

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

KAITLYN NICOLE BILDILLI,
Petitioner.

No. 2 CA-CR 2022-0149-PR
Filed November 29, 2022

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NOT FOR PUBLICATION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. CR2018117066001DT
The Honorable Peter A. Thompson, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Grand Canyon Law Group LLC, Mesa
By Angela Poliquin
Counsel for Petitioner

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MEMORANDUM DECISION

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

STARING, Vice Chief Judge:

¶1 Kaitlyn Bildilli seeks review of the trial court’s order summarily dismissing her petition for post-conviction relief filed pursuant to Rule 33, Ariz. R. Crim. P. We review a court’s denial of post-conviction relief for an abuse of discretion. *See State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). Bildilli has shown no such abuse here.

¶2 Pursuant to a 2018 plea agreement, Bildilli was convicted of sexual conduct with a minor (count seven) and attempted public sexual indecency (count eight).¹ The trial court suspended the imposition of sentence and placed Bildilli on concurrent lifetime and ten-year probation terms with sex-offender conditions. In January 2022, more than three years after she was sentenced, Bildilli filed a notice of and petition for post-conviction relief, asserting claims under Rule 33.1(a) and (h). Contending her untimely claims were not her fault,² Bildilli argued she had been illegally convicted of an offense not cognizable under Arizona law in count eight; she was actually innocent of count seven, and her sentence for

¹The victim in count seven was a minor fifteen years of age or over, while the victim in count eight was under the age of fifteen. Pursuant to the terms of the plea agreement, eight additional counts were dismissed, all of which involved minor victims.

²Bildilli argued her untimely filing was not her fault because she “did not realize she had any claims” in light of her “impairing mental health conditions” and “she did not have access to the necessary resources to explore avenues for post-conviction relief” until her family retained counsel for her. Citing *State v. Bigger*, 251 Ariz. 402 (2021), which she characterized as “a recent and significant change in the law . . . not of the Rule 33.1(g) ilk,” she argued that A.R.S. § 13-4234 previously barred her from seeking untimely post-conviction relief.

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that offense constituted cruel and unusual punishment; and trial counsel had been ineffective. She also requested an evidentiary hearing.

¶3 The trial court summarily dismissed Bildilli's petition. The court determined Bildilli's claims raised under Rule 33.1(a) were untimely because she had not "adequately explain[ed] why the failure to timely file a notice was not [her] fault." Ariz. R. Crim. P. 33.4(b)(3)(D). It also concluded her claims under Rule 33.1(h) were untimely, noting she had not provided a "sufficient reason why her claims were presented more than three years after sentencing." Ariz. R. Crim. P. 33.2(b)(1). This petition for review followed.

¶4 On review, Bildilli argues the trial court erred by summarily dismissing her illegal-sentence and actual-innocence claims, reasserting she was convicted of an offense (count eight) not cognizable under Arizona law. She specifically contends the court should have "appl[ied]" *State v. Reed*, 252 Ariz. 236, ¶¶ 14-15 (App. 2021), to her case.

¶5 In *Reed*, the defendant sought post-conviction relief under Rule 33.1(c) and (h) in a successive petition filed nearly four years after he had been placed on probation. *Id.* ¶¶ 4, 13. The trial court rejected the petition as untimely. *Id.* ¶ 4. Another division of this court granted relief on review, concluding "the passage of time alone cannot preclude relief" on claims under Rule 33.1(c) or (h) and the trial court "must consider whether the delay is reasonable." *Id.* ¶ 14. The court explained that the trial court should consider, among other things, "the consequences of a failure to address the merits of the claim and the prejudice to the State or victim." *Id.* Noting the state had not "assert[ed] prejudice," the court concluded "that when a defendant pleads guilty to an offense not cognizable under Arizona law, an illegal-sentence claim under Rule 33.1(c) or actual-innocence claim under Rule 33.1(h) is not time-barred if there is no evidence presented beyond the mere passage of time to suggest unreasonable delay." *Id.* ¶¶ 14-15.

¶6 We initially note that, although Bildilli asserts she was entitled to relief under *Reed*, she did not present that specific argument below, much less mention *Reed*. And, insofar as she asserts the trial court acknowledged she had "a cognizable claim under *Reed*," the record belies that assertion. Rather, the court stated that Bildilli's "claim that her conviction for attempted public sexual indecency is illegal *may* also be cognizable under Rule 33.1(h)," citing *Reed* in support of that statement. (Emphasis added.)

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¶7 Notably, in *Reed*, the state conceded error and did not “assert prejudice,” acknowledging that Reed had pled guilty to an offense not cognizable under Arizona law. *Id.* ¶¶ 7, 14-16. However, unlike *Reed*, here the state has not expressly conceded error, and, in fact, it did not respond to Bildilli’s arguments, either below or on review. *See State v. Healer*, 246 Ariz. 441, n.5 (App. 2019) (appellate court has discretion to decline to treat state’s decision not to file a response as a confession of error). Therefore, *Reed* is distinguishable. But even assuming that *Reed* does apply, because we disagree with Bildilli’s argument that count eight is *not* a specific intent crime and is thus not a legally cognizable offense under Arizona law, we conclude the trial court did not err by dismissing her argument.³ *See Roseberry*, 237 Ariz. 507, ¶ 7 (we will affirm if trial court’s ruling is legally correct for any reason).

