**IN THE COURT OF APPEALS**
**STATE OF ARIZONA**
**DIVISION ONE**

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FILED: 02/17/11
RUTH WILLINGHAM, ACTING CLERK
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| STATE OF ARIZONA, | ) | No. 1 CA-CR 09-0551 |
| | ) | |
| Appellee, | ) | DEPARTMENT C |
| | ) | |
| v. | ) | **MEMORANDUM DECISION** |
| | ) | (Not for Publication - |
| PAUL GIALAMAS, | ) | Rule 111, Rules of the |
| | ) | Arizona Supreme Court) |
| Appellant. | ) | |
| | ) | |

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-108466-001 DT

The Honorable Cari A. Harrison, Judge

**AFFIRMED**

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Thomas C. Horne, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
By Spencer D. Heffel, Deputy Public Defender
Attorneys for Appellant

Paul Gialamas — Kingman
Appellant

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**O R O Z C O**, Judge

**¶1** Paul Gialamas (Defendant), appeals his conviction and sentence for theft of a means of transportation. Defendant's counsel filed a brief in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), advising this Court that after a search of the entire appellate record, he found no arguable question of law that was not frivolous. Defendant also filed a supplemental brief that we address below.

**¶2** Our obligation is to review "the entire record for reversible error." *State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999). We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes (A.R.S.) sections 12-120.21.A.1. (2003), 13-4031 (2010), -4033.A.3. (2010). Finding no reversible error, we affirm Defendant's conviction and sentence.

**FACTS AND PROCEDURAL HISTORY**

**¶3** When reviewing the record, "we view the evidence in the light most favorable to supporting the verdict." *State v. Torres-Soto*, 187 Ariz. 144, 145, 927 P.2d 804, 805 (App. 1996). Defendant was indicted on one count of theft of means of transportation, a class three felony, in violation of A.R.S. §

13-1814 (2010).[1] After refusing to be evaluated pursuant to Rule 11, Defendant eventually complied and was found competent to stand trial.

**¶4** At trial, the victim testified that in January 2007 his Baja SC50 motorized scooter was stolen. The victim further testified that several weeks after the theft, he saw Defendant sitting on his scooter while waiting at a red light. The victim described his confrontation with Defendant: "I was trying to stall him until the cops got there. . . . Just trying to, you know, just talking to him, trying to hold him there until the police got to the scene."

**¶5** The victim testified that Defendant tried to sell the scooter back to him and "said he was going to get something to eat at the chow line, food line, and that's when he left." With this information, police responded to a nearby church and found Defendant in possession of the scooter. The victim testified that the scooter was damaged: "The ignition was broke, the lock steering was busted, the gas lock was busted, the helmet lock was busted, numerous scratches, [and the] handlebars were bent."

**¶6** An officer at the scene testified that Defendant, upon being apprehended, stated, "I stopped and talked to the guy, asked him if he was the one who owned the scooter. . . . Are you

[1] We cite to the current version of applicable statutes when no revisions material to this decision have since occurred.

proud of me? I did the right thing and [found] the owner." Another officer testified that Defendant "made a statement that he had purchased the bike for $100 from an unknown male." According to the officer, Defendant also stated that he obtained a temporary license plate online.

**¶7** Defendant's uncle testified that he loaned $100 to Defendant so that Defendant could purchase the scooter. Defendant's uncle also testified that he asked Defendant, "Paul is this thing hot?" to which Defendant responded, "No, it's not."

**¶8** In closing, the State emphasized that a scooter is a means of transportation in the eyes of the law and argued that Defendant knew or had reason to know the scooter in this case was stolen. The jury found Defendant guilty.

**¶9** Before sentencing, the State was able to prove that Defendant held two prior felony convictions. *See State v. Pennye*, 102 Ariz. 207, 208, 427 P.2d 525, 526 (1967) ("When a prior conviction is alleged . . . it is incumbent upon the state to prove: (1) that the defendant in the present case and the one convicted in the prior case are the same individual, and (2) that there was in fact a prior conviction."). The court imposed a mitigated sentence of 7.5 years in the Department of Corrections.

## DISCUSSION

**¶10** We have read and considered counsel's brief as well as Defendant's supplemental brief. We have carefully searched the entire record for reversible error and have found none. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881. Defendant was represented by counsel at all critical stages of the proceedings. The proceedings were conducted in compliance with the Rules and substantial evidence supported the jury's verdict of guilt.

**¶11** At sentencing, Defendant and his counsel were given an opportunity to speak. The information presented persuaded the trial court to impose a mitigated sentence. However, it appears that the court improperly sentenced Defendant under the laws in effect at the time of sentencing and not those in effect at the time of the offense. *See* A.R.S. § 1-246 (2002) ("the offender shall be punished under the law in force when the offense was committed"). That is, Defendant was sentenced to 7.5 years -- the mitigated sentence for a class three felony by a repetitive offender under the 2009 version of A.R.S. § 13-703; however, the minimum sentence for a class three felony with two priors under the 2007 statutory scheme is ten years. *Compare* A.R.S. § 13-703.J. (2009), *with* A.R.S. § 13-604.D. (2007).

