IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

KAI FELIX CIENFUEGOS,
Appellant.

Nos. 2 CA-CR 2020-0030, 2 CA-CR 2020-0031, and 2 CA-CR 2020-0032
(Consolidated)
Filed October 7, 2020

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NOT FOR PUBLICATION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).

Appeals from the Superior Court in Gila County
Nos. S0400CR201700355, S0400CR201700356, and S0400CR201700357
The Honorable Gary V. Scales, Judge Pro Tempore

APPEALS DISMISSED IN PART;
VACATED IN PART AND REMANDED

COUNSEL

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MEMORANDUM DECISION

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

V Á S Q U E Z, Chief Judge:

¶1 Pursuant to a plea agreement, Kai Cienfuegos was convicted in three separate cause numbers of possession of marijuana (2017-00355), solicitation to possess a narcotic drug (2017-00356), and possession of drug paraphernalia (2017-00357), all undesignated felonies. The trial court suspended the imposition of sentence, placed him on concurrent thirty-six-month terms of probation, and deferred designation of the offenses. In each case, a few weeks before Cienfuegos's probation was set to expire, probation officers filed petitions to terminate and the court followed their recommendations to designate the offenses as class six felonies. The court denied Cienfuegos's subsequent requests to instead designate the offenses as misdemeanors.

¶2 In separate appeals, Cienfuegos argues the trial court's orders designating the offenses in 2017-00355 and 2017-00357 as felonies must be vacated because he had not been given notice or a hearing. He also maintains the order designating the offense in 2017-00356 as a felony must be vacated because the trial court failed to hold a hearing.[1] This court consolidated his appeals in the above cases. For the reasons stated below, we dismiss Cienfuegos's appeals from the orders in 2017-00355 and 2017-00357 and vacate and remand in his appeal from the order in 2017-00356.

Factual and Procedural Background

¶3 We view the record in the light most favorable to sustaining the trial court's ruling. *State v. Wideman*, 165 Ariz. 364, 369 (App. 1990). In

[1]Because our decision on this issue is dispositive in the appeal from 2017-00356 and we lack jurisdiction in the other appeals, we do not address the following issues also raised by Cienfuegos: that the trial court abused its discretion in terminating his probation in 2017-00355, that the court abused its discretion in designating the offenses as felonies, and that all three offenses should be classified as class one misdemeanors.

May 2018, Cienfuegos pled guilty and was sentenced as described above. In accordance with the plea agreement, which described the offenses Cienfuegos was pleading guilty to as "undesignated non-dangerous felon[ies]," and pursuant to A.R.S. § 13-604(A), the trial court left the offenses undesignated at sentencing. Less than a month after Cienfuegos's sentencing, he violated the terms of his probation. The court reinstated him on probation, ordering him to serve 180 days in jail, and again deferred designation of the offenses.

¶4 In July 2018, a probation officer petitioned to terminate Cienfuegos's probation in 2017-00355, which was due to expire later that month, and to designate the offense as a felony. The officer apparently failed to provide a copy of the motion to Cienfuegos. Without conducting a hearing, the trial court terminated probation and designated that offense as a class six felony.

¶5 In December 2019, a probation officer filed petitions to terminate Cienfuegos's probation in the other two cases and recommended that the offenses be designated as felonies, again noting that Cienfuegos's probation would expire that month. Cienfuegos requested an extension of time in which to file a motion to designate both offenses as misdemeanors. Without ruling on the requested extension or holding a hearing, the court terminated Cienfuegos's probation and designated the offense in 2017-00357 as a felony on December 24, 2019.

¶6 A few days later, Cienfuegos filed motions to vacate the designation order in 2017-00355 and to designate all of the offenses as misdemeanors. On January 17, 2020, the trial court denied Cienfuegos's motions as to 2017-00355 and 2017-00357, and designated the offense in 2017-00356 as a class six felony. On January 21, 2020, Cienfuegos filed notices of appeal in all three cases.

Jurisdiction

¶7 We have an independent duty to ensure we have jurisdiction over an appeal. *State v. Eby*, 226 Ariz. 179, ¶ 3 (App. 2011). Our jurisdiction is derived from statute, *see State v. Celaya*, 213 Ariz. 282, ¶ 3 (App. 2006), and we must dismiss an appeal over which we lack jurisdiction, *see State v. Perry*, 245 Ariz. 310, ¶¶ 1, 8 (App. 2018).

¶8 A defendant who enters a guilty plea generally "may not appeal from a judgment or sentence that is entered pursuant to a plea agreement or an admission to a probation violation." A.R.S. § 13-4033(B). But a defendant may bring an appeal from a post-judgment order "affecting

the substantial rights of the party." And this court has concluded that an order, entered after the original conviction and sentence, designating an offense a felony affects a pleading defendant's substantial rights and may be appealed because the "issue could not have been raised in connection with the original judgment of guilt and imposition of probation." *State v. Delgarito*, 189 Ariz. 58, 60-61 (App. 1997).

¶9 A notice of appeal, however, "must be filed no later than 20 days after entry of the judgment or order." Ariz. R. Crim. P. 31.2(a)(2)(B). We lack jurisdiction over untimely appeals. *State v. Limon*, 229 Ariz. 22, ¶ 3 (App. 2011). Certain defendants may petition trial courts for relief if "the failure to timely file a notice of appeal was not the defendant's fault," Ariz. R. Crim. P. 32.1(f) (conviction after trial), or if "the failure to timely file a notice of post-conviction relief was not the defendant's fault," Ariz. R. Crim. P. 33.1(f) (conviction based on plea agreement).

