

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

MIGUEL MANOLITO PEREZ,
Petitioner.

No. 2 CA-CR 2013-0382-PR
Filed February 7, 2014

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NOT FOR PUBLICATION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); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Pima County

No. CR20055042

The Honorable Richard S. Fields, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

John William Lovell
Counsel for Petitioner

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MEMORANDUM DECISION

Judge Miller authored the decision of the Court, in which Chief Judge Howard and Presiding Judge Vásquez concurred.

M I L L E R, Judge:

¶1 Miguel Perez seeks review of the trial court’s ruling denying his motion for rehearing following the court’s dismissal of his post-conviction proceeding brought pursuant to Rule 32, Ariz. R. Crim. P. He argues the court was required to permit him to file a pro se petition for post-conviction relief after appointed counsel stated in an untimely filing he could find no colorable claims. We review a trial court’s ruling in a post-conviction-relief proceeding for a clear abuse of discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Perez has not sustained his burden of establishing such abuse here.

¶2 Perez was convicted after a jury trial of three counts of sale of a narcotic drug and one count each of attempted sale of a narcotic drug and attempted trafficking in stolen property. The trial court imposed concurrent, partially mitigated sentences, the longest of which are 12.5-year prison terms. We affirmed his convictions and sentences on appeal. *State v. Perez*, No. 2 CA-CR 2010-0039 (memorandum decision filed Aug. 16, 2011).

¶3 Perez timely filed a notice of post-conviction relief, and the trial court appointed counsel in April 2012. Despite being granted multiple extensions, counsel did not file a petition and the trial court dismissed the proceeding. Counsel’s final request for an extension was filed on the petition’s extended due date, July 1, 2013.

¶4 Counsel filed a motion for rehearing several weeks later in which he stated that he had completed his review of the record, “determined no grounds exist for Rule 32 relief,” requested Perez be

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given an opportunity to file a Pro Se Petition,¹ and asked the petition be re-opened to allow his no-grounds filing to be accepted. The trial court denied the motion without reference to the pro se petition request, stating inter alia that there was “no need for further proceedings where the merits are absent.” The court relied on *State v. Moore*, 125 Ariz. 528, 529, 611 P.2d 115, 116 (App. 1980), in which the court concluded that a motion for rehearing must allege specific errors in the trial court’s ruling on the petition for post-conviction relief.

¶5 On review, Perez claims that he is entitled to file a pro se petition pursuant to Rule 32.4(c) and *Montgomery v. Sheldon*, 181 Ariz. 256, 889 P.2d 614 (1995). He relies on the portion of Rule 32.4(c)(2) stating, “If counsel determines there are no colorable claims which can be raised on the defendant’s behalf, counsel shall file a notice advising the court of this determination Upon receipt of the notice, the court shall extend the time for filing a petition by the defendant in propria persona.”

¶6 The court in *Montgomery* addressed a pleading defendant’s right to proceed in propria persona in the event that his or her attorney declined to file a petition for post-conviction relief. 181 Ariz. at 260, 889 P.2d at 618. The court noted that “[s]elf representation is . . . a fundamental constitutional right” and that a pleading defendant waives his or her right to direct appeal, and thus a Rule 32 proceeding is that defendant’s only avenue to seek review. *Id.* at 259-60, 889 P.2d at 617-18. The court further observed that, because a defendant has a right to seek review of his or her conviction, “counsel cannot unilaterally shut the courthouse door.” *Id.* at 259, 889 P.2d at 617, quoting *Campbell v. Superior Court*, 178 Ariz. 193, 200, 871 P.2d 740, 747 (App. 1994) (Kleinschmidt, J., dissenting). The court concluded, a pleading “defendant has a constitutional right to file a *pro se* PCR petition if appointed counsel refuses to do so.” *Id.* at 261, 889 P.2d at 619.

¹Perez did not assert the trial court had erred in rejecting his last extension request.

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¶7 In his petition for review, Perez argues his pro se petition would have claimed ineffective assistance of appellate counsel for failing to seek review of our memorandum decision affirming his convictions and sentences. We need not determine whether the holding in *Montgomery* should be expanded to include a non-pleading defendant because Perez's appellate ineffective assistance claim, which he was not given the opportunity to present, lacks merit. Perez has cited no authority suggesting appellate counsel falls below prevailing professional norms in failing to assist in seeking further review. Indeed, we find authority holding otherwise. See *Pena v. United States*, 534 F.3d 92, 95 (2d Cir. 2008) (“[the] right to the effective assistance of counsel on first-tier appeal [does not] encompass[] a requirement that his attorney inform him of the possibility of certiorari review and assist him with filing a petition”). Further, Perez has not identified resulting prejudice, nor identified what claims he would have raised in a petition for review, much less established a reasonable likelihood our supreme court would have accepted review or granted relief. See *State v. Shattuck*, 140 Ariz. 582, 584, 684 P.2d 154, 156 (1984) (supreme court review discretionary “except in cases in which . . . the death penalty is imposed”). For the foregoing reasons, we conclude the trial court did not err by denying the motion for rehearing. Accordingly, although review is granted, relief is denied.