

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

ALAN MERCEL ALVARADO,
Petitioner.

No. 2 CA-CR 2020-0230-PR
Filed December 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NOT FOR PUBLICATION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
Nos. CR2015153267001SE and CR2016000959001DT
The Honorable Kevin B. Wein, Judge

REVIEW GRANTED; RELIEF DENIED

Alan M. Alvarado, Buckeye
In Propria Persona

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MEMORANDUM DECISION

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

BREARCLIFFE, Judge:

¶1 Alan Alvarado seeks review of the trial court’s ruling dismissing his notice of 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. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). Alvarado has not met his burden of establishing such abuse here.

¶2 Pursuant to a plea agreement in CR2015153267, Alvarado was convicted of weapons misconduct. Also pursuant to a plea agreement in CR2016000959, Alvarado was convicted of sale or transportation of dangerous drugs and conspiracy to commit sale or transportation of dangerous drugs. In March 2017, the trial court sentenced him to 4.5 years’ imprisonment for weapons misconduct, to run concurrently with an eight-year term for sale or transportation of dangerous drugs. The court suspended the imposition of sentence and imposed two years’ probation for conspiracy, to begin upon his release from prison.

¶3 More than two years later, in August 2019, Alvarado filed a notice of post-conviction relief under both cause numbers. He argued that the failure to file a timely notice was not his fault because his “[a]ttorney did not fulfill his ethical obligations . . . in regards to surrendering documents” and Alvarado had to obtain a court order “compelling counsel to forward [his] file.” In addition, Alvarado asserted claims of newly

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.*

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discovered material facts and ineffective assistance of counsel, also apparently based on counsel's failure to provide him with the case file.

¶4 The trial court dismissed the notice. It first determined that the proceedings were "untimely by more than two years." The court rejected Alvarado's claim that the failure to file a timely notice was not his fault, explaining that "[n]owhere in his submission does [Alvarado] adequately explain why he delayed more than two years before seeking post-conviction relief" and "[t]he record also reflects that he waited two years before even filing motions to obtain the case file." *See* Ariz. R. Crim. P. 33.1(f). Because Alvarado's notice was untimely, the court also determined that his claim of ineffective assistance of counsel was not cognizable. *See* Ariz. R. Crim. P. 33.1(a). Finally, the court concluded that Alvarado had not established a claim of newly discovered material facts because his attorney's "fail[ure] to provide the case file voluntarily . . . did not arise before the completion of conviction and sentencing" and Alvarado "did not exhibit reasonable diligence in raising the issue with the Court." *See* Ariz. R. Crim. P. 33.1(e). Alvarado filed a motion for reconsideration, which the court treated as a motion for rehearing and denied.

¶5 On review, Alvarado repeats his claim of ineffective assistance of counsel. He maintains that counsel failed to provide him with the case file until he obtained a court order and that the file he ultimately received contained "limited discovery" missing "31 pages of case log."

¶6 Ineffective assistance of counsel is a constitutional claim arising under Rule 33.1(a). *See State v. Petty*, 225 Ariz. 369, ¶ 11 (App. 2010). "A defendant must file the notice for a claim under Rule 33.1(a) within 90 days after the oral pronouncement of sentence." Ariz. R. Crim. P. 33.4(b)(3)(A). Here, Alvarado's notice was filed more than two years after sentencing. His claim was therefore untimely. *See* A.R.S. § 13-4234(G) ("The time limits are jurisdictional, and an untimely filed notice . . . shall be dismissed with prejudice.").

¶7 To the extent Alvarado reasserts his argument that the failure to file a timely notice was not his fault because counsel had failed to provide the case file, we find no abuse of discretion in the trial court's dismissal of this claim.² Pursuant to Rule 33.1(f), a pleading defendant is entitled to

²Alvarado does not reassert his claim of newly discovered material facts. We therefore do not address it. *See* Ariz. R. Crim. P. 33.16(c)(4) ("A

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relief if “the failure to timely file a notice of post-conviction relief was not the defendant’s fault.” However, the defendant must file the notice “within a reasonable time after discovering the basis for the claim.” Ariz. R. Crim. P. 33.4(b)(3)(B). As the court pointed out, Alvarado did not file a motion for an order to compel counsel to provide the file until April 2019, more than two years after his sentencing. Moreover, relief under this rule is limited to those situations—unlike the one here—where “the trial court failed to advise the defendant of his right to seek of-right post-conviction relief or . . . the defendant intended to seek post-conviction relief in an of-right proceeding and had believed mistakenly his counsel had filed a timely notice or request.” *State v. Poblete*, 227 Ariz. 537, ¶ 6 (App. 2011).

¶8 Much of Alvarado’s petition for review is dedicated to purported constitutional violations by police and prosecutors, including his claim of “unconstitutional suppression of evidence by the state.” He also summarily asserts that his guilty plea was “unlawful” because the state “abused its discretion to achieve their goal of mass incarceration at the expense of rights guaranteed by the Bill of Rights.” But these issues were not raised below. Accordingly, we do not address them for the first time on review. *See State v. Ramirez*, 126 Ariz. 464, 468 (App. 1980). In any event, we note that, as a pleading defendant, Alvarado waived all non-jurisdictional defects, including deprivations of constitutional rights, occurring before his plea. *State v. Flores*, 218 Ariz. 407, ¶ 6 (App. 2008); *see also State v. Lopez*, 99 Ariz. 11, 13 (1965) (pleading guilty waived challenges to legality of search and seizure).

¶9 Accordingly, we grant review but deny relief.

party’s failure to raise any issue that could be raised in the petition for review . . . constitutes a waiver of appellate review of that issue.”).