

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

MANUEL HERNANDEZ,
Petitioner.

No. 2 CA-CR 2015-0329-PR
Filed November 2, 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NOT FOR PUBLICATION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 Maricopa County
No. CR2009005855001DT
The Honorable Joseph C. Welty, Judge

REVIEW GRANTED; RELIEF DENIED

Manuel Hernandez, Buckeye
In Propria Persona

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MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Brammer¹ concurred.

ESPINOSA, Judge:

¶1 In this petition for review, Manuel Hernandez challenges the trial court's order denying his petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., in which he raised a claim of ineffective assistance of counsel and alleged the trial court had erred when it accepted counsel's stipulation that he had a historical prior felony conviction. "We will not disturb a trial court's ruling on a petition for post-conviction relief absent a clear abuse of discretion." *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Hernandez has established no such abuse here.

¶2 Following a jury trial, Hernandez was convicted of two counts of aggravated assault, one of which was a dangerous offense, assisting a criminal street gang, threatening or intimidating to further the interests of a criminal street gang, and misconduct involving weapons. He was sentenced to a combination of concurrent and consecutive prison terms totaling twenty-four years. On appeal appointed counsel filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967). After supplemental briefing by the parties concerning the trial court's failure to conduct the proper colloquy with Hernandez when his trial counsel stipulated that he had a prior felony conviction, this court affirmed the convictions and the sentences, as modified to reflect additional days of presentence incarceration credit. *State v. Hernandez*, No. 1 CA-CR 09-0627 (memorandum decision filed Mar. 21, 2011). Hernandez filed a

¹The Hon. J. William Brammer, Jr., 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.

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notice of post-conviction relief, and appointed counsel subsequently filed a notice stating he had reviewed the record but had found no basis in fact or law for seeking post-conviction relief.

¶3 In his pro se petition for post-conviction relief, Hernandez claimed trial counsel had been ineffective in failing to provide him information he needed to decide whether to accept the state's plea offer, including, but not limited to, information about the potential sentence were he to be convicted of all charges. He also argued counsel had been ineffective in failing to promptly communicate or adequately explain all plea offers made by the state. Additionally, Hernandez claimed counsel had been ineffective during trial when he failed to ensure witnesses were excluded from the courtroom other than when testifying pursuant to Rule 9.3(a), Ariz. R. Crim. P. He argued this had allowed witnesses to coordinate their testimony, which was inconsistent with what they previously told law enforcement officers during pre-trial interviews. In a related argument, he asserted trial counsel had failed to adequately impeach these witnesses based on their inconsistent statements. Hernandez also claimed the trial court had erred fundamentally by not conducting the required colloquy in connection with his admission to the allegation that he had one historical prior felony conviction.

¶4 Finding Hernandez had failed to raise a colorable claim of ineffective assistance of counsel and the claim of trial court error with respect to the historical prior felony conviction was precluded, having been raised and adjudicated on appeal, *see* Ariz. R. Crim. P. 32.2(a)(2), the trial court dismissed the petition. In his petition for review, Hernandez once again asserts trial counsel was ineffective in connection with plea negotiations and failure to assure witnesses were excluded from the courtroom. He also raises additional claims and arguments that were not presented to the trial court, such as the contention that his "history of incompetency and learning disability" and "diminished mental capacity" impeded his ability to understand the information he was given regarding the plea the state had offered and that counsel failed to investigate his history of mental illness.

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¶5 The trial court clearly identified the claims Hernandez raised and, based on the record before us, which includes a transcript showing the court, the prosecutor, and defense counsel reviewed the plea agreement with Hernandez and his sentencing exposure both with and without the agreement, resolved them correctly and in a manner that has permitted us to review its decision. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993). We adopt the court's ruling and need not restate it here. *See id.* We do not consider any of the arguments Hernandez has raised for the first time on review. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (declining to address issues not presented to trial court); *see also* Ariz. R. Crim. P. 32.9(c)(1)(ii).

¶6 Although we grant the petition for review, because Hernandez has not sustained his burden of establishing the trial court abused its discretion, relief is denied.