

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 -3 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

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|-------------------------|---|----------------------------|
| THE STATE OF ARIZONA, |) | 2 CA-CR 2010-0118-PR |
| |) | DEPARTMENT A |
| Respondent, |) | |
| |) | <u>MEMORANDUM DECISION</u> |
| v. |) | Not for Publication |
| |) | Rule 111, Rules of |
| FRANCISCO RENE BENITEZ, |) | the Supreme Court |
| |) | |
| Petitioner. |) | |
| _____ |) | |

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20070906

Honorable Stephen C. Villarreal, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
Attorneys for Respondent

Francisco R. Benitez

Buckeye
In Propria Persona

B R A M M E R, Presiding Judge.

¶1 After a jury trial held in his absence, petitioner Francisco Rene Benitez was convicted of two counts of aggravated driving under the influence of an intoxicant (DUI) and two counts of aggravated driving with an alcohol concentration of .08 or more. The trial court sentenced him to concurrent, enhanced, presumptive prison terms of ten years

on each count. This court affirmed the convictions and the sentences on appeal. *State v. Benitez*, No. 2 CA-CR 2008-0117 (memorandum decision filed Jan. 23, 2009). He then sought post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., which the court denied after an evidentiary hearing. In his pro se petition for review, Benitez contends the court erred when it denied his petition and his motion for rehearing. Unless the court has abused its discretion, we will not disturb its ruling. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 On November 14, 2007, the first day of trial, defense counsel filed a motion to continue the trial on the ground Benitez had contacted her the previous day from New Mexico and told her he was “ill with an unknown kidney problem,” and “he was in extreme pain.” She added that early in the morning on November 14, Benitez had left counsel a message and said his girlfriend was driving him back to Arizona for treatment; Benitez called counsel about four hours later and said he was at the New Mexico/Arizona border and was on his way back to Tucson and would be seeking treatment immediately, “probably [at University Medical Center].” He had said he believed he had kidney stones. Counsel told him to call her between 9:30 and 10:00 that morning to update her on his medical condition.

¶3 At the beginning of trial, counsel reiterated what she had stated in her motion. She told the trial court, “I haven’t had face-to-face contact with [Benitez]. I don’t know much about . . . his physical situation.” She added,

The last thing that I told him was to make sure to call me between 9:30 and 10 this morning so that I could update the Court as to his medical situation, if any. And I have not

received that phone call yet. I'm not sure why. I don't know if he's at [University Medical Center] getting treated I believe that there is a situation that he would not be voluntarily absenting himself from trial. But I can't avow to the Court that's, in fact, the situation.

¶4 The trial court denied the motion to continue, finding there was insufficient “trustworthy, reliable information” that the court could “depend [on] and continue th[e] case.” Benitez appeared at the April 2, 2008, trial on the state’s allegation that he had prior felony convictions, at which counsel stated she had been unable to obtain documentation supporting Benitez’s claim that he had been unable to attend the trial in November because of his illness, and requested additional time to obtain the documentation. The court responded that it had been “waiting since November of last year to get evidence that there was some sort of problem [with] this man and why he couldn’t be here for the trial” but that it had not “seen one whit of evidence yet” The court denied the request.¹

¹With respect to Benitez’s trial in absentia, this court noted the following in a footnote in our memorandum decision on appeal:

Benitez’s counsel moved for a continuance on the first day of trial, assuming “health issues” had prevented Benitez from calling in or attending. The trial court denied the motion, however, stating insufficient information had been presented that a medical condition caused Benitez to be absent. Although the court indicated to counsel later that day that it would accept documentary proof of Benitez’s condition, apparently none was furnished. Benitez does not challenge the court’s denial of his motion to continue.

¶5 In his August 2009 petition for post-conviction relief, Benitez claimed he had not voluntarily absented himself from trial and that trial counsel had been ineffective in failing to obtain documentation to establish to the trial court that he had been ill and had been hospitalized for kidney stones. He stated in his affidavit, which was attached to his Rule 32 petition, that he had become “ill with a kidney stone immediately before trial and was hospitalized at Kino Hospital for the two days immediately preceding the trial, and the two days after the trial.” The court held an evidentiary hearing on Benitez’s petition for post-conviction relief on December 21, 2009, at which Benitez, his mother, and trial counsel testified. Benitez testified he had not been in the hospital on the day of trial but claimed he had been in bed that day and had told his attorney he was ill. On cross-examination, he admitted he had received hospital discharge papers from the times he was hospitalized but claimed he had not given them to trial counsel because he had lost them. Benitez acknowledged the court had been asking for documentation to support his contention that he had been too ill to attend trial but claimed he did not know he could obtain his own medical records simply by asking for them.

