

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

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THE STATE OF ARIZONA,  
*Respondent,*

*v.*

FREDERICK SCOTT WHITAKER,  
*Petitioner.*

No. 2 CA-CR 2019-0268-PR  
Filed May 13, 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NOT FOR PUBLICATION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 Pima County  
Nos. CR20151942001 and CR20160210001  
The Honorable Deborah Bernini, Judge

**REVIEW GRANTED; RELIEF DENIED**

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Frederick Scott Whitaker, Eloy  
*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 Frederick Whitaker seeks review of the trial court’s ruling denying his motion to correct, which we treat as a 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. Harden*, 228 Ariz. 131, ¶ 3 (App. 2011). Whitaker has not met his burden of establishing such abuse here.

¶2 Pursuant to a plea agreement, Whitaker was convicted of fraudulent schemes and artifices in Cause No. CR20151942001 and trafficking in stolen property in Cause No. CR20160210001. The trial court imposed enhanced, consecutive prison terms, totaling 13.75 years, and ordered that Whitaker pay restitution to the victims. In its sentencing minute entry, the court also provided that “during the defendant’s incarceration, restitution shall be paid at a rate to be determined by the Department of Corrections [(DOC)] pursuant to applicable Arizona law.”

¶3 In August 2017, Whitaker filed a notice of post-conviction relief, and the trial court appointed counsel to represent him in that proceeding. A few months later, Whitaker filed a pro se motion to correct the sentencing minute entry “in accordance to the sentence date transcript” to show that “his restitution is not due until the completion of his sentence.” The court denied the motion, explaining that the minute entry was “correct” because it “did not order a criminal restitution order.” In July 2018, appointed counsel filed a notice stating she had reviewed the record and had been “unable to find any colorable claims for relief to raise in th[e]

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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.* 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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post-conviction proceeding.” The court gave Whitaker leave to file a pro se petition.

¶4 In September 2018, Whitaker filed a motion to correct, pursuant to Rule 24.4, Ariz. R. Crim. P.,<sup>2</sup> again arguing that the trial court had orally indicated at sentencing that restitution would “commence after his release” from DOC and that the order in the sentencing minute entry indicating otherwise was a “[c]lerical mistake.” The court planned to treat Whitaker’s motion as his pro se petition for post-conviction relief, but while awaiting the state’s response Whitaker filed a motion requesting an extension of time in which to file his petition. The court thus understood that Whitaker planned to file a separate petition, granted him an extension of time to do so, and suspended its ruling on the motion to correct until the post-conviction relief proceeding was “ready for ruling.”

¶5 Nearly a year later, in August 2019, Whitaker filed a second motion to correct, contending the trial court should not have suspended its ruling on the restitution issue while awaiting completion of the post-conviction proceeding because the matters were “unrelated.” Shortly thereafter, the court denied Whitaker’s seventh request for an extension of time in which to file his petition for post-conviction relief. Because no petition was filed by the due date, the court then dismissed Whitaker’s notice.

¶6 As part of that ruling, the trial court also denied Whitaker’s motion to correct. It explained that “[t]he language in the . . . sentencing minute entry complied with” the applicable Arizona law because the court “did not determine the manner or specific amounts to be paid pursuant to a restitution order from a defendant’s wages while in prison” and DOC could withhold amounts consistent with A.R.S. § 31-230(C). Whitaker filed a motion for reconsideration, which the court also denied.

¶7 Whitaker now “appeals” the trial court’s denial of his motion to correct. Although Whitaker has not cited any authority for his appeal and the state has not filed an answering brief contesting the issue of jurisdiction, this court has an independent duty to examine its jurisdiction and, if lacking, to dismiss the appeal. *See State v. Perry*, 245 Ariz. 310, ¶ 3 (App. 2018).

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<sup>2</sup>Rule 24.4 provides that “[t]he court on its own or on a party’s motion may, at any time, correct clerical errors, omissions, and oversights in the record.”

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¶8 This court's jurisdiction is limited by statute. *See* Ariz. Const. art. VI, § 9; A.R.S. § 12-120.21(A). Pursuant to A.R.S. §§ 13-4031 through 13-4033, certain rulings on post-trial motions "are separately appealable orders." *State v. Wynn*, 114 Ariz. 561, 563 (App. 1977) (discussing motions made pursuant to Rules 24.2 and 24.3, Ariz. R. Crim. P.). Such rulings may be appealed by a defendant pursuant to § 13-4033(A)(3), which provides that an appeal may be taken from "[a]n order made after judgment affecting the substantial rights of the party."

