

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

OCT -5 2012

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	2 CA-CR 2012-0329-PR
	)	DEPARTMENT B
Respondent,	)	
	)	<u>MEMORANDUM DECISION</u>
v.	)	Not for Publication
	)	Rule 111, Rules of
MICHAEL ERNEST HILLYER,	)	the Supreme Court
	)	
Petitioner.	)	
_____	)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF MOHAVE COUNTY

Cause No. CR200901058

Honorable Derek Carlisle, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

Matthew J. Smith, Mohave County Attorney  
By James M. Schoppmann

Kingman  
Attorneys for Respondent

Michael Hillyer

Kingman  
In Propria Persona

V Á S Q U E Z, Presiding Judge.

¶1 Pursuant to a plea agreement, petitioner Michael Hillyer was convicted in 2009 of aggravated assault, domestic violence. The trial court suspended the imposition of sentence, placed Hillyer on probation for four years, and imposed a six-month jail term as a condition of probation. The following year, the state filed a petition to revoke

probation followed by a supplemental petition to revoke. Pursuant to a probation violation plea agreement, Hillyer admitted he had violated the terms of his probation, and, in May 2011, the court imposed a mitigated, 2.5-year prison term with credit for 331 days served.<sup>1</sup> Hillyer then filed a “Motion for; Amendment to State Habeas Corpus,” which the court treated as a petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P.<sup>2</sup> The court dismissed the petition without conducting an evidentiary hearing, and this petition for review followed. We will not disturb a trial court’s denial of post-conviction relief absent a clear abuse of discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). We find no such abuse here.

¶2 Hillyer argues, as he did in his petition below, that the trial court improperly enhanced his sentence based on prior convictions and that trial counsel was ineffective for failing to challenge his sentence on that ground. At the disposition hearing, the court expressly found as a mitigating factor Hillyer’s community support, and as an aggravating factor his “prior record,” and noted that the former outweighed the latter before imposing a mitigated sentence. In its denial of post-conviction relief, the court correctly noted that, having found only one mitigating factor, it “could not sentence the defendant to less than two and one-half years in prison. So, even if the Court had

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<sup>1</sup>After rejecting the sentencing limits in the original probation violation plea agreement, the trial court permitted Hillyer to accept the same plea agreement but with different sentencing limits, to wit, that he would receive either a supermitigated two-year prison term or a mitigated 2.5-year term.

<sup>2</sup>The trial court treated Hillyer’s initial petition for writ of habeas corpus as a supplement to his notice of post-conviction relief.

found no aggravating factors, the sentence would have been the same.” See A.R.S. §§ 13-701, 13-702.

¶3 Although it appears Hillyer was released from custody on August 13, 2012, because it also appears he is on supervised parole status, potentially exposing him to additional incarceration if he violates the conditions of his release, we address his claim on review. However, for the reasons stated by the trial court in its ruling, quoted above, Hillyer has not established the court abused its discretion in dismissing his sentencing claim. Specifically, Hillyer’s sentence would not have changed even had the court not found any aggravating factors. See A.R.S. §§ 13-701, 13-702. We similarly conclude the court correctly dismissed his claim that counsel was ineffective for having failed to raise a claim that had no merit. See *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984).

¶4 Accordingly, we grant the petition for review but deny relief.

/s/ Garye L. Vásquez  
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Philip G. Espinosa  
PHILIP G. ESPINOSA, Judge

/s/ Virginia C. Kelly  
VIRGINIA C. KELLY, Judge