

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

GERALD WAYNE MALLOY,
Petitioner.

No. 2 CA-CR 2020-0117-PR
Filed September 11, 2020

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NOT FOR PUBLICATION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 Pima County

No. CR20133947001

The Honorable Deborah Bernini, Judge

REVIEW GRANTED; RELIEF DENIED

Gerald Wayne Malloy, Florence
In Propria Persona

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MEMORANDUM DECISION

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

ESPINOSA, Judge:

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

¶2 Pursuant to a plea agreement in December 2013, Malloy was convicted of trafficking in stolen property. The state had alleged that Malloy had at least eight prior convictions from Arizona, California, Arkansas, and Missouri, and, as part of the plea agreement, Malloy admitted to "kidnapping and/or attempt to commit a sexual assault and/or aggravated assault, in Pima County Superior Court, Tucson, Arizona, cause number CR-39792 as a historical prior conviction to CR20133947."¹ The trial court sentenced Malloy as a category-two repetitive offender to a presumptive 9.25-year term of imprisonment. *See* A.R.S. § 13-703(B), (I).

¶3 Malloy subsequently initiated a proceeding for post-conviction relief, claiming that his trial counsel had rendered ineffective assistance by failing to present or explain the plea agreement to him. The trial court summarily dismissed Malloy's petition, explaining, in part, that at the change-of-plea hearing Malloy had acknowledged reading and understanding the plea agreement. In addition, the court noted that at the hearing it had gone "over all of the essential terms of the plea" with Malloy and had explained that the "range of sentence was 4.5 years to as much as 25.5 years," consistent with the range for a category-two repetitive offender. Malloy did not seek review of that ruling.

¹As part of the same plea agreement, Malloy also pled guilty to stalking in cause number CR20132754001. The trial court sentenced him to a presumptive prison term of 1.5 years, to be served consecutively with his sentence in cause number CR20133947.

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¶4 In March 2020, Malloy filed a second petition for post-conviction relief, asserting that the trial court had lacked subject matter jurisdiction to sentence him, that his sentence was not authorized by law or the plea agreement, and that the failure to file a timely notice was not his fault.² See Ariz. R. Crim. P. 33.1(b), (c), (f). Specifically, Malloy argued that his conviction in CR39792 could not be a historical prior felony conviction for purposes of sentence enhancement because it had occurred more than ten years before the current offense. See A.R.S. § 13-105(22)(b) (historical prior felony conviction includes “[a]ny class 2 or 3 felony . . . that was committed within the ten years immediately preceding the date of the present offense”).

¶5 The trial court summarily dismissed Malloy’s petition. Although it agreed with Malloy that his conviction in CR39792 did not constitute a historical prior felony conviction under § 13-105(22)(b), the court concluded that the conviction qualified as a historical prior under § 13-105(22)(d). The court explained that under that section, “a third or more felony is deemed a historical prior felony conviction no matter how old the previous convictions may be and that includes offense[s] committed outside of the jurisdiction of the state of Arizona if punishable by that jurisdiction as a felony.”³ In addition, the court noted, to the extent Malloy was claiming his conviction in CR39792 did not constitute a historical prior felony conviction under § 13-105(22)(d) because the state “did not prove any of the predating felonies, the record reflects that the admission to one prior felony conviction was a negotiated term of his plea agreement and the

²Malloy argued that he had learned in January 2020, after the post-conviction relief rules were amended, see Ariz. Sup. Ct. Order R-19-0012 (Aug. 29, 2019), “that the historical prior allegation was contrary to statute and that he could now raise the issue.” But the amendments to the post-conviction relief rules were largely changes in form and did not affect Malloy’s ability to substantively raise this issue.

³In 2015, after Malloy committed the instant offense, the Arizona Legislature amended § 13-105(22)(d) to provide: “For the purposes of this subdivision, ‘prior felony conviction’ includes any offense committed outside the jurisdiction of this state that was punishable by that jurisdiction as a felony.” 2015 Ariz. Sess. Laws, ch. 74, § 1. Even assuming the amendment does not apply here, see *State v. Fell*, 210 Ariz. 554, ¶¶ 21-23 (2005) (discussing retroactivity of amendment to sentencing scheme), we must nonetheless uphold the trial court’s ruling if it was legally correct for any reason, see *State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015).

