

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

---

THE STATE OF ARIZONA,  
*Respondent,*

*v.*

BRAD LEE FARABOUGH,  
*Petitioner.*

No. 2 CA-CR 2020-0143-PR  
Filed September 15, 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NOT FOR PUBLICATION  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 Maricopa County  
No. CR2017142431001DT  
The Honorable Michael D. Gordon, Judge

**REVIEW GRANTED; RELIEF DENIED**

---

COUNSEL

Allister Adel, Maricopa County Attorney  
By Adena J. Astrowsky, Deputy County Attorney, Phoenix  
*Counsel for Respondent*

Rosemarie Peña-Lynch, Maricopa County Legal Advocate  
By Kerri L. Chamberlin, Deputy Legal Advocate, Phoenix  
*Counsel for Petitioner*

STATE v. FARABOUGH  
Decision of the Court

---

MEMORANDUM DECISION

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

---

E P P I C H, Presiding Judge:

¶1 Petitioner Brad Farabough seeks review of the trial court’s ruling summarily dismissing his petition for post-conviction relief filed pursuant to Rule 33, Ariz. R. Crim. P.<sup>1</sup> We will not disturb that ruling unless the court has abused its discretion. *See State v. Bennett*, 213 Ariz. 562, ¶ 17 (2006); *see also State v. Poblete*, 227 Ariz. 537, ¶ 1 (App. 2011) (petitioner bears burden of establishing abuse). Farabough has not met his burden of establishing such abuse here.

¶2 Pursuant to a plea agreement, Farabough was convicted of failing to register as a sex offender. The trial court suspended the imposition of sentence and placed Farabough on supervised probation for life.

¶3 Farabough initiated a proceeding for post-conviction relief, and the trial court appointed counsel. In his petition, Farabough argued there was an “insufficient factual basis to support [his] plea” because at the time of the offense he was “transient” and “had been sleeping at motels that he paid for on a day-to-day basis.” Relying on *State v. Burbey*, 243 Ariz. 145 (2017), Farabough asserted that, because he did not have a “permanent residence,” the seventy-two-hour registration requirement in A.R.S. § 13-3822(A) did not apply and, instead, he had ninety days in which to register as transient. In addition, Farabough maintained that his trial counsel had rendered ineffective assistance by bargaining for, and advising him to enter into, a plea agreement for an offense that lacked a factual basis.

---

<sup>1</sup> 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*, 249 Ariz. 180, n.1 (App. 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)).

STATE v. FARABOUGH  
Decision of the Court

¶4 The trial court summarily dismissed Farabough’s petition. The court noted that the relevant facts were undisputed:

In August 2017, [Farabough], a registered sex offender, had lived in one motel – where he had registered as a sex offender – [and moved] to another motel where he did not register at all. He paid for the room daily. Law enforcement arrested him on September 14, 2017 for failing to register as a sex offender.

The court disagreed with the underlying premise of Farabough’s argument—that his living in a motel made him transient under § 13-3822(A). The court found Farabough’s “living circumstances were far different than those faced by the defendant in *Burb[e]y*.” The court additionally observed that Farabough had paid for the motel room for at least seventeen days at the time of his arrest, which suggested that he “used the motel room as his home.” The court thus concluded “there was a sufficient factual basis to establish [Farabough’s] guilt” because “[t]he evidence clearly and convincingly established that he was not transient and had, quite simply, just moved from one dwelling to another without registering as required by Arizona law.” This petition for review followed.

¶5 On review, Farabough reasserts his claims of an insufficient factual basis supporting the offense of failing to register as a sex offender and his related claim of ineffective assistance of counsel. In addition, Farabough argues the trial court erred in dismissing his petition by “ignor[ing] the qualifier ‘permanent’ in A.R.S. § 13-3822(A).” He maintains that “for the purpose of registration, a person who moves to a temporary residence is transient and must only register every 90 days.”

¶6 “Before entering judgment on a guilty plea, the trial court must determine whether a factual basis exists for each element of the crime to which [the] defendant pleads.” *State v. Salinas*, 181 Ariz. 104, 106 (1994); *see also* Ariz. R. Crim. P. 17.3(b). “A factual basis is required for the purpose of shielding the innocent from conviction, rather than to provide a back-door for defendants to obviate finality by challenging their guilty pleas.” *State v. Johnson*, 181 Ariz. 346, 349 (App. 1995).

¶7 As relevant here, § 13-3822(A) directs a person who is required to register as a sex offender to inform the sheriff in person and in writing of the person’s new residence or address within seventy-two hours

STATE v. FARABOUGH  
Decision of the Court

after moving. In addition, § 13-3822(A) 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.”

¶8 In *Burbey*, our supreme court clarified that “[r]egistered sex offenders must notify law enforcement officials of their new ‘residence’ or address within seventy-two hours after they move” and those who are transient only “must ‘register as a transient not less than every ninety days’ if the person ‘does not have an address or a permanent place of residence.’” 243 Ariz. 145, ¶ 1 (quoting § 13-3822(A)). The court reversed Burbey’s conviction and sentence because he was “transient” and not required to notify the sheriff of a new residence within seventy-two hours of moving. *Id.* ¶¶ 1, 18-19. Burbey had left a halfway house, where he had initially registered, and “became homeless, living outdoors near [an] intersection.” *Id.* ¶ 2.

¶9 Contrary to Farabough’s assertion, the trial court did not ignore the phrase “permanent place of residence” in § 13-3822(A). Rather, the court pointed out that “residence” is statutorily defined as a “person’s dwelling place” and that “dwelling” carries the meaning of a place or structure where one intends to return as opposed to visit. *See Burbey*, 243 Ariz. 145, ¶¶ 6, 12. The court further noted that “dwelling” encompasses both structural and temporal aspects. *See id.* ¶ 12. Applying that meaning to the facts of this case, the court concluded that Farabough’s motel room was his dwelling place, given that it was a structure where he resided and returned daily. The court correctly noted that this case is distinguishable from *Burbey* because Farabough moved from one motel to another and was adamant that he was not homeless.

¶10 Although Farabough may have referred to himself as “transient,” the trial court was not bound by that characterization. *See Salinas*, 181 Ariz. at 108 (trial court in best position to assess defendant when considering ambiguous and inconsistent statements); *cf. State v. Shaw*, 19 Ariz. App. 510, 511 (1973) (record sufficient to support finding of factual basis for plea, notwithstanding defendant’s conflicting expressions of intent). The record shows that Farabough was required to register as a sex offender and that he stayed at the second motel for more than seventy-two hours without registering. The court therefore did not abuse its discretion

STATE v. FARABOUGH  
Decision of the Court

in finding not colorable Farabough's claim that his plea to failing to register as a sex offender lacked a sufficient factual basis.<sup>2</sup>

¶11 Accordingly, we grant review but deny relief.

---

<sup>2</sup>Because Farabough's claim of ineffective assistance of trial counsel depends upon his claim of an insufficient factual basis, which we have rejected, and Farabough offers no separate argument as to how the trial court erred with regard to his ineffective assistance claim, we do not address that claim further. See *Bennett*, 213 Ariz. 562, ¶ 21 ("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.").