IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

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THE STATE OF ARIZONA,
Respondent,

v.

JAIME ROSALES,
Petitioner.

No. 2 CA-CR 2019-0291-PR
Filed August 7, 2020

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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NOT FOR PUBLICATION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).

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Petition for Review from the Superior Court in Pinal County
No. S1100CR200301192
The Honorable Dwight P. Callahan, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

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COUNSEL

Kent P. Volkmer, Pinal County Attorney
By Geraldine L. Roll, Deputy County Attorney, Florence
Counsel for Respondent

Harriette P. Levitt, Tucson
Counsel for Petitioner

MEMORANDUM DECISION

Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Eppich and Judge Espinosa concurred.

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

¶1   Petitioner Jaime Rosales seeks review of the trial court's ruling denying his petition for post-conviction relief filed pursuant to Rule 33, Ariz. R. Crim. P.[1] We will not disturb that ruling unless the court has abused its discretion. *See State v. Martinez*, 226 Ariz. 464, ¶ 6 (App. 2011). Rosales has not met his burden of establishing such abuse here.

¶2   Pursuant to a plea agreement in 2003, Rosales was convicted of two counts of attempted child molestation. The trial court sentenced him to ten years' imprisonment for one count, followed by lifetime probation for the second. Twice between June 2016 and January 2017, the state filed a petition to revoke Rosales's probation, alleging he had violated various conditions of his probation, Rosales admitted to violating the terms of his probation, and the court reinstated lifetime probation.

¶3   In June 2017, the state filed a third petition to revoke probation, again alleging that Rosales had violated conditions of his probation. The following month, Rosales once again admitted to doing so. The trial court revoked Rosales's probation and sentenced him to ten years' imprisonment, consistent with the probation department's recommendation.

¶4   Rosales filed a notice of post-conviction relief, and the trial court appointed counsel. In his petition, Rosales asserted two claims for

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[1] Our supreme court amended the post-conviction relief rules, effective January 1, 2020. Ariz. Sup. Ct. Order R-19-0012 (Aug. 29, 2019). "Because it is neither infeasible nor works an injustice here, we cite to and apply the current version of the rules." *State v. Mendoza*, No. 2 CA-CR 2019-0281-PR, n.1, 2020 WL 3055826 (Ariz. Ct. App. June 9, 2020) ("amendments apply to all cases pending on the effective date unless a court determines that 'applying the rule or amendment would be infeasible or work an injustice'" (quoting Ariz. Sup. Ct. Order R-19-0012)).

relief: (1) that he had not been properly advised pursuant to Rule 27.9, Ariz. R. Crim. P.,[2] before he admitted to violating the terms of his probation during the July 2017 revocation hearing; and (2) that his trial counsel had rendered ineffective assistance during that hearing by failing to object when the court did not comply with Rule 27.9. In response, the state conceded that the court had failed to advise Rosales of his right to cross-examine witnesses against him and his right to present witnesses on his behalf, as required by Rule 27.9(a). However, the state argued any error was harmless, reasoning that "Rosales was aware of the Rule 27.9 rights he was waiving because he had been properly advised of those rights at the prior hearings." As to the ineffective assistance of counsel claim, the state asserted that Rosales had not established a colorable claim because he failed to show that he would not have admitted to violating his probation if the court had properly advised him pursuant to Rule 27.9.

¶5 The trial court summarily denied the petition. It agreed with the state that, during the July 2017 revocation hearing, the court had failed to personally address Rosales and ensure he understood his rights pursuant to Rule 27.9(a). But, the court noted, "The failure of the court to follow the provisions of Rule 27.9 does not automatically result in a finding of reversible error." Because Rosales had failed to offer "proof that his admission was not knowing, intelligent or voluntary," the court concluded that he failed to present a colorable claim for relief. The court also noted that Rosales made no change to his admission during the revocation

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[2]Rule 27.9(a) requires the trial court to personally address and ensure the defendant understands (1) the nature of the probation violation, (2) the right to counsel, (3) the right to cross-examine witnesses against the defendant, (4) the right to present witnesses on the defendant's behalf, (5) that by admitting a violation of a probation condition, the defendant waives the right to a direct appeal and may only seek review through a proceeding for post-conviction relief, and (6) regardless of the outcome of the probation violation proceeding, if the alleged violation involves a criminal offense for which the defendant has not been tried, the defendant may be tried for that offense, and statements made during the probation violation proceeding may be used to impeach the defendant's testimony at a later trial. The court may accept the defendant's admission to violating probation only if, among other things, it finds the defendant forgoes those rights. Ariz. R. Crim. P. 27.9(b).

