

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

DEMOORE T. GRAY,
Petitioner.

No. 2 CA-CR 2020-0233-PR
Filed January 21, 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NOT FOR PUBLICATION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 Maricopa County
No. CR2017133594001DT
The Honorable Greg S. Como, Judge

REVIEW GRANTED; RELIEF DENIED

DeMoore T. Gray, Tucson
In Propria Persona

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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 DeMoore Gray seeks review of the trial court’s ruling summarily dismissing his successive notice of 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). Gray has not shown such abuse here.

¶2 Gray pled guilty to theft of a means of transportation and was sentenced to a 4.5-year prison term. About eight months later, Gray filed a notice of post-conviction relief asserting he was “not liable for any delayed claim” and requesting that his trial counsel and the state provide him with their respective files, that “all records and transcripts” for his case be prepared, and that he be resentenced because an “ineligible” prior conviction was applied at sentencing. The trial court summarily dismissed the notice, but ordered that Gray be provided with his grand jury transcript and, “[o]ut of an abundance of caution,” that trial counsel produce Gray’s “entire file.”

¶3 Gray did not seek review of that ruling, instead filing a second notice of post-conviction relief asserting the state had obtained the indictment against him “under false pretenses” and he was “actually innocent.” The crux of his claim was that, at the grand jury proceeding, the state had identified as the owner of the stolen vehicle an employee of the vehicle’s actual owner—an automobile dealership—instead of the

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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dealership. Gray characterized this claim as one of newly discovered evidence. He also claimed that the trial court had erred by denying his motion to withdraw his guilty plea.

¶4 The trial court summarily dismissed the notice. It determined that, insofar as Gray was raising constitutional claims, he had waived those unrelated to the validity of his plea and, in any event, could not raise them in a successive post-conviction proceeding. The court further concluded the grand jury transcript was not newly discovered evidence and, moreover, Gray had not been diligent in raising the issue. This petition for review followed.

¶5 On review, Gray first argues the court “denied [him] access to the courts” and violated his due process rights by dismissing his notice as untimely. But the court did not dismiss Gray’s most-recent notice on timeliness grounds, but instead on waiver grounds. *See* Ariz. R. Crim. P. 33.2(a)(3). Even so, to the extent Gray raises constitutional claims, including his claim that he should have been permitted to withdraw from the plea agreement, they are untimely. *See* Ariz. R. Crim. P. 33.4(b)(3)(A). And Gray cites no Arizona authority for the proposition that the court may not dismiss untimely claims in a notice of post-conviction relief without the state having raised the issue. The authority he cites instead largely addresses civil claims or issues of federal criminal procedure and does not apply here.

¶6 In the remainder of his petition for review, Gray raises claims he did not identify in his notice: that he did not agree to representation by appointed counsel, that counsel could not waive his presence at the preliminary hearing, that the plea agreement “fails to state an offense,” that he was “prejudiced” by an “unauthorized stipulation” that he submit to only one mental health examination, and that the state was “required to dismiss the charges” against him because the victim did not file a stolen vehicle affidavit. He also contends for the first time on review that he was improperly sentenced as a repetitive offender and that A.R.S. § 13-703 is unconstitutional.² We do not address claims not first raised in the trial court. *See State v. Ramirez*, 126 Ariz. 464, 468 (App. 1980).

²Gray raised similar claims in his first notice of post-conviction relief. The dismissal of that notice is not before us. *See* Ariz. R. Crim. P. 33.16(a)(1) (permitting petition for review of “dismissal of a notice” of petition for post-conviction relief “[n]o later than 30 days after entry of the trial court’s final decision”).

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¶7 Last, Gray filed an “addendum” to his petition for review in which he reframes his claim regarding the grand jury as an argument that the state had presented “fabricated testimony” to obtain an indictment. Rule 33.16 governs the filing of petitions for review and does not provide for such addendums. We thus do not consider the arguments raised in his addendum.

¶8 We grant review but deny relief.