

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

GLEN EDWARD BOYD,
Petitioner.

No. 2 CA-CR 2020-0148-PR
Filed February 11, 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NOT FOR PUBLICATION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 Pima County
No. CR20064777001
The Honorable Gus Aragon, Judge

REVIEW GRANTED; RELIEF DENIED

Glen E. Boyd, Florence
In Propria Persona

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MEMORANDUM DECISION

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

V Á S Q U E Z, Chief Judge:

¶1 Glen Boyd seeks review of the trial court’s ruling summarily dismissing his successive petition for post-conviction relief filed pursuant to Rule 33, Ariz. R. Crim. P. We will not disturb that order unless the court abused its discretion. *See State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). Boyd has not shown such abuse here.

¶2 In 2008, Boyd pled guilty to three counts of sexual assault and one count of kidnapping. For the sexual assault counts, the trial court imposed consecutive prison terms totaling thirty-five years, and, for kidnapping, the court suspended the imposition of sentence and placed Boyd on a consecutive seven-year probation term. He sought post-conviction relief, arguing that he would have rejected probation for kidnapping had he known any prison term would be served concurrently with his other terms. The court, pursuant to the parties’ stipulation, vacated the probation order and imposed a concurrent 12.5-year prison term for kidnapping.

¶3 Boyd’s counsel immediately filed a second notice of post-conviction relief, requesting appointment of new post-conviction counsel to evaluate her effectiveness. Appointed counsel filed a notice stating she had reviewed the record but had found no “meritorious [or] non-frivolous issues” to raise. The trial court dismissed the proceeding when Boyd failed to file a pro se petition.

¶4 In 2019, Boyd again sought post-conviction relief, asserting he had recently discovered he had been “deemed” to be seriously mentally ill (SMI) in 2006 and arguing that designation was a newly discovered mitigating circumstance. The trial court dismissed the proceeding, noting that Boyd had failed to provide any documents supporting his claim. Boyd did not seek review of that ruling.

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¶5 Two months later, in February 2020, Boyd filed a motion seeking leave to file a “delayed” petition for post-conviction relief, which the trial court denied. In April 2020, Boyd again sought post-conviction relief, raising the same underlying issue as support for claims of newly discovered evidence and ineffective assistance of counsel, and asserting his failure to timely seek post-conviction relief was without fault on his part. He also claimed his sentence was not authorized by law, citing Rule 33.1(c). He attached several documents indicating that the Arizona Department of Corrections had changed his status in June 2019 to designate him as SMI based on community health records preceding his time in prison. The trial court summarily dismissed the proceeding and denied Boyd’s motion for reconsideration. This petition for review followed.

¶6 On review, Boyd repeats his claims. The trial court did not err in summarily rejecting them. Several of his claims cannot be raised in this successive proceeding. Rule 33.1(f), which permits relief for the failure to timely seek post-conviction relief, applies only to the failure to file a notice of post-conviction relief within the time limits of Rule 33.4. His claim of ineffective assistance of counsel also cannot be raised in a successive proceeding. *See* Ariz. R. Crim. P. 33.1(a), 33.2(a)(3), (b).

¶7 Boyd has identified, however, two claims that may be raised in a successive proceeding. His claim of sentencing error under Rule 33.1(c) is not subject to preclusion under Rule 33.2(a)(3) for his failure to previously raise it. *See* Ariz. R. Crim. P. 33.2(b). However, even had Boyd identified a sentencing error in his petition below, which he did not, he failed to explain his failure to raise “the claim in a previous notice or petition” as required by Rule 33.2(b)(1).

¶8 Boyd’s claim of newly discovered evidence is similarly not subject to preclusion under Rule 33.2(a)(3). But, it is subject to preclusion under Rule 33.2(a)(2) because it was raised and rejected in his previous post-conviction proceeding. Even were the claim not precluded, Boyd has provided no information about the diagnosis leading to his SMI designation, much less established it would have affected either his competence to plead guilty or his sentences. *See* Ariz. R. Crim. P. 33.1(e). And, insofar as Boyd asserts the SMI designation supports his claim of ineffective assistance of counsel, Rule 33.1(e) does not contemplate a claim of newly discovered ineffective assistance of counsel and is instead restricted to “newly discovered” material facts that “probably would . . . change[] the judgment or sentence.” *See State v. Serna*, 167 Ariz. 373, 374

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(1991) (describing five elements of cognizable newly discovered evidence claim).

¶9 We grant review but deny relief.