

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

HECTOR LONGORIA,
Petitioner.

No. 2 CA-CR 2020-0183-PR
Filed February 10, 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NOT FOR PUBLICATION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. S1100CR201601470
The Honorable Kevin D. White, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Kent P. Volkmer, Pinal County Attorney
By Thomas C. McDermott, Bureau Chief – Criminal Appeals, Florence
Counsel for Respondent

DuMond Law Firm PLLC, Phoenix
By Samantha K. DuMond
Counsel for Petitioner

STATE v. LONGORIA
Decision of the Court

MEMORANDUM DECISION

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

STARING, Vice Chief Judge:

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

¶2 In 2016, Longoria pled guilty to attempted child abuse under circumstances likely to cause death or serious physical injury, child abuse, and weapons misconduct. The trial court imposed a 12.5-year prison term for attempted child abuse and, for the remaining counts, suspended the imposition of sentence and placed Longoria on concurrent probation terms, the longer of which is lifetime probation for his conviction of child abuse.

¶3 Longoria filed a timely notice of post-conviction relief. After being granted numerous extensions, counsel filed a notice stating he had found “no colorable claims that he can raise on [Longoria]’s behalf.” The court granted leave for Longoria to file a pro se petition. After requesting and being granted two more extensions, Longoria retained new counsel. The court granted more extensions, ultimately setting August 9, 2019, as the due date for Longoria’s petition.

¶4 When no petition had been filed by that date, the trial court dismissed the proceeding, but later granted Longoria’s motion to reinstate

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.*

STATE v. LONGORIA
Decision of the Court

it, ordering that Longoria file a petition by December 6, 2019. Longoria then submitted a petition that was filed by the clerk on December 10, 2019. He indicated in the petition that he had “filed” it “via USPS” on December 6. Longoria argued in the petition that: (1) trial counsel had been ineffective for failing to adequately investigate the case, (2) the factual basis for the convictions of attempted child abuse was inadequate, and (3) the trial court had erred in failing to conduct an inquiry, pursuant to *State v. Reynolds*, 25 Ariz. App. 409 (1976),² when Longoria claimed his innocence during a settlement conference and expressed at sentencing that he “never knew the poor child was as injured as he was.”

¶5 In addition to addressing the merits of Longoria’s claims in its response, the state argued that the petition was untimely, citing Rule 33.7 and A.R.S. § 13-4234(G).³ Longoria replied that the state was not permitted to raise “a timeliness defense in a responsive pleading” and was instead required to file “a motion to strike.” He also argued his petition was timely because he had “delivered [it] to a carrier” by the due date, citing Rule 31.13(c)(2)(B), Ariz. R. Crim. P., and *Lee v. State*, 218 Ariz. 235 (2008).

¶6 The trial court determined that Rule 31.13 applied only to appeals, not petitions for post-conviction relief, and that Longoria’s petition was thus untimely. The court observed that Longoria’s “late filing serves as an independent and adequate basis for dismissal” of his petition. The court went on, however, to evaluate the merits of Longoria’s claims, concluding they warranted summary rejection. This petition for review followed.

¶7 On review, Longoria first argues the trial court erred in concluding his petition was untimely. He asserts, as he did below, that his filing was timely pursuant to Rule 31.13(c)(2)(B), which provides that a pro se paper brief is timely filed if “the filing party delivers the brief to a third-party commercial carrier within the time allowed for filing, for the

²In *Reynolds*, this court determined that “when a plea of guilty is coupled with a statement by defendant as to his innocence, the trial court has a duty to inquire into and resolve the conflict between the waiver of trial and the claim of innocence.” 25 Ariz. App. at 413.

³The state also argued the trial court had erred by reinstating Longoria’s proceeding after initially dismissing it for failure to file a petition.

STATE v. LONGORIA
Decision of the Court

carrier's delivery to the appellate clerk within 3 calendar days."⁴ But Rule 31.13 governs the filing of appellate briefs, and nothing in the rule's language suggests it also applies to petitions for post-conviction relief.⁵ See *Osterkamp v. Browning*, 226 Ariz. 485, ¶ 14 (App. 2011) (plain language best indicator of "supreme court's intent in promulgating the rule"); see also Ariz. R. Crim. P. 31.1(a)(2) ("The provisions of Rule 31 govern criminal appeals from the superior court to the Court of Appeals and the Supreme Court.").

¶8 Rather, filings in the trial court are governed by Rule 1.7, Ariz. R. Crim. P., which unambiguously provides in subsection (b)(1) that a paper document is "deemed filed on the date the clerk receives and accepts it." Thus, under Rule 1.7, Longoria's petition was untimely. And we reject Longoria's assertion that Rule 31.13 nonetheless applies because Rule 33 proceedings are the functional equivalent of an appeal for pleading defendants. See *Montgomery v. Sheldon*, 181 Ariz. 256, 260 (1995) (noting post-conviction proceedings "followed by appellate review" are "similar to a direct appeal for an Arizona defendant who pleads guilty"). Any similarities between appeals and post-conviction proceedings do not give us the authority to modify our procedural rules. See *Bergeron ex rel. Perez v. O'Neil*, 205 Ariz. 640, ¶¶ 24, 27 (App. 2003).

¶9 Longoria also requests that we adopt the "common law mail rule" as described in *Lee v. State*, 218 Ariz. 235 (2008) because Rule 33 "does not explicitly require a filing [to] be received by the clerk on the date the filing is due." First, it is unnecessary for Rule 33 to contain any such requirement because Rule 1.7(b) establishes that the date of filing is the date the document is received and accepted by the clerk. Second, Longoria misunderstands the common law mail rule, which does not establish the date of filing, but merely states that, for a properly mailed item, "proof of

⁴Longoria states, without contradiction from the state, that electronic filing was not available in Pinal County Superior Court at the time he filed his petition.

⁵Even if Rule 31.13 applied to petitions for post-conviction relief, subsection (c)(2) is facially inapplicable to Longoria because he was represented by counsel. We additionally note that he cites the incorrect subsection of (c)(2), because he did not deliver his petition to a "third-party commercial carrier" as described in (c)(2)(B), but instead to the United States Postal Service as described in (c)(2)(A).

STATE v. LONGORIA
Decision of the Court

the fact of mailing will, absent any contrary evidence, establish that delivery occurred." *Lee*, 218 Ariz. 235, ¶ 8.

¶10 Because the trial court did not err in concluding Longoria's petition was untimely filed and subject to dismissal on that basis alone, we need not address the merits of his post-conviction claims. Nor need we address the state's argument that his untimely petition deprived the court of jurisdiction under § 13-4234(G).

¶11 We grant review but deny relief.