IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

STEPHEN MICHAEL BOROWSKI,
Petitioner.

No. 2 CA-CR 2020-0189-PR
Filed December 2, 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NOT FOR PUBLICATION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. CR2017145746001DT
The Honorable William Wingard, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

COUNSEL

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

Stephen M. Borowski, Phoenix
In Propria Persona

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 Stephen Borowski seeks review of the trial court's ruling dismissing his petition for post-conviction relief filed pursuant to Rule 33, Ariz. R. Crim. P.[1] We will not disturb that order unless the court abused its discretion. *See State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). Borowski has not shown such abuse here.

¶2 Borowski pled guilty to shoplifting with at least two predicate convictions and was sentenced to a 3.5-year prison term. He sought post-conviction relief, and appointed counsel filed a notice stating she had reviewed the record but found no "claims for relief to raise in post-conviction relief proceedings." Borowski then filed a pro se petition and supplement asserting his preliminary hearing had been improperly delayed and his attorney had been unprepared. He later moved to supplement his petition, which the court allowed. In that supplement, he argued the state could not have proven the crime of robbery as charged in the indictment, his conduct did not constitute shoplifting, and his previous offenses could not serve as predicate convictions for shoplifting because he had not been represented by counsel during those proceedings. The trial court summarily dismissed the proceeding. This petition for review followed.

¶3 On review, Borowski first takes issue with the trial court's statement that his guilty plea waived all nonjurisdictional defects,

[1] Our supreme court amended the post-conviction relief rules, effective January 1, 2020. Ariz. Sup. Ct. Order R-19-0012 (Aug. 29, 2019). "The 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.'" *State v. Mendoza*, 249 Ariz. 180, n.1 (App. 2020) (quoting Ariz. Sup. Ct. Order R-19-0012). "Because it is neither infeasible nor works an injustice here, we cite to and apply the current version of the rules." *Id.*

including constitutional claims. He asserts, for the first time, that he wanted to "file for dismissal due to constitutional violations before sentencing," but his attorney had told him to "wait." Borowski did not raise this argument below and, accordingly, we do not address it. *See State v. Ramirez*, 126 Ariz. 464, 468 (App. 1980); *see also* Ariz. R. Crim. P. 33.16(c)(2)(B) (petition for review must contain "issues the trial court decided that the defendant is presenting for appellate review"). And, because Borowski has not meaningfully explained how his counsel's alleged delays and lack of preparedness affected his decision to plead guilty, he has not shown the court erred in rejecting his claim of ineffective assistance. *See State v. Quick*, 177 Ariz. 314, 316 (App. 1993) (by entering guilty plea defendant waives all nonjurisdictional defects, including claims of ineffective assistance of counsel, except those relating to validity of plea).

¶4 Borowski also argues the trial court did not address the issues raised in his supplemental petition. We agree the court did not expressly describe and address those arguments. But any oversight was harmless; the issues Borowski raised in the supplement (and repeats in his petition for review) are meritless.

¶5 As he did in his supplemental petition, Borowski again suggests the state could not have proven he had committed robbery. Whether this is true, however, is irrelevant. Although Borowski was charged with robbery, he was not convicted of that crime.

¶6 Borowski also repeats his argument that the factual basis for his plea does not constitute shoplifting. At the change-of-plea hearing, Borowski admitted entering a store, taking "two energy drinks and a sandwich," and leaving "the store without paying the purchase price for those items." This plainly constitutes shoplifting. *See* A.R.S. § 13-1805(A). Borowski contends, however, that his conduct instead constitutes theft because he was not arrested in the store. He cites *State v. Lombardo*, 104 Ariz. 598 (1969), for the proposition that, "once past all point of sale and off premises or outside that shoplifting turns into theft."

¶7 Borowski misconstrues *Lombardo*. In that case, the supreme court determined that a jury instruction on shoplifting, as a lesser-included offense of theft, was not warranted because the defendant had completed the theft, thus "the record is such that the defendant can only be guilty of the crime charged or no crime at all." *Id.* at 601. This principle applies to whether a jury instruction is required, not to whether the factual basis of a plea is sufficient. *See State v. Durham*, 108 Ariz. 327, 329-30 (1972) (court

permitted to accept "guilty plea to a lesser offense although the facts more nearly correspond to the greater").

¶8 Additionally, Borowski restates his claim that his previous shoplifting offense could not serve as a predicate conviction for felony shoplifting under § 13-1805(I) because he had not been represented by counsel during those proceedings. Pursuant to § 13-1805(I), a person "who commits shoplifting and who has previously committed or been convicted within the past five years of two or more offenses involving burglary, shoplifting, robbery, organized retail theft or theft is guilty of a class 4 felony." Borowski admitted having been convicted of two counts of misdemeanor shoplifting in 2017.[2] A "presumption of regularity" applies when the state proves the existence of prior convictions—here, prior convictions that Borowksi admitted. *See State v. McCann*, 200 Ariz. 27, ¶ 15 (2001). It was Borowski's obligation to demonstrate the convictions were invalid because he had not been represented by counsel. *See id.* He did not do so.

¶9 We grant review but deny relief.

[2]Borowski also admitted having committed possession or use of narcotic drugs in 2012. Unlike his admissions to having committed shoplifting, Borowski admitted in connection with this offense that he had been represented by counsel. Because he did not raise it below, we do not address his argument that he should not have been sentenced as a category two repetitive offender. *See* A.R.S. § 13-703(B), (I); *Ramirez*, 126 Ariz. at 468; *see also* Ariz. R. Crim. P. 33.16(c)(2)(B).