IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

WEYLIN JAMES POCKLINGTON,
Petitioner.

No. 2 CA-CR 2016-0280-PR
Filed January 13, 2017

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NOT FOR PUBLICATION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. 31.24.

Petition for Review from the Superior Court in Pima County
No. CR20153807001
The Honorable Carmine Cornelio, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Barbara LaWall, Pima County Attorney
By Jacob R. Lines, Deputy County Attorney, Tucson
Counsel for Respondent

Dean Brault, Pima County Legal Defender
By Joy Athena, Deputy Legal Defender, Tucson
Counsel for Petitioner

MEMORANDUM DECISION

Judge Miller authored the decision of the Court, in which Presiding Judge Vásquez and Chief Judge Eckerstrom concurred.

M I L L E R, Judge:

¶1 Weylin Pocklington seeks review of the trial court's summary denial of his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. For the following reasons, we grant review, but we deny relief.

¶2 Pursuant to a plea agreement, Pocklington was convicted of failure of a person required to register as a sex offender to give notice of his change of residence. *See* A.R.S. §§ 13-3822, 13-3824. The trial court sentenced him to a mitigated, one-year prison term. Pocklington filed a timely notice of post-conviction relief and, in the petition that followed, claimed he was convicted in violation of his constitutional rights, including his right to the effective assistance of counsel.

¶3 Relying on A.R.S. § 13-3821(D) and (F), Pocklington argued his duty to register as a sex offender, imposed when he was a juvenile, "ended when he turned 25 years of age," [1] notwithstanding his previous conviction, as an adult, for a registration offense. *See* § 13-3821(A)(19) (imposing registration requirements for a person convicted of "[a] violation of § 13-3822 or 13-3824"). He maintained § 13-3821 is "[a]t best" ambiguous and should be resolved in his favor under the rule of lenity. In the alternative, he argued construing the statute to impose a lifetime obligation to register as a sex offender based on a "mere failure to register" between the ages of eighteen and twenty-five would

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[1]Pocklington was born on January 3, 1983.

violate his due process and equal protection rights under the United States Constitution. Finally, he maintained trial counsel was ineffective for failing to raise these arguments. The trial court summarily denied relief, and this petition for review followed.

Factual and Procedural Background

¶4 In 1996, Pocklington, then thirteen, was adjudicated delinquent for sexual conduct with a minor. The juvenile court placed him on probation in December 1996, and, on March 5, 1997, ordered him to register as a sex offender.

¶5 As an adult, Pocklington pleaded guilty to a registration violation committed in January 2007 and to a separate registration violation committed in December 2007, each prior to his twenty-fifth birthday. Both convictions were pursuant to A.R.S. § 13-3822. He was sentenced to .75 years' incarceration for the first conviction and a two-year term of imprisonment for the second. In the instant case, Pocklington pleaded guilty to a registration violation based on his failure to timely register as a transient. *See* § 13-3822(A). He was thirty-two years old on the date of this offense.

Discussion

¶6 We review a summary denial of post-conviction relief for an abuse of discretion. *State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006). Although we defer to a trial court's findings of fact, we review its legal conclusions de novo. *State v. Denz*, 232 Ariz. 441, ¶ 6, 306 P.3d 98, 101 (App. 2013). In his petition for review, Pocklington reasserts his claim that § 13-3821(A)(19), which effects a lifelong registration requirement upon conviction for a registration violation, does not "legally limit" other portions of the statute which provide that "[a]ny duty to register" based on a juvenile delinquency adjudication terminates "when the person reaches twenty-five years of age," § 13-3821(D), (F). In the alternative, he argues, as he did below, that applying the statute to extend his registration requirement to lifelong duration, based on "the non-sex offense" of failing to comply with registration requirements, violates his rights to due process and equal protection.

Rule 32 Claims in Of-Right Proceeding

¶7 Although a pleading defendant waives the right to a direct appeal, *see* Ariz. R. Crim. P. 17.1(e), he retains a constitutional right to appellate review by way of the post-conviction relief afforded by Rule 32. *See id.*; *see also* Ariz. Const. art. II, § 24; *Wilson v. Ellis*, 176 Ariz. 121, 123, 859 P.2d 744, 746 (1993). Pursuant to Rule 32.1(a), he may seek relief on the ground that his guilty plea was not intelligent or voluntary, and was therefore "in violation of the Constitution of the United States or of the State of Arizona." *See also Wilson*, 176 Ariz. at 123, 859 P.2d at 746 (noting availability of post-conviction relief "to attack the factual or legal basis" for admission of probation violation). "That right" of review "cannot be waived merely by a plea or admission." *Wilson*, 176 Ariz. at 123, 859 P.2d at 746; *cf. State v. Johnson*, 142 Ariz. 223, 224-25, 689 P.2d 166, 167-68 (1984) (admission of two prior convictions did not waive right to challenge factual basis for sentence enhancement); *State v. Bishop*, 139 Ariz. 567, 571, 679 P.2d 1054, 1058 (1984) (rejecting "bootstrapping argument" that guilty plea constituted waiver of "invalid determination of competency to enter that very plea"); *State v. Ethington*, 121 Ariz. 572, 573, 592 P.2d 768, 769 (1979) (holding right to appeal not negotiable in plea bargaining).

