IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

NICHOLAS GILES CALHOUN,
Petitioner.

No. 2 CA-CR 2020-0164-PR
Filed December 8, 2020

Petition for Review from the Superior Court in Pima County
No. CR20173240001
The Honorable Jeffrey T. Bergin, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Law Offices of Thomas E. Higgins P.L.L.C., Tucson
By Thomas E. Higgins
Counsel for Petitioner

MEMORANDUM DECISION

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

S T A R I N G, Presiding Judge:

¶1 Nicholas Calhoun 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.[1] We will not disturb that order unless the court abused its discretion. *See State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). Calhoun has not shown such abuse here.

¶2 Calhoun pled guilty to second-degree murder, leaving the scene of an accident resulting in death or serious physical injury, two counts of aggravated assault, criminal damage, endangerment, possession of a dangerous drug, possession of drug paraphernalia, and two counts of misdemeanor driving under the influence. The trial court sentenced him to concurrent prison terms for all felony counts except leaving the scene of an accident, the longest of which is eighteen years. For leaving the scene of an accident, the court suspended the imposition of sentence and placed Calhoun on a consecutive, three-year probation term.

¶3 Calhoun sought post-conviction relief, arguing his consecutive probation term was not permitted under A.R.S. § 13-116,[2] his

[1] Our supreme court amended the post-conviction relief rules, effective January 1, 2020. 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.'" *State v. Mendoza*, 249 Ariz. 180, n.1 (App. 2020) (quoting Ariz. Sup. Ct. Order R-19-0012). "Because it is neither infeasible nor works an injustice here, we cite to and apply the current version of the rules." *Id.*

[2] Below and on review, Calhoun initially frames this issue as a significant change in the law, citing *State v. Watson*, 248 Ariz. 208 (App. 2020). *See* Ariz. R. Crim. P. 33.1(g). He makes no effort, however, to show that *Watson* changed Arizona law. *See State v. Valencia*, 241 Ariz. 206, ¶ 9 (2016) ("A 'significant change in the law' is 'a clear break from the past.'"

sentences were unconstitutional "due to his impaired cognitive ability," and there was newly discovered evidence relevant to his sentences. Calhoun also requested that the trial court review "the entire record" to determine whether he was entitled to raise a defense of "guilty except insane" under A.R.S. § 13-502, could understand the proceedings against him sufficiently to enter a guilty plea, and, if his "mental health condition" is a statutory mitigating factor under A.R.S. § 13-701(E). The court summarily dismissed the proceeding, and this petition for review followed.

¶4 Calhoun repeats his claims on review. First, he argues that his consecutive term of probation for leaving the scene of an accident violates § 13-116. "Under § 13-116, a trial court may not impose consecutive sentences for the same act." *State v. Urquidez*, 213 Ariz. 50, ¶ 6 (App. 2006); *see also State v. Watson*, 248 Ariz. 208, ¶ 32 (App. 2020) (consecutive probation term must comply with § 13-116). But we need not evaluate whether consecutive punishment is permitted under § 13-116 because A.R.S. § 28-661(D) requires that Calhoun's probation term "shall run consecutively to any sentence imposed on the person for other convictions on any other charge related to the accident."

¶5 Calhoun asserts, however, that § 28-661(D) does not demonstrate "clear[] inten[t]" to create an exception to the general rule of § 13-116. He relies on language in *State v. Arnoldi*, 176 Ariz. 236, 242 (App. 1993), stating that § 13-116 "is paramount in the statutory scheme of sentencing." But, in *State v. Jones (Jones II)*, 235 Ariz. 501, ¶¶ 9-10 (2014), our supreme court overruled *Arnoldi* and rejected the notion that § 13-116 has some special primacy in Arizona law. The court determined that A.R.S. § 13-705(M) permitted consecutive sentences for dangerous crimes against children irrespective of § 13-116.[3] *Id.* ¶ 11. It applied the general principle

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(quoting *State v. Shrum*, 220 Ariz. 115, ¶ 15 (2009))). Instead, the core of his claim is that the probation term violates Arizona's prohibition against double punishment under § 13-116. Thus, we address his claim under Rule 33.1(c).

