

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

SEP 11 2013

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2013-0260-PR
)	DEPARTMENT A
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
WILLIAM CHARLES BARKER,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF MOHAVE COUNTY

Cause No. CR20071803

Honorable Rick A. Williams, Judge

REVIEW GRANTED; RELIEF DENIED

Matthew J. Smith, Mohave County Attorney
By Douglas Ryan Camacho

Kingman
Attorneys for Respondent

William Barker

Kingman
In Propria Persona

MILLER, Judge.

¶1 William Barker petitions this court for review of the trial court's order summarily dismissing his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that ruling unless the court clearly has abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Barker has not sustained his burden of establishing such abuse here.

¶2 Following his indictment of aggravated driving under the influence, Barker waived his right to counsel and elected to represent himself. During a joint hearing regarding this case and another case, CR-2007-1123, Barker requested that advisory counsel be appointed. The trial court agreed to appoint advisory counsel but ultimately did not do so, informing Barker at the beginning of his jury trial in CR-2007-1123 that it had spoken to numerous attorneys and that none of them "were able or willing to act as advisory counsel . . . this week." Barker did not object, request that he be appointed counsel, or raise the issue of advisory counsel again.

¶3 Barker was convicted as charged, and the trial court sentenced him to a 4.5-year prison term. After conducting a review pursuant to *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), we affirmed his conviction and sentence on appeal. *State v. Barker*, No. 1 CA-CR 10-0065 (memorandum decision filed May 3, 2011). Barker sought post-conviction relief, claiming that the trial court had abused its discretion by granting his request to appoint advisory counsel but failing to do so, thereby violating his right to counsel, and that appellate counsel had been ineffective in failing to obtain transcripts relevant to the issue and raise it on appeal. The trial court summarily denied relief, explaining that its

decision to appoint advisory counsel pertained to Barker's pending prosecution in CR-2007-1123 and that Barker had never requested advisory counsel in this case.

¶4 On review,¹ Barker asserts he is entitled to an evidentiary hearing on his claims, contending a hearing is necessary to demonstrate his "understanding of the extent of the appointment of advisory counsel," and thus whether he had "waive[d] advisory counsel in both cases." He additionally argues that the trial court's "failure to provide advisory counsel" as promised "violated [his] Sixth Amendment right to counsel." As Barker acknowledges, however, his claim that he was entitled to advisory counsel could have been raised on appeal. Thus, the claim is precluded pursuant to Rule 32.2(a)(3) and the trial court did not err in summarily rejecting it.² See *State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984) (appellate court obliged to affirm trial court's ruling if result legally correct for any reason).

¶5 Barker additionally repeats his argument that appellate counsel should have investigated and raised the argument that a trial court cannot withdraw the appointment of advisory counsel after granting a defendant's request, and that the court's conduct here thus violated his Sixth Amendment right to counsel. To establish a colorable claim of

¹After his counsel filed the instant petition for review, Barker filed a pro se "Notice and Motion for Relief from Judgment." We denied the motion because he was represented by counsel. We later granted Barker's motion to proceed pro se. Barker then filed a "Motion for Relief from Judgment" and "Motion to Compel," which we denied, informing Barker that we would consider only those issues presented in the petition for review.

²In any event, as we explain below, Barker has no constitutional right to advisory counsel. Thus, even were it not precluded, this claim is not a cognizable ground for relief pursuant to Rule 32.1.

ineffective assistance of appellate counsel, Barker must show counsel's performance was deficient and that there is a "reasonable probability . . . but for counsel's unprofessional errors, the outcome of the appeal would have been different." *See State v. Herrera*, 183 Ariz. 642, 647, 905 P.2d 1377, 1382 (App. 1995).

¶6 We first reject Barker's suggestion that the denial of advisory counsel implicates his Sixth Amendment right to counsel. There is no constitutional right to advisory counsel. *See Locks v. Sumner*, 703 F.2d 403, 407-08 (9th Cir. 1983); *cf.* Ariz. R. Crim. P. 6.1(c) (court "may" appoint advisory counsel upon defendant's waiver of right to counsel). Even assuming, without deciding, that the trial court intended to appoint advisory counsel for Barker in this proceeding, its inability to do so did not violate a constitutional right to advisory counsel.

¶7 Although Barker suggests the trial court abused its discretion by failing to provide him with advisory counsel, he does not develop this argument independently of his constitutional claim, which we have rejected. *Cf. State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (insufficient argument waives claim on review). Moreover, he argues only that, "[h]ad appellate counsel raised the issue, it could have been decided by the Court of Appeals." In order to demonstrate prejudice resulting from counsel's purportedly deficient conduct, Barker must demonstrate a reasonable probability the result would have been different—that is, that he would have been entitled to relief on appeal, not merely that we would have addressed the issue. *See Herrera*, 183 Ariz. at 647, 905 P.2d at 1382. He has not done so, and his claim of ineffective assistance of appellate counsel therefore fails.

¶8

For the reasons stated, although review is granted, relief is denied.

/s/ Michael Miller

MICHAEL MILLER, Judge

CONCURRING:

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

/s/ Garye L. Vásquez

GARYE L. VÁSQUEZ, Presiding Judge