

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

DONALD WAYNE MEYER,
Petitioner.

No. 2 CA-CR 2020-0128-PR
Filed January 7, 2021

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NOT FOR PUBLICATION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 Pinal County
No. S1100CR201803174
The Honorable Jason Holmberg, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Kent P. Volkmer, Pinal County Attorney
By Geraldine L. Roll, Deputy County Attorney, Florence
Counsel for Respondent

Donald W. Meyer, Florence
In Propria Persona

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MEMORANDUM DECISION

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

B R E A R C L I F F E, Judge:

¶1 Donald Meyer seeks review of the trial court’s orders summarily dismissing his petition for post-conviction relief, his petition for post-conviction deoxyribonucleic acid (DNA) testing, and his motion for rehearing pursuant to Rule 33, Ariz. R. Crim. P. We will not disturb those orders unless the court abused its discretion. *See State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). Meyer has not shown such abuse here.

¶2 Meyer pleaded guilty to child abuse and attempted child molestation. Pursuant to the terms of the plea agreement, in January 2020, the trial court sentenced Meyer to an aggravated prison term of 3.75 years followed by a lifetime term of probation. More than four months later, in May 2020, Meyer filed a notice of and petition for post-conviction relief and a petition for DNA testing. He alleged he “believed counsel would file all paperwork in his interest,” and asked that an attorney be appointed to represent him.¹

¶3 Meyer claimed, among other things, that certain statutes under which he had been charged, including former A.R.S. § 13-604.01,² are unconstitutional, and, therefore, the trial court lacked subject matter jurisdiction over him. He also asserted the imposition of a prison term and probation in the same matter was improper and that the court had incorrectly enhanced his sentence under *State v. Hannah*, 126 Ariz. 575, 576-77 (1980). He further suggested, without explanation, that he was actually innocent, and that trial counsel had been ineffective based on the “sheer volume of errors” he had committed. In a separate petition filed on the same day, Meyer asked the court to order DNA testing of “any and all” evidence collected in the case,

¹Trial counsel’s motion to withdraw was granted in January 2020, less than two weeks after Meyer was sentenced.

²*See* 2008 Ariz. Sess. Laws, ch. 301, §§ 17, 29.

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asserting the results “could provide exculpatory results.” See A.R.S. § 13-4240; Ariz. R. Crim. P. 33.17.

¶4 The trial court summarily dismissed Meyer’s petitions in a single ruling and subsequently denied his motion for rehearing. The court found the claims in his petition untimely and denied his request for DNA testing, correctly noting Meyer had failed to provide any facts to support it. This petition for review followed.

¶5 On review, Meyer repeats his claim that, based on the purported unconstitutionality of former § 13-604.01, the trial court lacked subject matter jurisdiction, and that his illegal sentence constitutes fundamental error, a claim he maintains cannot be waived and can be raised at any time.³ Meyer also reasserts his claim that he is entitled to relief from the imposition of lifetime probation and suggests, without argument or factual support, that he was actually innocent.⁴

¶6 We conclude the trial court did not abuse its discretion by dismissing Meyer’s Rule 33 proceeding, which he does not appear to dispute is untimely. Meyer was precluded from raising claims under Rule 33.1(a) in his untimely notice, and was only permitted to raise claims pursuant to Rule 33.1(b) through (h). See Ariz. R. Crim. P. 33.4(b)(3)(A) (notice of claim under Rule 33.1(a) must be filed within ninety days after sentence), 33.4(b)(3)(B) (although not subject to preclusion under Rule 33.2(a)(3), claims under Rule 33.1(b) through (h) must be raised in notice filed within reasonable time after discovery of basis for claim), 33.2(b)(1) (defendant must explain why claim

³Meyer mistakenly states the trial court imposed a mitigated sentence on the child abuse count. See A.R.S. § 13-702(D).

⁴We thus do not address Meyer’s actual innocence claim. See *State v. Stefanovich*, 232 Ariz. 154, ¶ 16 (App. 2013) (insufficient argument waives claim). Additionally, to the extent Meyer requests for the first time on review permission to file a “delayed appeal,” as a pleading defendant in a noncapital case, he does not have a right to a direct appeal. See A.R.S. § 13-4033(B). In any event, we do not address issues raised for the first time on review. See *State v. Ramirez*, 126 Ariz. 464, 468 (App. 1980); see also Ariz. R. Crim. P. 33.16(c)(2)(B). We similarly do not address his reference, also for the first time on review, to *State v. Peek*, which is, in any event, inapposite. 219 Ariz. 182, ¶ 10 (2008) (lifetime probation available for attempted child molestation occurring after effective date of 1997 amendment of § 13-902(E)).

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under Rule 33.1(b) through (h) raised in successive or untimely notice was not raised in previous notice or petition or in timely manner).