¶10 We have jurisdiction to review the trial court's designation of the offense as a felony in 2017-00356, as Cienfuegos filed his notice of appeal within twenty days of the appealable order. *See* A.R.S. §§ 12-120.21(A)(1), 13-4031; 13-4033(A)(3); Ariz. R. Crim. P. 31.2(a)(2)(B); *Delgarito*, 189 Ariz. at 60-61. In both 2017-00355 and 2017-00357, however, his notices were filed more than twenty days after the court designated the offenses as felonies and no permission had been granted to file a delayed appeal under Rule 32.1(f) or post-conviction relief under Rule 33.1(f). *See* Ariz. R. Crim. P. 31.2(a)(2)(B); *Limon*, 229 Ariz. 22, ¶ 3. Cienfuegos apparently argues he is entitled to file a delayed notice of appeal or post-conviction relief in 2017-00355 because the August order was "never disclosed to defense counsel nor" Cienfuegos or in 2017-00357 because his request for an extension was not explicitly ruled on at the time the court designated the offense a felony. We do not address these issues because they were not raised before the trial court.[2] *See State v. Ramirez*, 126 Ariz. 464, 468 (App. 1980) (declining to consider post-conviction issues not previously presented to trial court).

¶11 Cienfuegos further argues, citing § 13-4033(A)(3) and *Delgarito*, 189 Ariz. at 59, that we have jurisdiction despite his failure to timely appeal from the designations. He maintains his notices were timely as to the denial of his motion to designate the offenses as misdemeanors or,

[2]Nothing in this decision should be interpreted as precluding or mandating later relief under Rule 32.1(f) or Rule 33.1(f), as the issues are not before us and we are not ruling on their availability or applicability.

alternatively, that we may accept special-action jurisdiction. But a trial court's order denying a motion requesting the court to reconsider a previous ruling is not an order affecting substantial rights. *See State v. Jimenez*, 188 Ariz. 342, 345 (App. 1996) (applying *Arvizu v. Fernandez*, 183 Ariz. 224, 226-27 (App. 1995), when considering if order affects defendant's substantial rights); *Arvizu*, 183 Ariz. at 226-27 (in the context of civil jurisdiction, requiring that issues raised on appeal of post-judgment motion differ from those that could be raised on appeal from judgment). Thus, we lack jurisdiction to review the January 17, 2020 order in either case. *See Jimenez*, 188 Ariz. at 345; *cf. State v. Berry*, 133 Ariz. 264, 267 (App. 1982) (reviewing appeal by state under A.R.S. § 13-4032).

¶12 We likewise decline to accept special-action jurisdiction. Arizona has long expressed a "strong . . . policy against using extraordinary writs as substitutes for appeals," *State ex rel. Neely v. Rodriguez*, 165 Ariz. 74, 76 (1990), and a party's "delay in seeking special-action relief beyond [the] time for appeal" must be considered in determining "whether special-action jurisdiction [is] accepted," *Devlin v. Browning*, 249 Ariz. 143, n.1 (App. 2020). Cienfuegos has not presented sufficient justification to depart from that strong policy here.

Lack of Hearing Prior to Designation

¶13 Cienfuegos argues the felony designation in 2017-00356 should be vacated because the trial court failed to hold a hearing, which deprived him of due process. We review de novo constitutional issues and a court's interpretation of a statute or rule. *See State v. Gay*, 214 Ariz. 214, ¶ 4 (App. 2007) (constitutional issues); *State v. Hansen*, 215 Ariz. 287, ¶ 6 (2007) (statutory or rule interpretation).

¶14 Cienfuegos attached letters regarding treatment, certificates of completion for treatment, medical records, a transcript from a previous hearing, and character letters from his friends and family to his motion to designate the offense as a misdemeanor, but the trial court denied Cienfuegos's motion and designated the offense as a felony without a hearing. A trial court must provide a defendant with actual notice and an opportunity to be heard before designating an offense a felony. *See State v. Pinto*, 179 Ariz. 593, 597 (App. 1994) (requiring court to give defendant notice and opportunity to be heard before designation of offense); *State v. Benson*, 176 Ariz. 281, 283, 285 (App. 1993) (deciding "due process requires that the defendant be given actual notice and a hearing before the offense can be designated a felony"). Before designation of an offense as a felony, courts should conduct a hearing that complies with Rules 26.9 and

26.10(b)(1), Ariz. R. Crim. P. *See Pinto*, 179 Ariz. at 598 (requiring such a hearing). Rule 26.9 states that a "defendant has a right to be present at a presentencing hearing and must be present at sentencing." Rule 26.10(b)(1) provides that the court must "give the defendant an opportunity to address the court."

¶15 Here, there was no hearing or opportunity for Cienfuegos to be heard, as required. Cienfuegos did not waive this right by failing to explicitly request a hearing, contrary to the state's assertion. *Cf. State v. Allen*, 235 Ariz. 72, ¶¶ 19-20 (App. 2014) (right to be present at sentencing hearing under Rule 26.9 can only be waived under extraordinary circumstances and even defendant willfully avoiding hearing is insufficient). The court therefore violated Cienfuegos's due process rights by failing to conduct a hearing before designating the offense a felony, and we vacate the designation and remand for a hearing complying with Rules 26.9 and 26.10(b)(1). *See Pinto*, 179 Ariz. at 597; *Benson*, 176 Ariz. at 283, 285.

Disposition

¶16 For the reasons stated above, we dismiss the appeals from the orders in 2017-00355 and 2017-00357, vacate the trial court's felony designation for the offense in 2017-00356, and remand the matter to the court for a hearing consistent with this decision.