed to provide a sufficient and/or persuasive reason that the arguments he makes . . . were not raised in his prior petitions" and that "no remaining claim presents a material issue of fact or law that would entitle" him to post-conviction relief. This petition for review followed.

¶5 Although Davis states on review that he "did not [previously] make his claims specifically pursuant to Rule 32.1(h)," he nonetheless acknowledges that he did "in part bring his arguments in line with Rule 32.1(h)'s requirements" in several of his previous filings. He further contends that he provided the trial court with "sufficient reasons" for not having raised "his Rule 32 arguments" in previous petitions, offering as reasons his belief that trial counsel "misled" and "misadvi[sed]" him regarding both the plea process and the significance of the factual basis presented at the change-of-plea hearing. Notably, Davis points out that only after this court found his motion to withdraw his plea and vacate judgment barred as untimely for not falling within any of the exceptions to preclusion, *see Davis*, No. 2 CA-CR 2017-0213-PR, ¶ 5, did he then characterize his claim as subject to one of those exceptions, specifically, Rule 33.1(h).

¶6 On review, Davis essentially summarizes the arguments he raised in his petition below, frequently directing us to his petition for

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<sup>3</sup>As he asserts in the proceeding now before us, Davis alleged there were defects during the plea proceeding, including a defective factual basis, and that trial counsel had been ineffective.

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further detail. He maintains he has always asserted his innocence, and contends “that although he took a plea, his plea was absolutely involuntary.” He supports his actual innocence claim with arguments based on prosecutorial misconduct and ineffective assistance of trial counsel, again directing us to his petition to support those arguments.

¶7 To show actual innocence pursuant to Rule 33.1(h), a defendant must “demonstrate by clear and convincing evidence that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would find the defendant guilty of the offense beyond a reasonable doubt.” Claims excepted from preclusion under Rules 33.1(b) through (h) must be raised in a notice filed “within a reasonable time after discovering the basis for the claim.” Ariz. R. Crim. P. 33.4(b)(3)(B). And, Rule 33.2(b)(1) requires that a defendant who “raises a claim that falls under Rule 33.1(b) through (h) in a successive or untimely post-conviction notice . . . explain the reasons for not raising the claim in a previous notice or petition, or for not raising the claim in a timely manner.” The rule further provides that if a defendant’s explanation is inadequate, the trial court may summarily dismiss the claim, as the court did here. *Id.*

¶8 Assuming without finding that the actual innocence arguments Davis raised in his previous petitions are not precluded as having been previously adjudicated on the merits, *see* Rule 33.2(a)(2), (b)(1), we conclude the trial court correctly found that Davis’s explanation for not having raised his claims in a previous petition or in a timely manner was insufficient. *See* Ariz. R. Crim. P. 33.2(b)(1). Put simply, Davis failed to explain the reasons for not raising an actual innocence claim pursuant to Rule 33.1(h) in any of his prior Rule 33 proceedings, despite acknowledging that he previously had presented facts supporting his innocence and had challenged trial counsel’s conduct as it related to his innocence in several of those pleadings. Nor did he offer a reason for failing to present these claims within a reasonable time after discovering them, which occurred as early as 2014. *See* Ariz. R. Crim. P. 33.4(b)(3)(B).

¶9 To the extent we understand his argument, Davis has offered the following excuses for his untimely filing—that he apparently did not previously know that trial counsel had misled and misadvised him regarding his “ability to prove his innocence against unsubstantiated charges,” and that counsel had withheld “the knowledge of a factual basis” from him. Those allegations are inadequate to explain how trial counsel’s conduct impeded his ability to previously or timely raise a claim which, based on his prior pleadings, he apparently knew about long ago. Because

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Davis failed to explain the reasons for not raising his claim pursuant to Rule 33.1(h) in a previous post-conviction proceeding, or for not raising it in a timely manner, we cannot say the trial court abused its discretion in summarily dismissing his petition.

¶10 Moreover, we find unpersuasive Davis’s apparent suggestion that the trial court abused its discretion by considering essential portions of the record that established his guilt, including: his police interview containing his detailed admissions of guilt; the signed plea agreement; the minute entry from the change-of-plea hearing affirming that his plea was entered knowingly, intelligently and voluntarily;<sup>4</sup> and various exhibits, including the state’s factual basis and the victim’s journal. Davis essentially asks us to find that the trial court should have disregarded or treated as false a significant portion of the record when it considered the underlying petition. We decline to do so.

¶11 Although we grant review, relief is denied.

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<sup>4</sup>Insofar as Davis suggested below that the unavailability of the transcript of the change-of-plea hearing was intended to “conveniently conceal[]” the contents of that hearing, we note, pursuant to this court’s June 18, 2013, order, the record was deemed complete based on a memorandum of the Clerk of Greenlee County affirming that the transcript of that hearing was not available. Additionally, despite Davis’s assertion that his attorney did not advise him of the rights he was waiving by pleading no contest, he nonetheless testified under oath at a February 2013 evidentiary hearing that the trial court had so advised him at the change-of-plea hearing. Trial counsel also testified he had advised Davis of the rights he was waiving before he accepted the plea. At the conclusion of the evidentiary hearing, the court found Davis’s testimony “lack[ed] some credibility.”