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waiver of a . . . trial on the existence of that prior was discussed as part of the plea colloquy.” This petition for review followed.

¶6 On review, Malloy asserts the trial court “erred in accepting an admission to an Arizona prior conviction as a third or more prior felony conviction when the other priors were all foreign convictions.” He argues the court failed to make a finding that the foreign convictions were felonies in Arizona, relying on *State v. Heath*, 198 Ariz. 83 (2000), and *State v. Benenati*, 203 Ariz. 235 (App. 2002). Those cases, however, are distinguishable.

¶7 In *Heath*, the defendant argued that his sentence was improperly enhanced because the state had failed to establish that his prior convictions from other jurisdictions were punishable as felonies in Arizona. 198 Ariz. 83, ¶ 3. In response, the state asserted that because the defendant had admitted his prior felonies when he testified at trial, it was “relieved of its burden to prove that the defendant had committed every element that would be required to prove that such offense would be a felony in Arizona.” *Id.* ¶ 4. Our supreme court determined that “an admission by a defendant at trial dispenses with the necessity of proof of prior convictions” but it “does not constitute proof that the foreign conviction would have been a felony under Arizona law.” *Id.* The court explained that “the trial judge must make that determination.” *Id.*

¶8 Similarly, in *Benenati*, the defendant maintained the trial court had erred in finding his Florida convictions “constituted historical prior felony convictions for sentencing purposes when the state presented no evidence that the offenses of which he was convicted would constitute felonies under Arizona law.” 203 Ariz. 235, ¶ 23. At the sentencing hearing, however, the state introduced certified copies of two Florida judgments showing the defendant’s convictions in that state. *Id.* ¶ 25. This court reviewed the relevant statutes and concluded the defendant’s robbery conviction from Florida would constitute a felony in Arizona. *Id.* ¶ 26. We therefore determined the trial court committed no error in enhancing the defendant’s sentence. *Id.*

¶9 Here, unlike in *Heath* and *Benenati*, Malloy pled guilty, and, as part of the plea agreement, he admitted to committing a historical prior felony conviction in CR39792 for purposes of sentence enhancement. See *State v. Miles*, 3 Ariz. App. 377, 380 (1966) (“The admission of the truth of the allegation of prior conviction should carry the same dignity as the plea of guilty to a charged offense.”); see also *Wallace v. State ex rel. Eyman*, 5 Ariz.

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App. 377, 379 (1967) (admission of prior conviction “was conclusive in all subsequent proceedings”). The trial court found that Malloy had knowingly, voluntarily, and intelligently entered into the plea agreement.

¶10 By pleading guilty, a defendant waives all non-jurisdictional defects, including deprivations of constitutional rights. *State v. Flores*, 218 Ariz. 407, ¶ 6 (App. 2008). Although Malloy attempts to frame this issue as one of subject-matter jurisdiction, which cannot be waived, *id.*, the propriety of his enhanced sentence based on his admission to a historical prior felony conviction is a non-jurisdictional defect. *See State v. Espinoza*, 229 Ariz. 421, ¶ 19 (App. 2012) (subject-matter jurisdiction refers to court’s statutory or constitutional power to hear and determine particular type of case); *cf. State v. Bryant*, 219 Ariz. 514, ¶¶ 14-17 (App. 2008) (describing sentencing error as voidable). Moreover, Malloy’s plea agreement provided that he waived the right to raise any motion or objection “to the court’s entry of judgment against [him] and imposition of sentence upon [him] consistent with th[e] agreement.” The trial court sentenced Malloy as a category-two repetitive offender, consistent with his admission and the sentencing scheme in both the plea agreement and § 13-703(I). The issue was therefore waived, and the court did not abuse its discretion in summarily dismissing the petition.

¶11 Accordingly, although we grant review, relief is denied.