¶9 Nevertheless, any right of appeal pursuant to § 13-4033(A)(3) is limited by § 13-4033(B), which precludes a pleading defendant in a noncapital case from appealing his or her judgment or sentence. *See Hoffman v. Chandler*, 231 Ariz. 362, ¶ 16 (2013); *see also* Ariz. R. Crim. P. 17.1(e) (defendant who pleads guilty in noncapital case waives right to file notice of appeal and to have appellate court review proceedings on direct appeal but may seek relief under Rule 33, Ariz. R. Crim. P., by filing notice of and petition for post-conviction relief). In other words, "[a] pleading defendant may not circumvent" § 13-4033(B) "simply by filing a post-judgment motion to raise sentencing issues." *State v. Delgarito*, 189 Ariz. 58, 60 (App. 1997).

¶10 As we explained in *State v. Jimenez*, 188 Ariz. 342, 345 (App. 1996), when a post-judgment motion is denied – and the trial court's ruling therefore does not "actually change[] or modif[y] the judgment or sentence originally imposed" – this court lacks jurisdiction over an appeal from that ruling. This is so because in the absence of a change to the defendant's judgment or sentence, his or her "substantial rights" are not affected, and § 13-4033(A)(3) does not provide a statutory basis for an appeal. *See id.* However, "a pleading defendant may directly appeal the trial court's ruling on a post-judgment motion if the issues raised are not those that would normally arise in an appeal from the original judgment and sentence." *Delgarito*, 189 Ariz. at 60.

¶11 Whitaker pled guilty as described above and waived his right to a direct appeal from his judgment or sentence. *See* § 13-4033(B); Ariz. R. Crim. P. 17.1(e). The trial court denied Whitaker's motion to correct, neither changing nor modifying anything in the sentencing minute entry. Accordingly, we lack jurisdiction over Whitaker's appeal. *Cf. State v. Gessner*, 128 Ariz. 487, 488 (App. 1981) (order appealed did not affect substantial rights of appellant by re-imposing probation condition because effect on appellant's rights occurred once condition was first imposed).

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¶12 Nevertheless, our supreme court has made clear that we must “broadly interpret [Rule 33] to preserve the rights of pleading defendants to appellate review.” *Hoffman*, 231 Ariz. 362, ¶ 18. Accordingly, as the trial court attempted to, we will treat Whitaker’s motion to correct as a petition for post-conviction relief and will review it under Rule 33.

¶13 Whitaker relies on the following portion of the sentencing transcript to support his assertion that the trial court ordered his restitution to commence upon his release from prison:

The Court: . . . [D]id you need to address any of the restitution issues?

[Defense counsel]: Judge, the only single thing I can think of, part of the restitution was tied in with the plea, aside from the comments I made about it. So I think you have to follow that.

I would ask that any restitution order commence with his release from DOC.

The Court: Okay. Of course.

Whitaker maintains the court’s ruling is “black and white” in that the court stated, “Of course,” in response to defense counsel’s request that restitution commence upon his release from DOC. We disagree.

¶14 At that point in the sentencing hearing, the trial court had not imposed any sentence or ordered any restitution. The court’s response was merely an acknowledgment of defense counsel’s statements, including his suggestion that the court must act consistently with the plea agreement. Notably, the sentencing judge was the same judge who ruled on Whitaker’s motion to correct. If she intended the language to carry some different meaning, Whitaker gave her the chance to correct it, yet she declined to do so. *Cf. State v. Organ*, 225 Ariz. 43, ¶ 10 (App. 2010) (we infer factual findings reasonably supported by record necessary to support trial court’s ruling). Instead, the court noted that the order in its sentencing minute entry complied with Arizona law, specifically § 31-230(C) and *State v. Stocks*, 227 Ariz. 390 (App. 2011). We agree.

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¶15 “[T]here is a strong governmental interest in making victims whole by requiring criminal defendants to pay restitution.” *Stocks*, 227 Ariz. 390, ¶ 14. “To that end, the legislature has provided a comprehensive statutory scheme for collecting restitution ‘to insure that maximum efforts are expended to obtain payment of restitution.’” *Id.* (quoting *State v. Moore*, 156 Ariz. 566, 568 (1988)). One such statute is § 31-230(C), which provides:

If the court has ordered the prisoner to pay restitution pursuant to § 13-603, the director shall withdraw a minimum of twenty percent, or the balance owing on the restitution amount, up to a maximum of fifty percent of the monies available in the prisoner’s spendable account each month to pay the court ordered restitution.

The statute is mandatory. *See State v. Seyrafi*, 201 Ariz. 147, ¶ 14 (App. 2001) (“shall” normally indicates mandatory provision).

¶16 Accordingly, Whitaker did not present a colorable claim under Rule 33. *See State v. Runningeagle*, 176 Ariz. 59, 63 (1993) (colorable claim of post-conviction relief is “one that, if the allegations are true, might have changed the outcome”). Summary denial was therefore appropriate. *See Harden*, 228 Ariz. 131, ¶ 3.

¶17 Accordingly, we grant review but deny relief.