

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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THE STATE OF ARIZONA,  
*Respondent,*

*v.*

LEVITICUS LEROY NAJAR,  
*Petitioner.*

No. 2 CA-CR 2020-0227-PR  
Filed December 16, 2020

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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NOT FOR PUBLICATION  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).*

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Petition for Review from the Superior Court in Maricopa County  
No. CR2017135526002DT  
The Honorable Douglas Gerlach, Judge

**REVIEW GRANTED; RELIEF DENIED**

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COUNSEL

KBUNITED LLC, Phoenix  
By Kerrie M. Droban  
*Counsel for Petitioner*

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MEMORANDUM DECISION

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

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ESPINOSA, Judge:

¶1 Leviticus Najar 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.<sup>1</sup> We will not disturb that order unless the court abused its discretion. *See State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). Najar has not shown such abuse here.

¶2 In 2018, Najar pled guilty to solicitation to commit concealment of a dead body. The trial court suspended the imposition of sentence and placed Najar on a three-year probation term. Less than a year later, Najar filed a notice of post-conviction relief, asserting his failure to file his notice within ninety days of sentencing was without fault on his part, *see* Ariz. R. Crim. P. 33.1(f), 33.4(b)(3)(A), and asking that counsel be appointed. He explained he had recently been indicted for second-degree murder “based on the same facts and investigation” leading to his guilty plea and asserted he had not been “advised that he could be placed in jeopardy for the homicide by signing the plea agreement” and “had no awareness he could face new charges until” his recent indictment. The court appointed counsel and allowed the “proceeding to move forward,” specifically noting it had made no determination of the merits of Najar’s claim or whether “any claims to be raised in the Petition are not procedurally precluded.”

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<sup>1</sup> 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.*

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¶3 Najar then filed a petition asserting his trial counsel had been ineffective because he had “assur[ed]” Najar that, if he accepted the state’s offer to plead guilty to solicitation, he would not be charged with homicide “arising from the same set of circumstances.” He also argued his “double jeopardy rights” had been violated because the state had “breached the terms of its contract” by indicting him for second-degree murder and the state had engaged in “vindictive prosecution by increasing the severity of the initial charge.” The trial court summarily dismissed the proceeding. This petition for review followed.

¶4 On review, Najar repeats the arguments made in his petition in the trial court.<sup>2</sup> We first address his claim that counsel assured him the state would not seek to prosecute for homicide “if he pled guilty.” “To state a colorable claim of ineffective assistance of counsel, a defendant must show both that counsel’s performance fell below objectively reasonable standards and that this deficiency prejudiced the defendant.” *State v. Bennett*, 213 Ariz. 562, ¶ 21 (2006) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). “[A] defendant may obtain post-conviction relief on the basis that counsel’s ineffective assistance led the defendant to make an uninformed decision to accept or reject a plea bargain, thereby making his or her decision involuntary.” *State v. Banda*, 232 Ariz. 582, ¶ 12 (App. 2013).

¶5 But Najar has provided no evidence counsel told him the state had promised to forgo charging him with murder if he pled guilty to a different offense. Instead, counsel’s affidavit avowed only that he had “assured [Najar] the State had assured [him] it did not have enough evidence to file murder charges.” Indeed, counsel also avowed the state had informed him it would charge Najar with homicide if it could. And, at his change-of-plea hearing, Najar told the trial court no unwritten promises had been made to secure his plea. Nor has Najar identified any evidence that counsel fell below prevailing professional standards by believing the state, at the time of the plea offer, lacked sufficient evidence to charge Najar with murder. The court did not err in summarily rejecting this claim.

¶6 Najar also repeats his claim that his double jeopardy rights have been violated. “The Double Jeopardy Clauses in both the United

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<sup>2</sup>Najar did not address in his petition his claim under Rule 33.1(f), and the trial court did not address that issue, instead addressing the merits of Najar’s remaining claims. We assume, without deciding, that the court determined he was entitled to seek untimely relief under Rule 33.1(a). See Ariz. R. Crim. P. 33.1(f), 33.4(b)(3)(A).

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States and Arizona Constitutions protect a defendant ‘against a second prosecution for the same offense after acquittal’ and ‘against a second prosecution for the same offense after conviction.’” *State v. Carter*, 249 Ariz. 312, ¶ 7 (2020) (quoting *Ohio v. Johnson*, 467 U.S. 493, 398 (1984)). But, even if the state’s decision to charge Najar with murder violated double jeopardy, Najar has not explained what legal effect that would have here, since it would only bar the later prosecution.

¶7 Last, Najar again claims the state engaged in “vindictive prosecution” by charging him with second-degree murder following his guilty plea. But, again, this claim could be raised in the homicide prosecution, but not this case. See *State v. Mieg*, 225 Ariz. 445, ¶ 10 (App. 2010) (“[T]he Constitution’s due process guarantees prevent prosecutors from punishing defendants for exercising their protected legal rights by subsequently subjecting them to more severe charges.”). And, to the extent he suggests the state violated the terms of the plea agreement by breaking its promise to forgo charging him further, he has not established any such promise existed.

¶8 Although we grant review, relief is denied.