¶8 Nonetheless, "[b]y entering a plea of guilty, the accused is not simply stating that he did the discrete acts described in the indictment; he is admitting guilt of a substantive crime." *United States v. Broce*, 488 U.S. 563, 570 (1989). Accordingly, as a general rule, "a guilty plea, intelligently and voluntarily made, bars the later assertion of constitutional challenges to the pretrial proceedings," *Lefkowitz v. Newsome*, 420 U.S. 283, 288 (1975), and a pleading defendant "may only attack the voluntary and intelligent character of the guilty plea," *Tollett v. Henderson*, 411 U.S. 258, 267 (1973).

¶9 Rule 17.3, Ariz. R. Crim. P., like its federal counterpart, Rule 11, Fed. R. Crim. P., "is intended to produce a complete record at the time the plea is entered of the factors relevant to this voluntariness determination." *State v. Carr*, 112 Ariz. 453, 454-55, 543 P.2d 441, 442-43 (1975), *quoting McCarthy v. United States*, 394 U.S. 459, 465 (1969). In order to find a factual basis for the plea, as

required by Rule 17.3, "[t]he judge must determine that the conduct which the defendant admits constitutes the offense charged in the indictment or information or an offense included therein to which the defendant has pleaded guilty." *Id.*, *quoting McCarthy*, 394 U.S. at 467. Thus, Rule 17.3, like its federal counterpart considered in *McCarthy*, is "designed to assist the . . . judge in making the constitutionally required determination that a defendant's guilty plea is truly voluntary" and "to 'protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge.'" *McCarthy*, 394 U.S. at 465, 467, *quoting* Fed. R. Crim. P. 11 advisory committee's note to 1966 amendment.

¶10 As the Supreme Court has explained, "[B]ecause a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." *Id.* at 466. Accordingly, our supreme court has held a conviction on a guilty plea "cannot be sustained unless there is a factual basis to support each of the elements of the crime to which the plea is made." *Carr*, 112 Ariz. at 455, 543 P.2d at 443.

¶11 We conclude Pocklington's first argument, that "§ 13-3821(A)(19) [does not] legally limit the application of § 13-3821(C)" is consistent with these authorities and so is cognizable under Rule 32.1(a). Although his claim requires us to engage in statutory construction, this is often the case when a defendant contends that a particular element of an offense, as defined by statute, is unsupported by a sufficient factual basis. For example, in *Johnson*, the defendant's plea agreement provided for sentence enhancement based on two historical prior felony convictions, but he informed the court that those convictions arose from a single incident, a fact that was not disputed by the state. 142 Ariz. at 224-25, 689 P.2d at 167-68. On appeal, he challenged the factual basis to enhance his sentence for two historical prior convictions, noting the statutory provision that "[c]onvictions for two or more offenses committed on the same occasion shall be counted as only one conviction for the purposes of" the repetitive offender sentencing provisions. *Id.*, *quoting* 1978 Ariz. Sess. Laws, ch. 201, § 101; *see* A.R.S. § 13-703(L). Reviewing the

record in light of this provision, our supreme court found "the trial court erred in finding a factual basis to support the allegation of two prior convictions available for use as enhancement," and it vacated the conviction, the order accepting the plea agreement, and the appellate court decision that found the argument had been waived. *Id.*

¶12 In essence, Pocklington similarly "attack[s] the factual or legal basis" for the plea, *Wilson*, 176 Ariz. at 123, 859 P.2d at 746, by arguing, based on the statutory construction he proposes, that he was not "a person who is required to register under [title 13, chapter 38, article 3]," § 13-3822(A), and so could not have violated § 13-3822. As addressed below, we are not persuaded by this argument.

