

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

WADE COLE DICKINSON,
Petitioner.

No. 2 CA-CR 2020-0187-PR
Filed November 10, 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NOT FOR PUBLICATION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 Yavapai County
Nos. P1300CR20060477, P1300CR201200744,
P1300CR201301298, and P1300CR201400230
The Honorable Christopher L. Kottke, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Sheila Polk, Yavapai County Attorney
By Steven J. Sisneros, Deputy County Attorney, Prescott
Counsel for Respondent

Kennedy Klagge, Yavapai County Public Defender
By Jillian J. Bachman-Underhill, Deputy Public Defender, Camp Verde
Counsel for Petitioner

STATE v. DICKINSON
Decision of the Court

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 Wade Dickinson seeks review of the trial court’s ruling dismissing his petition for post-conviction relief filed pursuant to Rule 33, Ariz. R. Crim. P.¹ We will not disturb that ruling unless the court abused its discretion. *See State v. Martinez*, 226 Ariz. 464, ¶ 6 (App. 2011). Dickinson has not met his burden of establishing such abuse here.

¶2 Pursuant to a plea agreement in 2006, Dickinson pled guilty to trafficking in stolen property in CR20060477. The trial court suspended the imposition of sentence and placed Dickinson on probation for four years, commencing upon his release from prison in another case. In February 2012, upon the state’s motion, the court extended the term of probation for an additional five years because Dickinson had failed to pay restitution. In July 2012, the state filed a petition to revoke probation, alleging that Dickinson had violated the conditions of his probation.

¶3 After a jury trial, Dickinson was also convicted of fraudulent schemes and artifices, forgery, taking the identity of another, and theft in CR201000452. And pursuant to a global plea agreement in 2014, Dickinson was convicted of fraudulent schemes and artifices in CR201200744; fraudulent schemes and artifices, weapons misconduct, and possession of dangerous drugs in CR201301298; and trafficking in stolen property in CR201400230. Dickinson admitted he was on probation in CR20060477 at the time of these offenses, and the trial court explained that pleading guilty

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.*

STATE v. DICKINSON
Decision of the Court

would constitute an “automatic violation” of his probation. The parties stipulated that the court would not sentence Dickinson to more than twenty-five years’ imprisonment for all five cases.

¶4 The trial court sentenced Dickinson to five years’ imprisonment in CR20060477; concurrent and consecutive prison terms totaling 19.5 years in CR201000452; 15.75 years’ imprisonment each in CR201200744 and CR201400230; and concurrent terms, the longest of which was 15.75 years in CR201301298. The terms in CR201000452, CR201200744, CR201301298, and CR201400230 were concurrent with each other but consecutive to CR20060477.

¶5 In October 2014, Dickinson filed a notice of post-conviction relief in CR20060477, CR201200744, CR201301298, and CR201400230. The trial court, however, summarily dismissed the notice because it was filed more than ninety days after entry of judgment and sentence, and he had failed to offer any reason why it was not timely filed.

¶6 In June 2017, Dickinson filed a second notice of post-conviction relief in CR201200744, CR201301298, and CR201400230, pursuant to Rule 33.1(e). He argued that this court’s “recently issued opinion,” reversing his convictions in CR201000452 based on a double jeopardy violation, constituted newly discovered material facts. *See State v. Dickinson*, 242 Ariz. 120, ¶¶ 16, 23-25 (App. 2017). In his subsequently filed petition, Dickinson argued that he should be allowed to withdraw from the global plea agreement, or in the alternative be resentenced, because the plea “was premised” on his convictions in CR201000452 and the trial court relied on CR201000452 in sentencing Dickinson in the other cases. The court granted multiple extensions while the parties attempted to reach a resolution.

¶7 In January 2019, Dickinson filed an amended petition, adding claims under CR20060477. Specifically, Dickinson asserted that he was being held in custody after his sentence had expired and that he was actually innocent of the probation violation because his four-year term of probation had “lapsed” on December 12, 2011, making the motion to extend probation and the petition to revoke filed by the state in 2012 untimely. *See* Ariz. R. Crim. P. 33.1(d), (h). He also asserted that the trial court “lacked subject matter jurisdiction to hear a petition to revoke probation” after December 12, 2011, and that he had received ineffective assistance of trial counsel related thereto. *See* Ariz. R. Crim. P. 33.1(a), (b). Dickinson further

STATE v. DICKINSON
Decision of the Court

suggested that the court erroneously relied on the probation revocation when sentencing him in CR201200744, CR201301298, and CR201400230.

¶8 In response, the state argued that Dickinson had been “on probation at the time of the new offenses” and thus had been “lawfully sentenced in his 2006 probation case and his other new matters.” In addition, the state maintained that Dickinson “did not raise any colorable claim to allow him to withdraw from the global plea agreement.” Thereafter, the trial court summarily dismissed Dickinson’s petition in July 2019. The next month, Dickinson filed a “Motion to Reconsider Summary Dismissal and Request for Hearing,” arguing that he was entitled to an evidentiary hearing.² The court held a status conference and heard argument from the parties. It thereafter affirmed its July 2019 ruling. This petition for review followed.