hearing even with "full knowledge" that the probation department had recommended a ten-year sentence. This petition for review followed.[3]

¶6   On review, Rosales repeats his claim that the trial court failed to advise him of his rights pursuant to Rule 27.9 before he admitted to violating the terms of his probation. He contends, "[I]t doesn't matter that [he] had two prior revocation hearings" because the court had an obligation to advise him of his rights "in each and every revocation proceeding." Rosales further maintains, "[T]here is no indication that [he] understood that he could be sent to prison as a result of this violation."

¶7   If the trial court determines that no claim raised in a petition for post-conviction relief "presents a material issue of fact or law that would entitle the defendant to relief under [Rule 33], the court must summarily dismiss the petition." Ariz. R. Crim. P. 33.11(a). Put another way, a defendant is entitled to an evidentiary hearing if a material issue of fact exists. Ariz. R. Crim. P. 33.13(a).

¶8   Rosales is correct that the trial court had an obligation to personally address him and determine that he understood his rights pursuant to Rule 27.9(a), even though it had previously done so at two earlier revocation hearings. *See State v. Zanzot*, 175 Ariz. 83, 85 (App. 1993). But the court recognized as much in its ruling here. Instead, the court's ruling turned on the principle that the failure to comply with Rule 27.9(a) is not reversible error if, "in the light of the entire record, it is clear that the [defendant] made a knowing and intelligent waiver of these rights." *State v. Kovacevich*, 26 Ariz. App. 216, 218 (1976); *see also State v. Coon*, 114 Ariz. 148, 151 (App. 1977) (purpose of Rule 27.9 to ensure defendant's admission to probation violation "free and voluntary").[4] Rosales offers no argument on this point.

¶9   As the trial court noted, Rosales provided no affidavit or other evidence suggesting that his admission to violating his probation was anything but knowing, intelligent, and voluntary. *See* Ariz. R. Crim. P.

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[3]The trial court allowed Rosales to file a delayed petition for review, after granting his second petition for post-conviction relief, in which he asserted he was unable to file a timely petition for review in the first proceeding.

[4]Rule 27.9 was previously numbered Rule 27.8. *See State v. Johnson*, 117 Ariz. 9, 10 (App. 1977).

33.7(e) ("The defendant must attach to the petition any affidavits, records, or other evidence currently available to the defendant supporting the allegations in the petition."). And we cannot presume that Rosales would not have admitted to violating the terms of his probation had he been fully advised under Rule 27.9(a). *See State v. Glad*, 170 Ariz. 483, 484 (App. 1992). Indeed, Rosales has not at any point disputed that he violated his probation.

¶10 Although Rosales maintains "there is no indication that [he] understood that he could be sent to prison," he did not make this argument below.[5] *See* Ariz. R. Crim. P. 33.16(c)(2)(B) (petition for review must contain issues decided by trial court that defendant is presenting for review); *State v. Ramirez*, 126 Ariz. 464, 468 (App. 1980) (court of appeals does not address issues raised for first time in petition for review). Even assuming this argument were not waived, however, Rule 27.9(a) "does not require the trial court to advise a probationer of [the] potential sentence for the offense as to which he had been placed on probation." *State v. Butler*, 125 Ariz. 289, 290 (App. 1980). Accordingly, the trial court did not abuse its discretion in concluding that Rosales had failed to present a material issue of fact or law that would entitle him to relief. *See Martinez*, 226 Ariz. 464, ¶ 6.

¶11 Rosales also repeats his claim that his trial counsel rendered ineffective assistance by failing to object to the trial court's lack of compliance with Rule 27.9 during the July 2017 revocation hearing. However, "we conclude he has waived this claim on review because he cites no relevant authority and does not develop the argument in any meaningful way." *State v. Stefanovich*, 232 Ariz. 154, ¶ 16 (App. 2013); *see also* Ariz. R. Crim. P. 33.16(c)(2) (petition for review must contain statement of material facts and reasons why appellate court should grant petition).

¶12 For the reasons stated above, we grant review but deny relief.

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[5]As the state points out, during the second revocation hearing, the trial court warned Rosales, "[I]f I do see you again we're not even going to talk about reinstatement [of probation]."