IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

RYAN AUSTIN MEMBRILA,
Petitioner.

No. 2 CA-CR 2015-0162-PR
Filed September 18, 2015

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NOT FOR PUBLICATION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. 31.24.

Petition for Review from the Superior Court in Pima County
No. CR20113378001
The Honorable Javier Chon-Lopez, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Barbara LaWall, Pima County Attorney
By Jacob R. Lines, Deputy County Attorney, Tucson
Counsel for Respondent

Ryan Austin Membrila, Tucson
In Propria Persona

MEMORANDUM DECISION

Presiding Judge Vásquez authored the decision of the Court, in which Judge Howard and Judge Kelly[1] concurred.

V Á S Q U E Z, Presiding Judge:

¶1 Petitioner Ryan Membrila seeks review of the trial court's order dismissing his of-right petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P. For the following reasons, we grant review but deny relief.

¶2 Pursuant to a plea agreement, Membrila was convicted of manslaughter, a dangerous felony, and aggravated driving under the influence of intoxicating liquor (DUI) while his license was suspended, revoked, or restricted. The trial court sentenced him to presumptive, concurrent terms of imprisonment, the longer of which is 10.5 years.

¶3 In a petition for post-conviction relief filed by counsel, Membrila argued the trial court improperly considered his "unresolved substance abuse issues" as an aggravating circumstance relevant to sentencing. Membrila then filed a "Supplemental Pro-Per Petition for Post-Conviction Relief" in which he relied on *State v. Alvarez*, 205 Ariz. 110, 67 P.3d 706 (App. 2003), *State v. Germain*, 150 Ariz. 287, 723 P.2d 105 (App. 1986), and *State v. Pena*, 209 Ariz. 503, 104 P.3d 873 (App. 2005), to argue the court also had improperly found, as an aggravating factor at sentencing, that "the victim's immediate family suffered . . . emotional . . . harm," A.R.S. § 13-701(D)(9), because there was no "showing of . . . emotional harm rising above or beyond that normally expected from a manslaughter." And, relying on *Pena*, he maintained he was entitled to be resentenced without consideration of the allegedly improper

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[1]The Hon. Virginia C. Kelly, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and our supreme court.

aggravating factors. He also argued his trial counsel rendered ineffective assistance in failing to object to the court's findings regarding aggravating circumstances.[2]

¶4 The trial court summarily dismissed the petitions, finding Membrila had failed to state a colorable claim for relief. *See* Ariz. R. Crim. P. 32.6(c). In his pro se petition for review of that ruling, Membrila essentially reasserts the arguments he made below.

¶5 We review a trial court's summary dismissal of post-conviction relief for an abuse of discretion. *State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006). We find none here.

¶6 In its detailed ruling dismissing Membrila's petition, the trial court addressed all claims raised by counsel and by Membrila in his pro se supplement. The court correctly found Membrila's case distinguished from *Alvarez* and *Germain* on a number of grounds. For example, the court noted that, unlike the defendants in those cases, Membrila had been sentenced to a presumptive prison term, not one that had been increased based on an aggravating circumstance. *See Germain*, 150 Ariz. at 290, 723 P.2d at 108 (ordinarily, absent finding of statutorily enumerated aggravating circumstances, court may not increase presumptive sentence "by using the very elements of the crime as aggravating factors").

¶7 Importantly, in finding Membrila had failed to state a colorable claim, the trial court also concluded that "[t]he presumptive sentences are justified," "even without the use of substance abuse as an aggravating factor," and that none of the issues raised by Membrila "would have changed the [presumptive] sentence[s] imposed." *See Strickland v. Washington*, 466 U.S. 668, 694

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[2] Although "hybrid representation" is disfavored, *State v. Roscoe*, 184 Ariz. 484, 498, 910 P.2d 635, 649 (1996), the trial court's ruling indicates that it considered Membrila's supplemental pro per petition and supplemental reply in addition to the petition and reply filed by counsel, *see State v. Dixon*, 226 Ariz. 545, ¶ 38, 250 P.3d 1174, 1182 (2011) (trial court has discretion to permit hybrid representation).

(1984) (to establish prejudice required for claim of ineffective assistance of counsel, defendant must show reasonable probability that, but for counsel's alleged errors, "the result of the proceeding would have been different").

¶8 The presumptive sentences Membrila received were within the ranges provided by his plea agreement and were authorized by statute. *See* A.R.S. §§ 13-702(A), (D), 13-704(A); *see also State v. Bly*, 127 Ariz. 370, 372-73, 621 P.2d 279, 281-82 (1980) (recognizing Arizona's "policy of presumptive sentencing" and absence of statutory requirement for "special findings" when presumptive sentence imposed). "[A]nd we will not disturb a sentence that is within [the] statutory limits . . . unless it clearly appears that the court abused its discretion." *State v. Cazares*, 205 Ariz. 425, ¶ 6, 72 P.3d 355, 357 (App. 2003).

¶9 As Membrila suggests, in *Pena*, a case before us on direct appeal, we held a trial court's unsupported finding of an aggravating circumstance was not harmless error—even though the court had imposed a mitigated sentence, not an aggravated one—because "[t]he reversal of a single aggravating factor may mean that 'the sentencing calculus . . . has changed.'" 209 Ariz. 503, ¶¶ 1, 22-25, 104 P.3d at 874, 879, *quoting State v. Lehr*, 205 Ariz. 107, ¶ 8, 67 P.3d 703, 705 (2003) (alteration in *Pena*). We emphasized that "[t]he exercise of sentencing discretion" belongs to the trial court and stated, "When it is 'unclear whether the judge would have imposed the same sentences absent the inappropriate factor, the case must be remanded for resentencing.'" *Id.* ¶¶ 23-24, *quoting Alvarez*, 205 Ariz. 110, ¶ 19, 67 P.3d at 712.

¶10 But in contrast here, the trial court, not this court, provides a "pleading defendant a form of post-conviction appellate review." *State v. Smith*, 184 Ariz. 456, 458, 460, 910 P.2d 1, 3, 5 (1996) (for pleading defendant, "trial court performs the initial appellate review, providing the only appeal as of constitutional right from the plea or admission"). Having performed its required review, that court has expressly stated it would have imposed presumptive terms regardless of the errors alleged by Membrila. Thus, unlike the court in *Pena*, we can "determine with certainty," 209 Ariz. 503, ¶ 25, 104 P.3d at 879, that any of the errors alleged, if errors at all, did not

result in an illegal sentence, *see id.*; *see also* Ariz. R. Crim. P. 32.1(c), and that counsel did not render ineffective assistance in failing to object to the court's findings at sentencing, *see Strickland*, 466 U.S. at 694.

¶11 The trial court did not abuse its discretion in dismissing Membrila's petition for failure to state a colorable claim. Accordingly, although we grant review, we deny relief.