Statutory Construction of Section 13-3821

¶13 "In addressing competing interpretations of a statute, we first look to its text and intent," and, "[w]hen the plain text of the statute is clear and unambiguous, there is no need to resort to other methods of statutory interpretation to determine the legislature's intent." *State v. Burbey*, 240 Ariz. 497, ¶ 8, 381 P.3d 290, 293-94 (App. 2016). Section 13-3821(A) currently provides that a person convicted of an offense listed in that subsection shall, "within ten days after the conviction . . . or within ten days after entering and remaining in any county of this state, . . . register with the sheriff of that county." A similar provision was in place when Pocklington was adjudicated delinquent for the offense of sexual conduct with a minor, one of the ten offenses then listed in § 13-3821(A). *See* 1996 Ariz. Sess. Laws, ch. 315, § 2. The 1996 provision of the statute also provided, in relevant part, that "[t]he court may require a person who has been adjudicated delinquent for an act that would constitute an offense specified in subsection A . . . of this section to register pursuant to this section," but specified that "[a]ny duty to register under this subsection shall terminate when the person reaches the age of twenty-five." *Id.*

¶14 As Pocklington notes, a juvenile court's discretionary authority to order sex offender registration until the age of twenty-five has not materially changed since Pocklington's delinquency

adjudication. *See* § 13-3821(D). In contrast, § 13-3821(A) has been expanded significantly, and now enumerates twenty-one offenses that trigger registration requirements upon conviction. *Compare* § 13-3821(A), *with* 1996 Ariz. Sess. Laws, ch. 315, § 2. Since 1997, that list includes a violation of the sex offender registration requirements found in §§ 13-3822 and 13-3824.[2] *See* § 13-3821(A)(19); *see also* 1997 Ariz. Sess. Laws, ch. 136, § 22 (adding "violation of section 13-3822 or section 13-3824" to § 13-3821(A)).

¶15 Pocklington first argues his conviction is illegal because he was not "a person who is required to register under this article[, title 13, chapter 38, article 3]" on September 5, 2015, the date of the charged offense. He relies on § 13-3821(D) and (F),[3] which both provide that any duty to register imposed pursuant to a delinquency adjudication terminates at age twenty-five.

¶16 We do not disagree with Pocklington's assertion that references to "this article" in §§ 13-3822 and 13-3824 necessarily

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[2]Section 13-3822 specifies the manner in which "a person who is required to register under this article" must notify law enforcement of any change of residence, name, or electronic identifier, and, relevant to Pocklington's conviction, provides, "If the person has more than one residence or does not have an address or a permanent place of residence, the person shall register as a transient not less than every ninety days with the sheriff in whose jurisdiction the transient is physically present." § 13-3822(A), (C); *see also Burbey*, 240 Ariz. 497, ¶ 14, 381 P.3d at 295 (section also requires "all registrants, including those who become homeless" to notify sheriff within seventy-two hours of moving from previously registered address). § 13-3824(A) provides, "A person who is subject to registration under this article and who fails to comply with the requirements of this article is guilty of a class 4 felony."

[3]"Any duty to register under subsection D or E of this section for a juvenile adjudication terminates when the person reaches twenty-five years of age." § 13-3821(F). Subsection D pertains to juvenile delinquency adjudications involving Arizona residents; subsection E relates to such adjudications of non-residents.

encompass those subsections, but we find little support, based on the plain language of these statutes, for his suggestion that an adult conviction for violation of the registration statutes, *see* § 13-3821(A)(19), creates no "new duty" to register, independent of the original juvenile court order. According to Pocklington, § 13-3821(A)(19) merely provides that a person convicted of violating the registration statutes—defined as a person who is already "required to register," § 13-3822(A), and "subject to registration," § 13-3824(A)—must then register, so as to be held "accountable for not registering."

¶17 The trial court rejected this proposition, stating it would require the court to "find that the legislature put A.R.S. 13-3821(A)(19) in the statute for no reason." We agree. Construing § 13-3821(A)(19) to impose no independent duty to register, in contrast to the independent duty occasioned by every other offense listed in that subsection, would render the legislature's inclusion of registration offenses as "mere 'surplusage.'" *Herman v. City of Tucson*, 197 Ariz. 430, ¶ 14, 4 P.3d 973, 977 (App. 1999) (court "must give meaning to 'each word, phrase, clause, and sentence . . . so that no part of the statute will be void, inert, redundant, or trivial'"), *quoting Walker v. City of Scottsdale*, 163 Ariz. 206, 210, 786 P.2d 1057, 1061 (App. 1989); *see also Phx. Newspapers, Inc. v. Dep't of Corr.*, 188 Ariz. 237, 244, 934 P.2d 801, 808 (App. 1997) ("[W]e presume that the legislature does not enact superfluous or reiterative legislation."). The court noted that Pocklington was "convicted *as an adult* of the violations of A.R.S. § 13-3824" and concluded, "These adult convictions create their own separate duty to register" that gave rise to his current conviction. We find no abuse of discretion or legal error with respect to the court's analysis of this issue, and the factual basis Pocklington presented at his change-of-plea hearing was sufficient to support his conviction for a registration violation.

