IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

FRANCISCO XAVIER VELOZ,
Petitioner.

No. 2 CA-CR 2016-0194-PR
Filed September 2, 2016

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NOT FOR PUBLICATION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 Graham County
No. CR201300318
The Honorable Michael D. Peterson, Judge

REVIEW GRANTED; RELIEF DENIED

Francisco Veloz, San Luis
In Propria Persona

MEMORANDUM DECISION

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

E C K E R S T R O M, Chief Judge:

¶1 Francisco Veloz seeks review of the trial court's order denying his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that order unless the court abused its discretion. *State v. Roseberry*, 237 Ariz. 507, ¶ 7, 353 P.3d 847, 848 (2015). Veloz has not met his burden of demonstrating such abuse here.

¶2 After a jury trial, Veloz was convicted of organized retail theft and theft, and sentenced to concurrent prison terms, the longest of which was 4.5 years. *State v. Veloz*, 236 Ariz. 532, ¶ 1, 342 P.3d 1272, 1274 (App. 2015). On appeal, we vacated his theft conviction and a portion of the criminal restitution order imposed at sentencing, but affirmed his conviction for organized retail theft and his 4.5-year prison term. *Id.* ¶¶ 21-22. Among the issues we addressed and rejected on appeal was Veloz's argument that the statute defining organized retail theft was unconstitutionally vague. *Id.* ¶¶ 2-14. In doing so, we noted that "someone using an artifice arguably could be charged with shoplifting or organized retail theft, exercise of prosecutorial discretion does not render the latter void for vagueness." *Id.* ¶ 14.

¶3 Veloz sought post-conviction relief, arguing that his trial counsel had been ineffective in failing to "file any pretrial motions" related to the purported vagueness of the statute or to a defense of selective prosecution. Had counsel done so, Veloz maintained, appellate counsel would have had "an adequate record" to support arguments on appeal. The trial court summarily denied relief, observing that Veloz "has failed to establish how the filing of

any pretrial motion would have had any impact on the outcome in this case." This pro se petition for review followed.

¶4 On review, Veloz repeats his claim that trial counsel was ineffective in failing to file pretrial motions. "To state 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." *State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006); *accord State v. Kolmann*, 239 Ariz. 157, ¶ 9, 367 P.3d 61, 64 (2016); *see also Strickland v. Washington*, 466 U.S. 668, 687-88 (1984).

¶5 Veloz has not made a colorable claim that counsel fell below prevailing professional norms, much less that Veloz was prejudiced. He has not explained what issues the pretrial motions should have addressed or how their filing could have changed the outcome of his case. He seems to suggests that he was charged with organized retail theft because "the prosecution ha[d previously] dealt with [him] on different occasions." But a claim of selective prosecution requires a defendant to show "(1) other similarly situated people were not charged with the crime he is accused of; and (2) the decision to charge him with that crime was made based on an impermissible ground, like race or religion." *State v. Montano*, 204 Ariz. 413, ¶ 78, 65 P.3d 61, 76 (2003). Veloz does not identify any fact relevant to this required showing.

¶6 Veloz also refers to numerous claims not raised in his petition below, including that a presentence report was written before the trial commenced, his sentence was disproportionate and that the court should have instructed the jury on a lesser offense. We do not address arguments not first presented to the trial court. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (reviewing court will not address claims not raised below).

¶7 We grant review but deny relief.