

NOTICE: NOT FOR PUBLICATION.
UNDER ARIZ. R. SUP. CT. 111(c), THIS DECISION DOES NOT CREATE LEGAL PRECEDENT
AND MAY NOT BE CITED EXCEPT AS AUTHORIZED.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Respondent*,

v.

ERNEST MONTANO, *Petitioner*.

No. 1 CA-CR 12-0648-PR
FILED 11-14-2013

Petition for Review from the Superior Court in Maricopa County
Nos. CR2009-167248-001 DT and CR2006-134107-001SE
The Honorable Paul J. McMurdie, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Ernest Montano, Tucson

Petitioner, in Propria Persona

MEMORANDUM DECISION

Per Curium: Presiding Judge Andrew W. Gould, Judge Donn Kessler and
Judge Michael J. Brown delivered the decision of the Court.

STATE v. MONTANO
Decision of the Court

PER CURIUM:

¶1 Petitioner Ernest Montano pled guilty to aggravated driving under the influence, attempted possession of drugs for sale and possession of narcotic drugs for sale in two cases. The trial court sentenced him to an aggregate term of nine years' imprisonment. Montano filed a pro se of-right petition for post-conviction relief after his counsel found no colorable claims. The same trial court that sentenced Montano summarily dismissed the petition and Montano now seeks review. We review the summary dismissal of a petition for post-conviction relief for abuse of discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). We have jurisdiction pursuant to Arizona Rule of Criminal Procedure 32.9(c).

¶2 Of the many issues Montano raises in his petition for review, he presented only one of those issues in the petition for post-conviction relief below. Montano argues his trial counsel was ineffective when she failed to present sufficient evidence of mitigating factors at the consolidated sentencing hearing. Specifically, Montano argues counsel should have provided more evidence regarding his Crohn's disease and his diverticulitis.

¶3 To state a colorable claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below objectively reasonable standards and that the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). To show prejudice, a defendant must show that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

¶4 We deny relief. The sentencing memorandum defense counsel provided to the court included medical records that addressed Montano's gastrointestinal problems, including his Crohn's disease. Defense counsel argued in the memorandum and at sentencing that Montano's physical health, including his Crohn's disease, was a mitigating factor that, combined with many other mitigating factors, warranted mitigated sentences for all counts. Montano himself addressed his condition at sentencing. While Montano argues his counsel should have done more, he does not explain what additional information or documentation counsel failed to provide to the court. Further, he has failed to establish the trial court would have imposed different sentences had it known any additional information. Montano has, therefore, failed

STATE v. MONTANO
Decision of the Court

to present a colorable claim of ineffective assistance and the trial court did not abuse its discretion when it summarily dismissed the petition.

¶5 While Montano raises many other issues in his petition for review, he did not raise those issues in the petition for post-conviction relief he filed below. A petition for review may not present issues not first presented to the trial court. *State v. Bortz*, 169 Ariz. 575, 577, 821 P.2d 236, 238 (App. 1991); Ariz. R. Crim. P. 32.9(c)(1)(ii).

¶6 We grant review and deny relief.



Ruth A. Willingham · Clerk of the Court
FILED: mjt