

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

MICHAEL SMILEY,
Petitioner.

No. 2 CA-CR 2022-0181-PR
Filed January 5, 2023

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NOT FOR PUBLICATION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. CR2008009327015DT
The Honorable Michael C. Blair, Judge

REVIEW GRANTED; RELIEF DENIED

Michael Smiley, Florence
In Propria Persona

MEMORANDUM DECISION

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

B R E A R C L I F F E, Judge:

¶1 Michael Smiley seeks review of the trial court’s order summarily dismissing his 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. Martinez*, 226 Ariz. 464, ¶ 6 (App. 2011). Smiley has not met his burden of establishing such abuse here.

¶2 Pursuant to a 2009 plea agreement, Smiley was convicted of possession of drug paraphernalia and use of a wire in a drug-related transaction. The trial court sentenced him to six months in jail for the possession offense and to three years’ imprisonment for the wire offense. Smiley was released from prison in September 2011 in this matter, but he was reincarcerated on a new offense in December 2014.

¶3 In April 2021, Smiley filed a notice of and petition for post-conviction relief under this cause number. He argued his sentence was illegal and he was actually innocent, pursuant to Rule 33.1(c) and (h), respectively. Relying on *State v. Simmons*, 238 Ariz. 503 (App. 2015), Smiley maintained that, as the principal/buyer in this case, he only communicated with the principal/seller and therefore could not be convicted of violating A.R.S. § 13-3417(A) for use of a wire in a drug-related transaction.¹ In addition, Smiley asserted that because his “illegal conviction and sentence in this case [were] used to enhance his current sentence, the conviction and sentence for a violation of § 13-3417(A) must be vacated and [he] must be resentenced for his current case.”

¹In *Simmons*, this court determined that the defendant, “as the principal/seller in a buy-sell drug transaction, could [not] be convicted of violating § 13-3417(A), where there is no evidence of a wire or electronic communication by [the defendant] with any person except the other principal/buyer.” 238 Ariz. 503, ¶ 1.

¶4 The trial court appointed counsel for Smiley, but counsel was “unable to find a colorable issue.”² Pursuant to Smiley’s motion, the court reinstated his April 2021 petition. After receiving the state’s response to that petition, the court ordered Smiley to file a reply by April 4, 2022. On April 19, 2022, however, the court received a letter from Smiley indicating that he had not yet received the state’s response and requesting a fifteen-day extension once he received the response.

¶5 On June 27, 2022, the trial court issued its order in this Rule 33 proceeding. First, the court observed, although Smiley had requested an extension to file a reply, he “never advised when he received the state’s response, and he never filed a reply.” The court noted that Smiley’s address was the same on the mailing certificate on the state’s response as in the court’s records and on Smiley’s April 19 letter. The court concluded that “a reply is not required by the rules” and would not “assist . . . in the resolution of this matter.” Second, the court explained that “*Simmons* was decided on November 23, 2015, which is 1,526 days after [Smiley] was released from prison in this case” and that Smiley’s Rule 33 petition was “dated April 5, 2021, which is 1,960 days after *Simmons* was issued.” The court determined that Smiley had “failed to explain why he is entitled to relief due to a change in the law that occurred several years after he completed his sentence” and had “failed to explain why he waited more than five years after the law changed to seek post-conviction relief.” In addition, because the state would be prejudiced by the passage of time if the case were reopened, the court concluded summary dismissal was appropriate. This petition for review followed.

¶6 On review, Smiley repeats his claims that his sentence is illegal and that he is actually innocent.³ Smiley argues he could not have

²In appointing counsel, the trial court noted that “the plea agreement and sentencing order cite to A.R.S. § 13-2312,” which governs illegal control of an enterprise and illegally conducting an enterprise, rather than § 13-3417(A). But the factual basis supporting the plea, which apparently led counsel to conclude there was no colorable claim regarding this issue, is not part of our record on review. Because the court did not address the matter further, we do not either.

³Smiley also notes in his petition for review that he “would like this court to [know] a response from the state has still not been received.” However, he received the trial court’s order dismissing his Rule 33 petition and he does not suggest that his challenge to that order has somehow been hampered by not receiving the response.

raised his claims before being released from prison in this matter because “no one has the ability to go more than 4 years into the future and [learn] the outcome of the *Simmons* case.” He further maintains that the Arizona Department of Corrections (ADOC) obtained tablets in September 2020 but it was not until February 2021 that a “legal resource app” was installed on the tablets and that through that app he discovered *Simmons* and thereafter filed his Rule 33 petition.

¶7 For claims under Rule 33.1(b) through (h), a petitioner must file a notice for post-conviction relief “within a reasonable time after discovering the basis for the claim.” Ariz. R. Crim. P. 33.4(b)(3)(B). When a petitioner raises such a claim in an untimely notice, he “must explain the reasons for not raising the claim . . . in a timely manner.” Ariz. R. Crim. P. 33.2(b)(1). “If the notice does not provide sufficient reasons why the defendant did not raise the claim . . . in a timely manner, the court may summarily dismiss the notice.” *Id.*

¶8 Aside from stating that he “learned of this claim only recently through the new legal materials provided by the [ADOC],” Smiley did not present any argument regarding the timeliness of this Rule 33 proceeding below. We therefore could deem his new arguments on review waived. *See* Ariz. R. Crim. P. 33.16(c)(2)(B) (petition for review must contain issues decided by trial court); *State v. Ramirez*, 126 Ariz. 464, 468 (App. 1980) (appellate court will not consider on review claims not raised below). In addition, Smiley has not directed us to any authority – and we are aware of none – suggesting that caselaw developed after a defendant has completed his term of imprisonment and discovered by the defendant several years later could be used to support a timely claim for post-conviction relief.

¶9 In any event, the substance of Smiley’s *Simmons* claim does not warrant relief under Rule 33.1(c). Generally, Rule 33.1(c) “addresses sentences not authorized by the substantive law in effect at the time of sentencing.” *State v. Evans*, 252 Ariz. 590, ¶ 16 (App. 2022). Smiley’s sentence for use of a wire in a drug-related transaction was within the statutory range and the terms of the plea agreement. *See* A.R.S. §§ 13-702(D), 13-3417(C). Smiley’s argument is more appropriately characterized as one attacking his conviction, not sentence.

¶10 Smiley’s Rule 33.1(h) claim also fails. Under Rule 33.1(h), a petitioner is entitled to post-conviction relief if he “demonstrates by clear and convincing evidence that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would find the defendant guilty of the offense beyond a reasonable doubt.” In support of his claim, Smiley offers only his assertion that he, as the principal/buyer,

communicated solely with the principal/seller. But Smiley was one of more than three dozen individuals named in a nearly 400-count indictment. Smiley's bare assertion is insufficient to support his claim. *See State v. Donald*, 198 Ariz. 406, ¶ 17 (App. 2000) (to achieve evidentiary hearing, defendant must present more than conclusory assertion). For all these reasons, we cannot say the trial court abused its discretion in summarily dismissing Smiley's petition. *See Martinez*, 226 Ariz. 464, ¶ 6; *see also State v. Huez*, 240 Ariz. 406, ¶ 19 (App. 2016) (we must uphold trial court's ruling if legally correct for any reason).

¶11 Accordingly, we grant review but deny relief.