IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

RICHARD MARTINEZ,
Petitioner.

No. 2 CA-CR 2020-0191-PR
Filed January 8, 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NOT FOR PUBLICATION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. CR20080065001
The Honorable Wayne E. Yehling, Judge

REVIEW GRANTED; RELIEF DENIED

Richard Martinez, Florence
In Propria Persona

MEMORANDUM DECISION

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

E C K E R S T R O M, Judge:

¶1 Richard Martinez seeks review of the trial court's order 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). Martinez has not met his burden of establishing such abuse here.

¶2 Pursuant to a plea agreement in 2008, Martinez was convicted of four counts of armed robbery, seven counts of aggravated assault, and two counts of weapons misconduct. He was sentenced to consecutive and concurrent, presumptive prison terms totaling twenty-one years. The trial court later resentenced Martinez because the state had violated his plea agreement by recommending consecutive sentences. The court imposed the same aggregate twenty-one-year prison term. Martinez has repeatedly sought and been denied post-conviction relief. *See State v. Martinez*, No. 2 CA-CR 2017-0175-PR (Ariz. App. Aug. 29, 2017) (mem. decision); *State v. Martinez*, No. 2 CA-CR 2016-0221-PR (Ariz. App. Sept. 19, 2016) (mem. decision); *State v. Martinez*, No. 2 CA-CR 2015-0147-PR (Ariz. App. Sept. 3, 2015) (mem. decision); *State v. Martinez*, No. 2 CA-CR 2014-0030-PR (Ariz. App. June 17, 2014) (mem. decision); *State v. Martinez*, No. 2 CA-CR 2012-0235-PR (Ariz. App. Sept. 13, 2012) (mem. decision); *State v. Martinez*, No. 2 CA-CR 2010-0066-PR (Ariz. App. Aug. 17, 2010) (mem. decision).

---

[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.*

¶3 In August 2018, Martinez filed another notice of post-conviction relief, and the trial court appointed counsel. Counsel subsequently filed a notice stating she had reviewed the record but had "been unable to find any arguably meritorious legal issues to raise." Martinez filed a pro se petition in May 2019. He argued that the state had suppressed "material mitigating evidence," specifically evidence related to the testing of a firearm and the operation of its cylinder. He also cited Rule 33.1(e), framing his claim as one of newly discovered material facts.

¶4 On July 29, 2019, the trial court dismissed the petition. It explained that Martinez had previously sought post-conviction relief on "the issue of the operability of the firearm involved in the robbery in this case" and "the issue of whether disclosure occurred." The court thus concluded that he "would normally be precluded from raising the issue again." However, the court pointed out that a claim of newly discovered material facts pursuant to Rule 33.1(e) is excepted from the rule of preclusion. The court then rejected that claim, explaining there was "clear evidence" Martinez had received the "full disclosure," including "notes of the operability of the firearm."

¶5 On August 19, 2019, Martinez filed a motion for rehearing. After confusion over which division was assigned his case, the trial court denied the motion in March 2020. The court observed that Martinez's motion was untimely because it was filed more than fifteen days after its ruling. In addition, the court concluded that, even assuming the motion was timely, Martinez had failed to allege "adequate grounds" for relief. In April 2020, Martinez requested an extension of time in which to file a petition for review. The court granted him until September 24, 2020.[2]

¶6 In his petition for review, Martinez argues the trial court "erred in ruling that [he had] received full disclosure of the firearm testing and that his claim was adjudicated in previous proceedings." He maintains he presented a colorable claim entitling him to an evidentiary hearing

[2]Martinez's petition for review was not filed until October 9, 2020. However, according to the petition, Martinez mailed it on September 23, 2020. *See State v. Goracke*, 210 Ariz. 20, ¶¶ 10-12 (App. 2005) (prisoner mailbox rule applies to petition for review). In the absence of any facts suggesting that his assertion was not accurate or a response challenging the timeliness, we address the merits of his claims.

because none of the disclosure he obtained included "the notes to how the cylinder to the . . . revolver was open[e]d and loaded."[3]

¶7 "If, after identifying all precluded and untimely claims, the court determines that no remaining claim presents a material issue of fact or law that would entitle the defendant to relief under this rule, the court must summarily dismiss the petition." Ariz. R. Crim. P. 33.11(a). A defendant is entitled to an evidentiary hearing only if he presents a colorable claim. *State v. Gutierrez*, 229 Ariz. 573, ¶ 25 (2012). A colorable claim of newly discovered material facts has five requirements:

> (1) the evidence must appear on its face to have existed at the time of trial but be discovered after trial;
>
> (2) the motion must allege facts from which the court could conclude the defendant was diligent in discovering the facts and bringing them to the court's attention;
>
> (3) the evidence must not simply be cumulative or impeaching;
>
> (4) the evidence must be relevant to the case;
>
> (5) the evidence must be such that it would likely have altered the verdict, finding, or sentence if known at the time of trial.

State v. Amaral, 239 Ariz. 217, ¶ 9 (2016).

¶8 Martinez's claim presupposes that this purportedly "newly discovered" evidence—notes about the revolver's cylinder operation—exists. But he offers no proof of its existence, instead insisting that the state failed to disclose it, despite similar issues being raised previously. *See, e.g.*, *State v. Martinez*, 226 Ariz. 464, ¶ 4 (App. 2011); *Martinez*, No. 2 CA-CR

[3]In September 2020, before he filed this petition for review, Martinez filed another petition for post-conviction relief, asserting a claim under Rule 33.1(c). The trial court denied that petition, as well as his motion for rehearing.

2017-0175-PR, ¶ 3. Without knowing what these notes say, assuming they exist, Martinez cannot meet his burden of establishing a colorable claim. *See State v. Leyva*, 241 Ariz. 521, ¶ 22 (App. 2017) (speculation insufficient to state colorable claim); *State v. Donald*, 198 Ariz. 406, ¶ 21 (App. 2000) (to warrant evidentiary hearing, Rule 32 claim "must consist of more than conclusory assertions"). The trial court therefore did not abuse its discretion in summarily dismissing his claim. *See Roseberry*, 237 Ariz. 507, ¶ 7.

¶9 Martinez also contends that the trial court erred in denying his motion for rehearing as untimely because he was entitled to an extra five days for filing, pursuant to Rule 1.3(a)(5), Ariz. R. Crim. P.[4] Even though the court concluded that Martinez's motion was not timely, it went on to consider the merits of his motion, finding that he had failed to allege "adequate grounds" for relief. We therefore need not determine whether the court erred in finding the motion untimely because any error would be harmless.

¶10 Accordingly, we grant review but deny relief.

[4] Rule 1.3(a)(5) provides, "If a party may or must act within a specified time after service and service is made under a method authorized by Rule 1.7(c)(2)(C), (D), or (E), 5 calendar days are added after the specified time period would otherwise expire under (a)(1)-(4), except as provided in Rule 31.3(d)."