

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

AUSTIN ALLEN STEWART,
Petitioner.

No. 2 CA-CR 2020-0155-PR
Filed September 28, 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NOT FOR PUBLICATION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).

Petition for Review from the Superior Court in Maricopa County
No. CR2015139716001DT
The Honorable David O. Cunanan, Judge

REVIEW GRANTED; RELIEF DENIED

Austin Allen Stewart, Florence
In Propria Persona

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MEMORANDUM DECISION

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

E P P I C H, Presiding Judge:

¶1 Austin Stewart seeks review of the trial court’s ruling summarily dismissing his notice of post-conviction relief filed pursuant to Rule 33, Ariz. R. Crim. P.¹ We will not disturb that order unless the court abused its discretion. *See State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). Stewart has not shown such abuse here.

¶2 Stewart pled guilty to three counts of attempted sexual conduct with a minor and one count of sexual abuse of a minor under the age of fifteen. The trial court imposed an eight-year prison term for one count of attempted sexual conduct with a minor and, for the remaining counts, suspended the imposition of sentence and placed Stewart on concurrent terms of lifetime probation.

¶3 Nearly two years later, Stewart filed a notice of post-conviction relief indicating that he was raising a claim of newly discovered material facts and a claim that his failure to timely seek post-conviction relief was without fault on his part. *See Ariz. R. Crim. P.* 33.1(e), (f). He further asserted that the state had “withheld” that A.R.S. § 13-902 was “ambiguous,” that § 13-902(E) and (F) are unconstitutional, and that his trial counsel had been ineffective. He asserted he had only recently “learned the laws mentioned” in his notice. The trial court summarily dismissed the notice, and this petition for review followed.

¹ 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.” *State v. Mendoza*, 249 Ariz. 180, n.1 (App. 2020).

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¶4 Stewart identified five issues for review: (1) the trial court was required to recuse because it allowed “conspiracy and fraud” to occur in his case; (2) the court failed to consider the declaration he attached to his notice; (3) the court erred by refusing to “toll[] the statute of limitations due to fraud”; (4) the court did not address his claim that § 13-902 is ambiguous; and (5) the court failed to apply the rule of lenity. We find no error.

¶5 First, Stewart did not request below that the trial court recuse itself. Even if this argument had any legal or factual basis, we do not address issues first raised on review. *See State v. Ramirez*, 126 Ariz. 464, 468 (App. 1980). And nothing in the record supports Stewart’s assertion that the court disregarded his declaration in rejecting his claims. The declaration contains only a list of legal arguments which, as we explain, do not entitle Stewart to relief.

¶6 As the trial court noted, Stewart’s notice was untimely under Rule 33.4(b)(3)(A). Although Stewart claimed he was without fault in failing to timely seek post-conviction relief, *see* Ariz. R. Crim. P. 33.1(f), his only argument was that he had been unaware of the law forming the basis for his claims. Rule 33.1(f) does not permit an untimely petition based on Stewart’s later discovery of what he believes to be a viable claim. *State v. Poblete*, 227 Ariz. 537, ¶ 7 (App. 2011). It permits relief only when a defendant “was unaware of” the right to seek post-conviction relief “or of the time within which a notice of post-conviction relief must be filed,” or when a defendant “intended to challenge the court’s decision but [counsel] or someone else interfered with his timely filing of a notice.” *Id.* Stewart has made no such allegation. Thus, he is not permitted to raise his various constitutional claims in this proceeding. *See* Ariz. R. Crim. P. 33.1(a), 33.2(a)(3), 33.4(b)(3)(A).

¶7 Stewart additionally asserted below that he was entitled to relief based on newly discovered material facts under Rule 33.1(e), a claim exempt from the timeliness requirements of Rule 33.4(b)(3)(A). But Stewart has identified no new facts. Rule 33.1(e) does not encompass newly discovered legal arguments, like Stewart raises here, but is instead limited to “newly discovered material facts” that “probably would have changed the judgment or sentence.” *See also State v. Serna*, 167 Ariz. 373, 374 (1991) (describing five elements of cognizable newly discovered evidence claim).

¶8 If we read Stewart’s notice generously, the sole non-constitutional claim he identified below is his argument that § 13-902 is “irreconcilable with it[]self” and the trial court could not impose lifetime

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probation without disregarding a portion of the statute. This claim is arguably raisable in this proceeding pursuant to Rule 33.1(c), which permits a challenge to a sentence “not authorized by law or by the plea agreement.” *See also* Ariz. R. Crim. P. 33.4(b)(3)(B) (requiring defendant to raise claim under Rule 33.1(c) “within a reasonable time after discovering the basis for the claim”).

¶9 His argument, as we understand it, is that § 13-902 is unclear because subsection (A)(2) provides that the maximum available probation term for class three felonies like Stewart’s, *see* A.R.S. §§ 13-1001(C)(2), 13-1404(C), 13-1405(B), is five years, but subsection (E) allows a lifetime term for his offenses. Thus, he reasons, this purported ambiguity must be resolved in his favor under the rule of lenity. *See generally State v. Johnson*, 171 Ariz. 39, 42 (App. 1992) (rule of lenity “applies to cases involving penal statutes susceptible to different interpretations, [and] mandates that our doubts be resolved in defendant’s favor”). There is, however, no ambiguity. Section 13-902(A) sets the general limits for probation terms and subsection (E) modifies those limits for certain offenses. *See State v. Johnson*, 240 Ariz. 402, ¶ 13 (App. 2016) (specific statutes control over general statutes). Absent ambiguity, the rule of lenity does not apply. *State v. Florez*, 241 Ariz. 121, n.6 (App. 2016).

¶10 We grant review but deny relief.