

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

MARK VINCENT MILLER,
Petitioner.

No. 2 CA-CR 2020-0201-PR
Filed November 25, 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NOT FOR PUBLICATION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. CR2015005747001DT
The Honorable Christine Mulleneaux, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

Mark Vincent Miller, San Luis
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 Petitioner Mark Miller seeks review of the trial court’s order summarily dismissing his notice of post-conviction relief filed pursuant to Rule 33, Ariz. R. Crim. P.,¹ and its denial of his motion for rehearing and his “Motion to Receive Back Time Credit in Custody.” We will not disturb the court’s order unless the court clearly abused its discretion. *See State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). We find no such abuse here.

¶2 Pursuant to a plea agreement entered in February 2016, Miller was convicted of two counts of organized retail theft. On March 21, 2016, in accordance with the stipulated terms in his plea agreement, the trial court suspended the imposition of sentence and placed Miller on concurrent, three-year terms of probation, to begin upon completion of his sentence in CR2014-114108-001-DT.² Miller began serving his probation in the instant cause in December 2017. In October 2018, the court determined he had violated the conditions of his probation, revoked his probation, and sentenced him to concurrent, 2.5-year prison terms, with a total of sixty-five days presentence incarceration credit.

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 Also on March 21, 2016, Miller was sentenced to a three-year term of imprisonment in the 2014 matter with 224 days presentence incarceration credit. According to Miller, he was on release for the 2014 offense when he committed the offenses in the instant matter.

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¶3 In March 2019, Miller filed a “Motion to Receive Back Time Credit in Custody,” asserting he was entitled to an additional ninety-nine days presentence incarceration credit for the time he spent in custody between December 12, 2015, when he was arrested in this matter, and March 21, 2016, when he was sentenced in both the 2014 case and this matter. Subsequently, in July 2019, Miller filed a notice of post-conviction relief. On the form notice, he checked the boxes indicating he was raising claims pursuant to Rule 33.1(a) and (f), and stated he “recently became aware” he was entitled to ninety-nine days additional credit in this cause, which he did not receive “due to the ineffective assistance of counsel.”

¶4 Noting that Miller’s untimely claim “arises” under Rule 33.1(c), the trial court determined it “[n]evertheless . . . must ensure that a sentencing order accurately reflects presentence incarceration credit,” and thus directed the state to file a written response to Miller’s motion and notice, which the court apparently treated as a single proceeding. In its response, the state agreed that Miller was entitled to more “than the 65 days for which he received credit” in this cause, and that he was entitled to “credit for the time he spent in custody in this matter prior to being sentenced to probation.” Despite the state’s concession, the court dismissed Miller’s notice and denied his motion, correctly concluding, “[w]hile it is true that [Miller] did not receive 99 days in [this cause], it’s because the 99 days credit was applied to his sentence in [the 2014 matter] and he is not entitled to duplicate credit.” The court also concluded Miller had failed to raise a colorable claim pursuant to Rule 33.1(a) and 33.1(f),³ and subsequently denied his “Reply,” which it deemed a motion for rehearing. *See* Ariz. R. Crim. P. 33.14(a). This petition for review followed.

¶5 On review, Miller reasserts he is entitled to credit for the ninety-nine days he was in custody pursuant to both the 2014 matter and this cause.⁴ *See* A.R.S. § 13-712(B) (“All time actually spent in custody

³Because Miller does not mention Rule 33.1(a) or (f) on review, much less challenge the trial court’s ruling in this regard, we do not address it. *See* Ariz. R. Crim. P. 33.16(c)(2); *State v. Rodriguez*, 227 Ariz. 58, n.4 (App. 2010) (declining to address argument not raised in petition for review).

⁴Miller relies on *State v. Bravo*, 171 Ariz. 132 (App. 1991), *rejected on other grounds* by *State v. Ives*, 187 Ariz. 102 (1996), to support his claim. However, *Bravo* is distinguishable from this case, in that it involved the applicability of presentence incarceration credit arising from a count for which the defendant was later acquitted. *Id.* at 139-40.

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pursuant to an offense until the prisoner is sentenced to imprisonment for such offense shall be credited against the term of imprisonment.”). We review the trial court’s calculation of presentence incarceration credits de novo. *State v. Bomar*, 199 Ariz. 472, ¶ 5 (App. 2001).

¶6 We note that, although the trial court stated that Miller’s claim is grounded in Rule 33.1(c) (sentence imposed not authorized by law or by the plea agreement), a claim the court noted was untimely, it nonetheless addressed his claim on the merits. Notably, although claims raised under amended Rule 33.1(c) are no longer automatically precluded, they still may be time barred. *See* Ariz. R. Crim. P. 33.2(b)(1). However, because the court addressed Miller’s claim on the merits, despite the fact that he first raised it nearly three years after he was sentenced and provided no meaningful reason for doing so, we do not address the timeliness of his claim under the amended rules.

¶7 In any event, the trial court correctly concluded as a matter of law that Miller was not entitled to additional credit on the sentences imposed in this matter, which were consecutive to the sentence imposed in the 2014 case. “When consecutive sentences are imposed, a defendant is not entitled to presentence incarceration credit on more than one of those sentences, even if the defendant was in custody pursuant to *all* of the underlying charges.” *See State v. McClure*, 189 Ariz. 55, 57 (App. 1997). A defendant is not entitled to “double credit” for time served. *State v. Whitney*, 159 Ariz. 476, 487 (1989). Here, the court correctly concluded that, because Miller had already received credit for the ninety-nine days in the 2014 matter, he was not entitled to duplicate credit in this matter. We thus find no error in the court’s ruling.

¶8 Accordingly, we grant review but deny relief.