¶8 Bildilli also contends the trial court erred by dismissing her claims under Rule 33.1(a), finding she had failed to adequately explain the reason for her untimely filing. Generally, a defendant must file a notice of post-conviction relief raising “a claim under Rule 33.1(a) within 90 days after the oral pronouncement of sentence.” Ariz. R. Crim. P. 33.4(b)(3)(A). However, the court must excuse an untimely notice filed under this subsection “if the defendant adequately explains why the failure to timely file a notice was not the defendant’s fault.” Ariz. R. Crim. P. 33.4(b)(3)(D). Bildilli states, “She cannot explain why a notice of PCR [post-conviction relief] was not filed within ninety days except that she did not know of any claims she might have, she did not have any legal advice on filing a notice, and that her own mental health issues prevented her from exploring the possibility.”⁴

³Public sexual indecency under § 13-1403(A) is a specific intent crime, as it requires an intentional or knowing act. Although subsection (B) of the statute provides that a person who “intentionally or knowingly engages” in any of the enumerated acts *and* is “reckless about whether a minor who is under fifteen years of age is present” commits public sexual indecency to a minor, the offense nonetheless requires intentional conduct. Similarly, pursuant to § 13-1001, a person commits attempt by “[i]ntentionally engag[ing] in conduct which would constitute an offense if the attendant circumstances were as such person believes them to be.”

⁴The affidavit Bildilli submitted with her petition below does not refer to any mental health issues.

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¶9 The trial court correctly determined that Bildilli’s January 2022 notice was filed more than ninety days after the oral pronouncement of sentence in October 2018, a conclusion she did not challenge below. As such, any Rule 33.1(a) claims were untimely, and, although the court would have had to excuse the untimely filing if Bildilli had established that the untimeliness was not her fault, *see Reed*, 252 Ariz. 236, ¶ 11, she failed to do so. As the court noted in its ruling below, Bildilli had been advised of her post-conviction rights and the ninety-day deadline for seeking relief. And, as the court also noted, Bildilli did not argue “that she was unaware of her right to post-conviction relief, but only that she was unaware of any claims she could present,” an argument the court correctly found unavailing. *See State v. Poblete*, 227 Ariz. 537, ¶ 7 (App. 2011) (Rule 32.1(f) permits relief when a defendant “was unaware of his right to petition for post-conviction relief or of the time within which a notice of post-conviction relief must be filed or that he intended to challenge the court’s decision but his attorney or someone else interfered with his timely filing of a notice.”).⁵

¶10 Finally, as to Bildilli’s claim of actual innocence under Rule 33.1(h), she was required under Rule 33.2(b)(1) to “explain the reasons for not raising the claim in a previous notice or petition, or for not raising the claim in a timely manner.” If that explanation was not “sufficient,” the trial court could summarily dismiss the proceeding. *Id.* Bildilli maintains the court failed to address whether she brought her claims within a reasonable time of discovery, instead relying only on the “passage of time” and “ignoring the change cast by” *State v. Bigger*, 251 Ariz. 402 (2021). Absent a sufficient explanation, however, there is no basis to conclude a defendant, as required by Rule 33.4(b)(3)(B), brought a claim “within a reasonable time” after discovering it. *See State v. Pope*, 130 Ariz. 253, 256 (1981) (defendant has “heavy burden in showing the court why the non-compliance should be excused”).

¶11 The trial court determined that Bildilli’s explanation that she had not consulted an attorney until 2021 was not a sufficient reason to explain her untimely filing, a determination within the court’s discretion. *See Ariz. R. Crim. P. 33.2(b)(1)*. The court specifically noted Bildilli was “not incarcerated but has been on probation and free to seek legal counsel or

⁵We decline Bildilli’s invitation to reconsider our ruling in *Poblete* on the basis that a “public lawyer generally does not see the client after sentencing and therefore cannot offer advice regarding a PCR claim” or that trial counsel “did not realize a basis for PCR existed.”

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otherwise investigate any possible claims for post-conviction relief during the three years between sentencing and the filing of her petition.”

¶12 Additionally, insofar as Bildilli argues the trial court should have considered *Bigger* with regard to her Rule 33.1(h) claim, we note that she raised this argument below as to her Rule 33.1(a) claims, not as to her actual-innocence claim. Moreover, *Bigger* addresses claims based on the “no fault’ exception” to filing time limits related to Rule 33.1(a), 251 Ariz. 402, ¶¶ 34, 37, *see* Rule 33.4(b)(3)(D), and thus does not apply to claims raised under Rule 33.1(b) through (h). In any event, we conclude the court correctly determined that while *Bigger* “may explain some portion of the length of the delay” with regard to Bildilli’s late filing of her claims under Rule 33.1(a), it ultimately did not explain her “failure to meet the initial 90-day deadline,” nor did she otherwise “adequately explain[]” her failure to timely file her notice.

¶13 Accordingly, we grant review but deny relief.