

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

CHARLES DANIEL COLE JR.,
Petitioner.

No. 2 CA-CR 2024-0189-PR
Filed November 20, 2024

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NOT FOR PUBLICATION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. CR2017110160001DT
The Honorable Gregory Como, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

DiMaggio Law Office PLLC, Phoenix
By Kaitlin S. DiMaggio
Counsel for Petitioner

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MEMORANDUM DECISION

Presiding Judge Gard authored the decision of the Court, in which Judge Eckerstrom and Judge Kelly concurred.

G A R D, Presiding Judge:

¶1 Charles Cole Jr. seeks review of the superior court’s ruling summarily dismissing his successive petition for post-conviction relief filed under Rule 33, Ariz. R. Crim. P. We will not disturb that ruling unless the court abused its discretion. *See State v. Mendoza*, 249 Ariz. 180, ¶ 1 (App. 2020). Cole has not met his burden of establishing such abuse here.

¶2 In 2017, Cole pled guilty to two counts of sexual conduct with a fifteen-year-old minor. The superior court suspended the imposition of sentence and placed Cole on concurrent ten-year terms of probation. In September 2023, Cole sought post-conviction relief, asserting claims of newly discovered material facts and actual innocence. *See Ariz. R. Crim. P. 33.1(e), (h)*. He relied on a recent email from the victim in which she asserted that she had been “coerced into making false statements” to convict Cole. In November 2023, the court subsequently dismissed the proceeding, concluding, in part, that Cole had failed to adequately explain the untimely assertion of his claims.

¶3 In June 2024, Cole initiated the current Rule 33 proceeding, again raising claims of newly discovered material facts and actual innocence. *See Ariz. R. Crim. P. 33.1(e), (h)*. He obtained a May 2024 affidavit from the victim in which she provided additional information about her purportedly false statements. She avowed that she had “presented [Cole] with a false identification card, which falsely indicated that [she] was over the legal age of consent,” and that Cole had been “entirely unaware of [her] true age.”

¶4 The following month, the superior court dismissed the proceeding. The court rejected the claim of newly discovered material facts, for several reasons. It observed that Cole had “raised a similar recantation claim in the first Rule 33 proceeding,” that the “affidavit did not exist at the time of sentencing,” and that recantation evidence is unreliable. The court found that the actual innocence claim was successive and that Cole had not

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met his burden of showing “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.” Ariz. R. Crim. P. 33.1(h). This petition for review followed.¹

¶5 On review, Cole first contends the superior court erred in rejecting his claim of newly discovered material facts. He argues that his current claim is not successive because the victim’s affidavit in this proceeding contains “significantly more information” than her email in the first proceeding. Cole therefore maintains that he is entitled to an evidentiary hearing.

¶6 By pleading guilty, Cole waived all non-jurisdictional defects unrelated to the voluntariness of his plea, including deprivations of constitutional rights. *State v. Flores*, 218 Ariz. 407, ¶ 6 (App. 2008). As this court has observed, Rule 33.1(e) “is applied quite restrictively to overturn guilty pleas” because, in part, a person who is “not manifestly guilty of the crime charged” may opt to plead guilty in the face of “a distinct possibility of a finding of guilt” to avoid the more severe sentence that could result from a jury trial. *State v. Fritz*, 157 Ariz. 139, 140 (App. 1988) (quoting *State v. McFord*, 125 Ariz. 377, 379 (App. 1980)). Cole does not assert that his guilty plea was involuntary. Even assuming the claim were not waived, however, Cole is not entitled to relief.

¶7 To receive an evidentiary hearing on a claim of newly discovered material facts, a defendant must present a colorable claim. *State v. Amaral*, 239 Ariz. 217, ¶ 9 (2016). There are five requirements for such a claim: (1) “the evidence must appear on its face to have existed at the time of trial but be discovered after trial,” (2) the defendant must have been “diligent in discovering the facts and bringing them to the court’s attention,” (3) the evidence must not be solely “cumulative or impeaching,” (4) “the evidence must be relevant to the case,” and (5) “the evidence must be such that it would likely have altered the verdict . . . if known at the time of trial.” *Id.*

¶8 Cole has failed to establish that he was diligent in discovering the facts and presenting them to the superior court. He knew of the victim’s

¹In September 2024, the superior court found Cole had violated the terms of his probation and reinstated him on probation, further ordering him to serve six months in jail.

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email and recantation by September 2023. He could have sought a more detailed affidavit at that time as part of his first Rule 33 proceeding but failed to do so. Instead, he waited approximately nine months before refile his claim with the more thorough affidavit. This is akin to “a second bite at the apple,” not diligence. See *State v. Lehr*, 201 Ariz. 509, ¶ 24 (2003).

¶9 Cole has also failed to establish that the facts would likely have changed the outcome. To establish sexual conduct with a minor, “the state is required to prove a defendant had knowingly engaged in sexual conduct and had done so with a person who was, in fact, under the age of eighteen.” *State v. Falcone*, 228 Ariz. 168, ¶ 18 (App. 2011). A “defendant may present an affirmative defense, limited to cases in which the victim was fifteen or older, if he can show he ‘did not know and could not reasonably have known’ the victim’s age.” *Id.* (quoting A.R.S. § 13-1407(B)). The victim’s affidavit stands in contrast to evidence that the victim’s mother had informed Cole of the victim’s age by text message. As the superior court pointed out, recantation evidence is highly suspect, and we will not reweigh the evidence. See *State v. Schroeder*, 100 Ariz. 21, 23 (1966) (superior court in best position to determine credibility of recanting evidence). Thus, we cannot say the court erred in rejecting this claim. See *Mendoza*, 249 Ariz. 180, ¶ 1.

¶10 Cole also reasserts his claim of actual innocence. He seems to challenge the sufficiency of the evidence of his mens rea and also questions the credibility of the victim’s mother. But this is precisely the type of claim that is waived by pleading guilty. See *State v. Starks*, 20 Ariz. App. 274, 276 (1973); see also *State v. Martinez*, 102 Ariz. 215, 216 (1967) (“[A]fter a plea of guilty, a defendant may not thereafter question the legal sufficiency of the evidence against him on appeal.”). Nor do Cole’s allegations establish his factual innocence. See *Bousley v. United States*, 523 U.S. 614, 623 (1998) (“‘[A]ctual innocence’ means factual innocence, not mere legal insufficiency.”). Moreover, as the superior court noted, Cole raised the same claim in his first Rule 33 proceeding. See Ariz. R. Crim. P. 33.2(a)–(b) (actual innocence claim precluded if “finally adjudicated on the merits in any previous post-conviction proceeding”). Cole has presented no authority establishing that the victim’s more detailed affidavit exempts his claim from the rule of preclusion. Thus, the court did not err by rejecting this claim. See *Mendoza*, 249 Ariz. 180, ¶ 1.

¶11 Accordingly, we grant review but deny relief.