¶7 Other than stating he “was of the opinion that his trial attorney would and had filed the paperwork required to appeal his convictions and sentences,” Meyer offers no explanation for his untimely filing.⁵ Notably, he does not assert he was unaware of the time limits for initiating a Rule 33 proceeding. In fact, the record shows he was unequivocally notified of the time limit to seek post-conviction relief, a notification he acknowledged in writing. He also does not assert that counsel promised to file a notice on his behalf or that he was otherwise prevented from timely seeking post-conviction relief. Moreover, although trial counsel’s motion to withdraw was granted in January 2020, less than two weeks after Meyer was sentenced, it does not appear Meyer asked for an attorney before he filed his pro se notice of post-conviction relief in May 2020, a request which the court was not, in any event, required to grant at that time. *See* Ariz. R. Crim. P. 33.5(a) (trial court generally must appoint counsel in timely first Rule 33 proceeding that meets certain requirements).

¶8 Untimeliness aside, Meyer was not entitled to relief on his claims that the trial court lacked subject matter jurisdiction or that he received an illegal sentence. Although he is correct that a claim that the court lacked subject matter jurisdiction may be raised at any time, *see* Ariz. R. Crim. P. 33.1(b), 33.2(b)(1), 33.4(b)(3)(B); *State v. Turner*, 239 Ariz. 390, ¶ 6 (App. 2016), the court here had subject matter jurisdiction over his case. *See* Ariz. Const. art. VI, § 14(4); A.R.S. §§ 12-123(A), 13-1001(C), 13-1410, 13-3623(B)(1). Moreover, Meyer has not demonstrated that the statutes under which he was charged are unconstitutional, nor are we aware of any authority so providing.⁶ *See State v. Stefanovich*, 232 Ariz. 154, ¶ 16 (App. 2013) (insufficient argument waives claim). And, even if they were and that fact rendered the charging document somehow defective, a deficient charging instrument does not deprive a court of subject matter jurisdiction, *State v. Maldonado*, 223 Ariz. 309,

⁵Additionally, other than a brief, wholly unsupported citation to Rule 33.1(f), Meyer likewise provided no argument or support to suggest that his late filing was not his fault.

⁶ Although certain documents incorrectly cited former § 13-604.01, instead of § 13-705, the indictment correctly cited § 13-705, and the record is clear that Meyer was charged with and pleaded guilty to one count involving a dangerous crime against children in the second degree.

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¶ 13 (2010), nor is an illegal sentence an error amounting to lack of subject matter jurisdiction, *State v. Bryant*, 219 Ariz. 514, ¶¶ 14-17 (App. 2008).

¶9 Insofar as Meyer attempted to raise a claim of ineffective assistance of trial counsel, as previously noted, such a claim cannot be raised in an untimely post-conviction proceeding. See Ariz. R. Crim. P. 33.1(a), 33.2(a), 33.4(b)(3)(A); see also *State v. Petty*, 225 Ariz. 369, ¶ 11 (App. 2010) (ineffective assistance of counsel claim “cognizable under Rule 32.1(a)”). And although a timely claim of sufficient constitutional magnitude may be exempt from preclusion, as Meyer correctly asserts, such a claim is not exempt from the timeliness requirements of Rule 33.4(b)(3). See *State v. Lopez*, 234 Ariz. 513, ¶¶ 8-9 (App. 2014) (untimely notice of post-conviction relief without an exception is time-barred by jurisdictional limitations regardless of claim’s “constitutional magnitude”). In addition, as a pleading defendant, Meyer waived “all non-jurisdictional defects and defenses, including claims of ineffective assistance of counsel, except those that relate to the validity of a plea,” *State v. Banda*, 232 Ariz. 582, ¶ 12 (App. 2013). Therefore, Meyer’s claim that trial counsel generally rendered ineffective assistance and failed to consult a medical expert or “brief[] the burden shifting issue,” is not only untimely, but waived.⁷ *Id.*

¶10 Finally, Meyer reasserts his request for DNA testing, generally contending that evidence in the case “would likely provide exculpatory results,” while conceding, however, “that the results could also be inconclusive or could demonstrate his guilt.” Other than reasserting his request for DNA testing, Meyer has failed to provide any argument explaining why the trial court erred by denying his DNA petition, and has thus waived this argument. See *Stefanovich*, 232 Ariz. 154, ¶ 16; Ariz. R. Crim. P. 33.16(c)(2)(D) (petition for review shall contain reasons why appellate court should grant petition). Moreover, as the court correctly concluded, Meyer did not provide any specificity about the evidence he wanted tested, nor did he assert such unidentified evidence was in the possession or control of the court or the state. See Ariz. R. Crim. P. 33.17.

¶11 Accordingly, we grant review but deny relief.

⁷As part of the plea agreement, Meyer also waived the right to challenge any judgment and sentence “consistent with this agreement.”