**¶12** Nevertheless, because the State failed to raise this issue on appeal, *see State v. Dawson*, 164 Ariz. 278, 792 P.2d

741 (1990), and because Defendant has not successfully challenged his sentence, *see State v. Anderson*, 171 Ariz. 34, 827 P.2d 1129 (1992), we will not disturb the sentence imposed by the trial court. That is, in the absence of both an appeal by the State and a successful challenge to the sentence by Defendant, errors committed by the trial court at sentencing that favor Defendant will not be disturbed.

**¶13** Defendant has raised several issues in a supplemental brief; however, all of them have been waived or are inappropriate for this Court to address. It is our duty to review the record for fundamental error. *See Clark*, 196 Ariz. at 537, ¶ 30, 2 P.3d at 96.

**¶14** First, Defendant raises several issues relating to pre-trial procedures prescribed by the Arizona Rules of Criminal Procedure. However, these arguments have been waived because they were not raised before trial. *State v. Lee*, 25 Ariz. App. 220, 223, 542 P.2d 413, 416 (1975) (Arizona Rule precluding untimely motions, defenses, objections, or requests is "far more comprehensive [than its federal counterpart], covering All motions which can be made and determined before trial"). Thus, we decline to address them.

**¶15** Second, Defendant argues that he was denied a speedy trial. However, because trial was held within the time limits prescribed by the Arizona Rules of Criminal Procedure,

Defendant's argument fails.[2] *See id.* ("[W]here time limits have expired, any objection to the violation of the speedy trial is deemed to be waived unless it is raised at least 20 days before trial."); *see generally Snyder v. Donato*, 211 Ariz. 117, 119-20, ¶¶ 8-10, ¶ 14, 118 P.3d 632, 634-35 (App. 2005) (explaining how time is calculated, and if necessary, extended).

**¶16** Third, Defendant contends the trial court erred in denying his motions for change of counsel. We note that Defendant went through five lawyers in the build-up to his trial. Thus, the trial court acquiesced to Defendant's request for a new court-appointed attorney several times before ultimately refusing. Defendant continually requested a specific attorney, while portraying a cantankerous attitude towards his actual counsel. "While an indigent defendant is entitled to effective assistance of counsel, he has no right to choose the particular attorney who will represent him." *State v. Hampton*, 208 Ariz. 241, 243, ¶ 6, 92 P.3d 871, 873 (2004); *accord State v. Bible*, 175 Ariz. 549, 591, 858 P.2d 1152, 1194 (1993). As such, we find no error.

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[2] We note that Defendant, by repeatedly changing counsel prior to trial and by refusing to be examined pursuant to Rule 11, brought much of the delay upon himself. Defendant's own conduct leading up to trial precludes a finding that he was prejudiced by any delay. *Lee*, 25 Ariz. App. at 223, 542 P.2d at 416 ("In the absence of a showing of prejudice, we cannot say that this is a denial of appellant's federal constitutional rights.")

**¶17** Fourth, Defendant challenges the decisions of appointed counsel, which we chose to interpret as claims of ineffective assistance of counsel. This court will not consider claims of ineffective assistance of counsel until they have first been presented to the court below in the form of a petition for post-conviction relief. *State v. Spreitz*, 202 Ariz. 1, 3, ¶ 9, 39 P.3d 525, 527 (2002). Because no such petition has been filed, we do not address these arguments.

**¶18** Fifth, and finally, even though we give considerable leeway to a pro per brief, if it is not clear what Defendant is arguing, that argument is deemed waived. *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) ("Defendant also raises several issues for which he offers argument insufficient for appellate review."). Because the remainder of Defendant's supplemental brief is indecipherable, we do not address it.

**CONCLUSION**

**¶19** For the reasons set forth above we affirm Defendant's conviction and sentence. Counsel's obligations pertaining to Defendant's representation in this appeal have ended. Counsel need do nothing more than inform Defendant of the status of the appeal and his future options, unless counsel's review reveals an issue appropriate for submission to the Arizona Supreme Court by petition for review. *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). Defendant has thirty days from

the date of this decision to proceed, if he so desires, with an in propria persona motion for reconsideration or petition for review.[3]

/S/
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PATRICIA A. OROZCO, Judge

CONCURRING:

/S/
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MAURICE PORTLEY, Presiding Judge

/S/
_____
MARGARET H. DOWNIE, Judge

[3] Pursuant to Rule 31.18.b., Defendant or his counsel have fifteen days to file a motion for reconsideration. On the Court's own motion, we extend the time to file such a motion to thirty days from the date of this decision.