¶6 Trial counsel testified Benitez had called her the morning of the trial. Based on that conversation, she understood he was going to the hospital once he got to Tucson and would call her and keep her informed. He never called and she did not hear from him again until he was arrested, months later. Benitez never provided counsel with documentation of his hospitalizations even though she had conversed numerous times with him and members of his family about the importance of obtaining the records; counsel stated that before sentencing she was trying to get the records so she could

submit them together with a motion for new trial. Despite these conversations and the efforts of her investigator, she had been unable to obtain any records. Benitez's mother testified she had sent documents to counsel. Her testimony was, at times, vague and conflicting.

¶7 In its December 21, 2010, minute entry, the trial court found Benitez had presented no evidence to support his ineffective assistance of counsel claim. The court added, "no documentation was ever provided by the defendant to his counsel that he was hospitalized during the time of trial, and said documentation has still not been provided as of today's date." Rejecting Benitez's remaining claims, the court found trial counsel had "adequately presented the defendant's health problems as a potential mitigating factor prior to his sentencing" and had "properly explained the State's proposed plea offer to him," and Benitez had been identified properly at the trial on the state's allegation of prior felony convictions for sentence-enhancement purposes.

¶8 Benitez filed a motion for rehearing. Attached to the motion for the first time were records from Kino Hospital that showed Benitez had been in its emergency room for kidney stones on November 9, 2007, and that he also had been there on November 24. He conceded there was no record of his having been hospitalized on the days of trial: November 14, 15, and 16. The trial court denied the motion for rehearing, finding there was "no evidence that Mr. Benitez was hospitalized and/or unable to attend his trial"

¶9 In his petition for review, Benitez reiterates his claim that trial counsel had been ineffective in failing to establish that he had been unable to attend trial for medical

reasons and that his absence from trial had not been voluntary. But Benitez has not sustained his burden of establishing the trial court abused its discretion when it rejected this claim. The trial record and the record developed in this Rule 32 proceeding established that when the trial began, Benitez had not provided counsel with any documentation establishing he could not attend trial for medical reasons. Indeed, as we noted above, Benitez was supposed to call counsel between 9:30 and 10:00 on the morning of trial to inform her of the status of his medical condition and let her know whether he had been hospitalized or was being treated. He failed to call her, and she could not, therefore, avow to the court that Benitez was unable to attend trial. And at the trial on the prior felony convictions, counsel made it clear she was having trouble obtaining medical records; Benitez did nothing to provide her with the documentation she needed to establish his absence had not been voluntary. That counsel in this proceeding finally was able to obtain documentation that he attached for the first time to the motion for rehearing does not establish the court abused its discretion when it rejected Benitez's claim that trial counsel had been ineffective at the time of trial.

¶10 To the extent the trial court's denial of Benitez's petition was based on the court's assessment and weighing of testimony presented at the evidentiary hearing, we will not interfere. It is for the trial court, not this court, to determine the credibility of witnesses, resolve any conflicts in the evidence, and weigh the evidence accordingly. *See State v. Fritz*, 157 Ariz. 139, 141, 755 P.2d 444, 446 (App. 1988).

¶11 Nor has Benitez established the trial court abused its discretion when it rejected his claim that the trial on the prior felony convictions was constitutionally

flawed. The claim was raised only summarily in the petition for post conviction relief.² And, although the court denied relief on this claim on its merits, because the claim could have been raised on appeal, it also is precluded. *See* Ariz. R. Crim. P. 32.2. Thus, Benitez has not established on review that the court erred by denying relief on this ground.

¶12 Benitez raises for the first time in his petition for review a claim of ineffective assistance of appellate counsel. Again, because this claim was not presented first to the trial court, we will not address it. *Ramirez*, 126 Ariz. at 468, 616 P.2d at 928.

¶13 The petition for review is granted but relief is denied.

/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

²In his petition below, Benitez did not raise this allegation in connection with his claim of ineffective assistance of trial counsel. To the extent Benitez is bootstrapping this claim on review to a claim of ineffective assistance of counsel, we do not address claims a defendant has not presented to the trial court and raises for the first time on review. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980).