Constitutional Challenges

¶18 We do not address Pocklington's constitutional challenges to § 13-3821(A)(19) because he has forfeited any such challenge by entering a guilty plea. *See State v. Crocker*, 163 Ariz. 516, 517, 789 P.2d 186, 187 (App. 1990) (by pleading guilty,

defendant waives all nonjurisdictional defenses, including challenge to constitutionality of statute); *see also State v. Lopez*, 234 Ariz. 513, ¶ 10, 323 P.3d 1164, 1166 (App. 2014) (appellate court will uphold Rule 32 ruling if correct for any reason); Ariz. R. Crim. P. 32.2(c) (any court on review of the record "may determine and hold" an issue is precluded). "When a defendant admits guilt of a substantive crime, he cannot reverse course on appeal and claim the criminal statute is unconstitutional." *United States v. De Vaughn*, 694 F.3d 1141, 1154 (10th Cir. 2012); *see also Broce*, 488 U.S. at 570. Accordingly, any challenge to the constitutionality of § 13-3821(A)(19) is foreclosed by Pocklington's guilty plea, and we do not address it further.

Ineffective Assistance of Counsel

¶19 Pocklington also suggests, as a "possible issue for remand," that trial counsel was ineffective in failing to present, as a "dispositive defense," that Pocklington had no duty to register after the age of twenty-five. Pocklington has done little to develop this claim in the context of the standards set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Moreover, as addressed above, such a defense, based on statutory analysis alone, would have been unsuccessful, and counsel cannot have been ineffective in failing to raise it. *See State v. Borbon*, 146 Ariz. 392, 399, 706 P.2d 718, 725 (1985) (declining to "fault defense counsel for failing to make an essentially futile request").

¶20 Pocklington has supported his constitutional arguments—that § 13-3821(A)(19), as construed in this decision, violates his rights to substantive due process and equal protection—with references to scholarly articles that address the consequences of sex offender registration, and its relation to legislative purposes, in the particular context of juvenile offenders. We are mindful of the severity of the consequences of sex offender registration, particularly in light of its lifelong duration. *See Fushek v. State*, 218 Ariz. 285, n.6, ¶¶ 23-26, 183 P.3d 536, 541 n.6, 542-43 (2008) (identifying "lifelong obligation[s]" of registrants and "potential stigmatic effect of widespread access to sex offender registration information"); *State v. Henry*, 224 Ariz. 164, ¶¶ 25-26, 228 P.3d 900, 907-08 (App. 2010); *but cf. State v. Lowery*, 230 Ariz. 536, ¶ 17, 287 P.3d 830, 836 (App. 2012)

(equal protection challenge did not establish absence of rational basis for requirement that out-of-state offenders comply with Arizona requirements). In his reply on his petition for review, Pocklington also refers to the "trends" evident in *Montgomery v. Louisiana*, in which the Supreme Court found sentences of life without parole constitutionally excessive "for all but 'the rare juvenile offender whose crime reflects irreparable corruption,'" ___ U.S. ___, ___, 136 S. Ct. 718, 734 (2016), *quoting Miller v. Alabama*, 567 U.S. ___, ___, 132 S. Ct. 2455, 2469 (2012). But Pocklington has developed no meaningful argument that trial counsel was ineffective in failing to challenge § 13-3821(A)(19) on constitutional grounds.[4]

¶21 To establish a colorable claim of ineffective assistance of counsel, a defendant must show "both that counsel's performance fell below objectively reasonable standards and that this deficiency prejudiced the defendant." *Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d at 68; *see also State v. Donald*, 198 Ariz. 406, ¶ 21, 10 P.3d 1193, 1201 (App. 2000) (to warrant evidentiary hearing, Rule 32 claim "must consist of more than conclusory assertions"); *cf. Tollett v. Henderson*, 411 U.S. 258, 267 (1973) (valid guilty plea will not be vacated for ineffective assistance of counsel on mere showing that "defendant was not advised of every conceivable constitutional plea in abatement he might have to the charge, no matter how peripheral such a plea might be to the normal focus of counsel's inquiry").

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[4]As addressed above, Pocklington's direct claims regarding equal protection and substantive due process, as well as his apparent suggestion, in his reply, that the registration requirement violates the Eighth Amendment, have been foreclosed by his guilty plea. *See De Vaughn*, 694 F.3d at 1154. Although we may find some merit to his policy argument, in which he challenges the wisdom of a lifetime registration requirement for a sex offense committed by a thirteen-year-old, such arguments are best addressed to the legislature. *See In re A.D.*, 119 A.3d 241, 254 (N.J. Super. Ct. App. Div. 2015) (court "not unsympathetic" to plaintiffs' argument that procedure to terminate registration requirement "should be" more available, but determination is "for the Legislature to make").

Pocklington has failed to make such a showing here, and he has thus failed to establish the trial court abused its discretion in summarily denying relief.

Disposition

¶22 For the foregoing reasons, although we grant review, we deny relief.