[3]Calhoun cites *State v. Jones*, 232 Ariz. 448 (App. 2013) in support of his position, but our supreme court vacated that decision in *Jones II*, 235 Ariz. 501, ¶ 14. It has no precedential value. *See Stephenson v. Nastro*, 192 Ariz. 475, ¶ 15 (App. 1998). And his reliance on *State v. Boldrey*, 176 Ariz. 378 (App. 1993), is also misplaced. Although our decision there concluded a previous version of § 13-705(M) did not conflict with § 13-116 because the

that "the more recent and specific statute applies," and determined the more-recently enacted § 13-705(M) controlled, despite "that reasonable people can disagree about which statute is more specific." *Id.* Section 28-661(D) was added in 2002. *See* 2002 Ariz. Sess. Laws, ch. 228, § 1. Section 13-116 "traces its roots to 1901," *Jones II*, 235 Ariz. 501, ¶ 11, and was last modified in 1977, 1977 Ariz. Sess. Laws, ch. 142, § 41. Thus, § 28-661(D) controls unless the legislature has "clearly indicated otherwise." *Jones II*, 235 Ariz. 501, ¶ 11. It has not.

¶6 Calhoun further contends the reference in § 28-661(D) to "any other charge related to the accident" excludes charges arising from the same facts. We disagree. The term "related" means only that the conduct is "[c]onnected in some way." *Related*, Black's Law Dictionary (11th ed. 2019). Section 28-661(D) cannot reasonably be read to exclude clearly connected conduct such as causing the accident from which a defendant then fled. *See State v. Lee*, 236 Ariz. 377, ¶ 16 (App. 2014) (plain language best indicator of legislative intent).

¶7 Calhoun next argues that his sentences were unconstitutional "due to his impaired cognitive ability," asserting he was "severely impaired throughout the duration of this case." But, although Calhoun cites psychological evaluations concluding he may suffer from a mental illness, none suggest he was not competent to plead guilty and be sentenced. A defendant is competent to plead guilty unless a "mental illness has substantially impaired his ability to make a reasoned choice among the alternatives presented to him and understand the nature of the consequences of his plea." *State v. Bishop*, 162 Ariz. 103, 105 (1989) (quoting *Sieling v. Eyman*, 478 F.2d 211, 215 (9th Cir. 1973)). There is no indication that at the change-of-plea colloquy Calhoun did not understand the proceedings. And his counsel stated he had no concerns about Calhoun's understanding of any defense or his ability to assist at trial. And, insofar as Calhoun claims his mental illness is a mitigating factor, evidence of his mental health condition was presented to the trial court and Calhoun has not developed any argument that the court failed to adequately weigh that evidence.[4] *See State v. Stefanovich*, 232 Ariz. 154, ¶ 16 (App. 2013) (failure to develop argument waives claim on review).

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defendant's multiple acts were separate acts, *Boldrey*, 176 Ariz. at 382-83, the supreme court's decision in *Jones II* renders that analysis unnecessary.

[4]Calhoun waived any defense under § 13-502 by pleading guilty. *See State v. Flores*, 218 Ariz. 407, ¶ 6 (App. 2006).

¶8 Finally, Calhoun repeats his claim that a 2008 psychological evaluation is newly discovered evidence relevant to his sentences. *See* Ariz. R. Crim. P. 33.1(e). "Evidence is not newly discovered unless it was unknown to the trial court, the defendant, or counsel at the time of trial and neither the defendant nor counsel could have known about its existence by the exercise of due diligence." *State v. Saenz*, 197 Ariz. 487, ¶ 13 (App. 2000). As the trial court pointed out, Calhoun was obviously aware of the evaluation and could have brought it to counsel's attention. Calhoun claims on review that it was unreasonable to believe he would have made counsel aware of the report in light of his mental illness. But he has not explained why his claimed mental illness would have prevented him from volunteering this information. Nor has he explained why counsel apparently took no steps to determine whether Calhoun had previously been evaluated. Thus, Calhoun has not demonstrated that he or his counsel were diligent in bringing the report to the court's attention. *See* Ariz. R. Crim. P. 33.1(e)(2).

¶9 We grant review but deny relief.