

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

MAR 23 2011

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	2 CA-CR 2010-0356-PR
	)	DEPARTMENT A
Respondent,	)	
	)	<u>MEMORANDUM DECISION</u>
v.	)	Not for Publication
	)	Rule 111, Rules of
ARTHUR LEE BRITO,	)	the Supreme Court
	)	
Petitioner.	)	
_____	)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20091358

Honorable Michael J. Cruikshank, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney  
By Jacob R. Lines

Tucson  
Attorneys for Respondent

Patrick C. Coppen

Tucson  
Attorney for Petitioner

B R A M M E R, Presiding Judge.

¶1 Petitioner Arthur Brito challenges the trial court’s summary dismissal of his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. We grant review and, for the following reasons, deny relief.

¶2 Pursuant to a plea agreement, Brito was convicted of aggravated driving while under the influence of intoxicating liquor (aggravated DUI) after having been convicted of two or more prior DUI offenses committed in the preceding eighty-four months. Under the terms of his agreement, he was not eligible for probation or a mitigated sentence, and the trial court sentenced him to a presumptive prison term of 2.5 years, to be served consecutively to the prison term imposed in Pima County Cause No. CR20060413, one of his previous DUI offenses, after his probation had been revoked in that case.

¶3 In his of-right petition for post-conviction relief, Brito argued (1) counsel had been ineffective in failing to investigate and present sufficient mitigating evidence at sentencing, and (2) the trial court had failed to afford adequate weight to mitigating circumstances or had considered incomplete or incorrect information in sentencing Brito to consecutive terms. In its ruling summarily denying relief, the court concluded neither claim was colorable. In finding Brito had failed to make a sufficient showing of prejudice to support an ineffective assistance claim, the court wrote, “[Brito] presents no mitigating evidence that would have affected the Court’s decision to run the sentences consecutively.” The court further found Brito’s claims of sentencing error were either unsupported by specific allegations or belied by the record.

¶4 On review, Brito argues the trial court abused its discretion in denying his claims without an evidentiary hearing. He suggests, “the *blanket* rejection of newly presented and arguably compelling mitigation in an ineffective assistance of counsel at sentencing scenario constitutes legal error because under Arizona law a sentencing court must consider all pertinent mitigating circumstances in sentencing.” We review the court’s summary denial of post-conviction relief for an abuse of discretion. *See State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006). Similarly, if a sentence imposed is within statutory limits, we will not disturb it “unless there is a clear abuse of discretion.” *State v. Ward*, 200 Ariz. 387, ¶ 5, 26 P.3d 1158, 1160 (App. 2001).

¶5 To determine whether a Rule 32 petitioner has stated a colorable claim entitling him to an evidentiary hearing, a trial court must consider whether, if the allegations of the petition are true, they “might have changed the outcome” of the proceeding. *State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993). The same judge who sentenced Brito performed this assessment after considering the additional mitigating circumstances Brito suggested, implicitly accepting them as true, and concluded those circumstances would not have changed the decision to impose consecutive sentences. Contrary to Brito’s assertion on review, we find neither legal error nor an abuse of discretion in the court’s summary denial of relief. Indeed, the court clearly identified and correctly resolved the legal issues Brito raised, in a manner that will be understood by any court in the future. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993). Because the court’s findings and conclusions are supported by the record before us, we see no purpose in rehashing the court’s order here

and, instead, we adopt it. *See id.* Accordingly, although we grant Brito’s petition for review, we deny relief.

/s/ J. William Brammer, Jr.  
J. WILLIAM BRAMMER, JR., Presiding Judge

CONCURRING:

/s/ Joseph W. Howard  
JOSEPH W. HOWARD, Chief Judge

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