¶9 On review, Dickinson argues the trial court abused its discretion by summarily dismissing his petition without an evidentiary hearing. As he did below, he contends the court “improperly used the illegally obtained convictions” in CR201000452 “as illegal sentencing factors” in CR201200744, CR201301298, and CR201400230. He also asserts that “his probation term had expired prior to the filing of the petition to revoke probation and, therefore, both the prison sentence he received for the revocation” and any corresponding enhancement to the sentences in CR201200744, CR201301298, and CR201400230 were “illegal.” Dickinson further maintains that “trial counsel ineffectiveness contributed to the resulting illegal sentence.”

¶10 “A defendant is precluded from relief under Rule 33.1(a) based on any ground . . . waived in any previous post-conviction proceeding, except when the claim raises a violation of a constitutional right that can only be waived knowingly, voluntarily, and personally by the defendant.” Ariz. R. Crim. P. 33.2(a)(3); *see also* Ariz. R. Crim. P. 33.4(b)(3)(A) (defendant must file notice for claim under Rule 33.1(a) within ninety days after oral pronouncement of sentence). By contrast, “[c]laims for relief based on Rule 33.1(b) through (h) are not subject to preclusion

²Dickinson’s motion was filed more than thirty days after the trial court’s dismissal of his petition. *See* Ariz. R. Crim. P. 33.14(a) (motion for rehearing may be filed no later than fifteen days after final decision on petition). The court nonetheless considered the motion on its merits. *See State v. Pope*, 130 Ariz. 253, 255 (1981) (time limits for motion for rehearing not jurisdictional).

STATE v. DICKINSON
Decision of the Court

under Rule 33.2(a)(3),” but the defendant nonetheless “must explain the reasons for not raising the claim in a previous notice or petition, or for not raising the claim in a timely manner.” Ariz. R. Crim. P. 33.2(b)(1); *see also* Ariz. R. Crim. P. 33.4(b)(3)(B) (defendant must file notice for claim under Rule 33.1(b) through (h) within reasonable time after discovery). “If the notice does not provide sufficient reasons why the defendant did not raise the claim in a previous notice or petition, or in a timely manner, the court may summarily dismiss the notice.” Ariz. R. Crim. P. 33.2(b)(1). “If, after identifying all precluded and untimely claims, the court determines that no remaining claim presents a material issue of fact or law that would entitle the defendant to relief under this rule, the court must summarily dismiss the petition.” Ariz. R. Crim. P. 33.11(a).

¶11 Because this was Dickinson’s second proceeding for post-conviction relief, and it was initiated more than ninety days after sentencing, he is precluded from relief based on Rule 33.1(a) grounds. *See* Ariz. R. Crim. P. 33.2(a)(3), 33.4(b)(3)(A). This includes claims of ineffective assistance of trial counsel. *See State v. Botello-Rangel*, 248 Ariz. 429, ¶¶ 8-9 (App. 2020). The trial court thus did not abuse its discretion in summarily dismissing such claims. *See Martinez*, 226 Ariz. 464, ¶ 6.

¶12 Assuming Dickinson’s probation argument, which he framed as falling under Rule 33.1(b), (d), and (h),³ was not subject to preclusion under Rule 33.2(a)(3), he failed to explain why it was not raised previously or in a timely manner.⁴ *See* Ariz. R. Crim. P. 33.2(b)(1). It was thus within the trial court’s discretion to summarily dismiss this claim. *See Martinez*, 226 Ariz. 464, ¶ 6; *see also State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015) (“We will affirm a trial court’s decision if it is legally correct for any reason.”).

³The thrust of Dickinson’s probation argument appears to be that the state presented, and the trial court relied on, “false and misleading information” at sentencing, which seems more appropriately characterized as a constitutional claim arising under Rule 33.1(a). As such, it would be precluded in this untimely, successive proceeding. *See* Ariz. R. Crim. P. 33.2(a)(3), 33.4(b)(3)(A).

⁴Below, Dickinson seemingly tried to hinge the timeliness of this claim on his filing of the second notice after this court had issued *Dickinson*, 242 Ariz. 120. However, his probation argument is wholly unrelated to and was discoverable apart from that opinion.

STATE v. DICKINSON
Decision of the Court

¶13 Dickinson’s claim of newly discovered material facts under Rule 33.1(e) based on our opinion reversing his convictions in CR201000452, *see Dickinson*, 242 Ariz. 120, ¶ 25, is likewise not subject to preclusion, *see Ariz. R. Crim. P. 33.2(b)(1)*. In addition, Dickinson filed his notice within thirty days of our mandate in that opinion. Assuming that was a “reasonable time” under Rule 33.4(b)(3)(B), Dickinson nevertheless failed to establish a colorable claim warranting an evidentiary hearing. As our supreme court has explained,

A colorable claim in a newly-discovered evidence case is presented if the following five requirements are met: (1) the evidence must appear on its face to have existed at the time of trial but be discovered after trial; (2) the motion must allege facts from which the court could conclude the defendant was diligent in discovering the facts and bringing them to the court’s attention; (3) the evidence must not simply be cumulative or impeaching; (4) the evidence must be relevant to the case; (5) the evidence must be such that it would likely have altered the verdict, finding, or sentence if known at the time of trial.

State v. Bilke, 162 Ariz. 51, 52-53 (1989). Rule 33.1(e) does not contemplate appellate decisions issued years after a guilty plea and sentencing as “newly discovered material facts” giving rise to post-conviction relief. The trial court therefore did not abuse its discretion in summarily dismissing this claim. *See Martinez*, 226 Ariz. 464, ¶ 6.

¶14 Accordingly, we grant review but deny relief.