

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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THE STATE OF ARIZONA,  
*Respondent,*

*v.*

EDMUNDO SEPULVEDA,  
*Petitioner.*

No. 2 CA-CR 2014-0024-PR  
Filed June 9, 2014

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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NOT FOR PUBLICATION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.*

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Petition for Review from the Superior Court in Maricopa County

No. CR2009173935002DT

The Honorable Barbara L. Spencer, Judge Pro Tempore

**REVIEW GRANTED; RELIEF DENIED**

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COUNSEL

William G. Montgomery, Maricopa County Attorney  
By E. Catherine Leisch, Deputy County Attorney, Phoenix  
*Counsel for Respondent*

James J. Haas, Maricopa County Public Defender  
By Terry J. Adams, Deputy Public Defender, Phoenix  
*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.

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M I L L E R, Judge:

¶1 Petitioner Edmundo Sepulveda was convicted after a jury trial of two counts of armed robbery and sentenced to concurrent, presumptive prison terms of 10.5 years on each count. On appeal, this court affirmed the convictions and sentences as modified to reflect an additional day of presentence incarceration credit. *State v. Sepulveda*, No. 1 CA-CR 10-0588 (memorandum decision filed June 30, 2011). In the petition for review filed by appointed counsel, Sepulveda challenges the trial court's order, entered after an evidentiary hearing, denying his petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., in which he claimed trial counsel had rendered ineffective assistance. In his pro se supplemental petition for review, he asserts the court erred in dismissing summarily his claim of ineffective assistance of appellate counsel.

¶2 In his Rule 32 petition, Sepulveda argued that trial counsel had been ineffective because he had not properly explained to him the "relative merits of the [state's] plea offer, vis-à-vis the evidence that the state had or did not have to present if the matter went to trial." He asserted that he had believed a surveillance video recording of the offense that the state had said existed would exonerate him by showing he had not threatened the victim with a knife. Sepulveda maintained he did not learn until trial that the surveillance equipment had malfunctioned and there was no such video, insisting that if counsel had told him this he would have accepted the plea agreement the state offered in January 2010 and reoffered on March 1, 2010, just before trial.

¶3 Sepulveda also claimed appellate counsel had been ineffective because he filed a brief pursuant to *Anders v. California*,

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386 U.S. 738 (1967), and did not challenge the trial court's admission over his objection of the recording of the 9-1-1 telephone call related to the robbery. Relying on *Crawford v. Washington*, 541 U.S. 36 (2004), he maintained this resulted in the admission of testimonial evidence in violation of his confrontation rights under the Constitution.

¶4 The trial court rejected the claim of ineffective assistance of appellate counsel summarily, finding only the claim of ineffective assistance of trial counsel was colorable and setting an evidentiary hearing on that issue. Brandon Cotto, Sepulveda's trial counsel, and Sepulveda testified at the hearing. In its October 2012 minute entry, the court outlined the correct legal standard for evaluating the claim as set forth in *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984), stating that to be entitled to relief on a claim of ineffective assistance of counsel, Sepulveda was required to establish counsel's performance had been deficient, based on prevailing professional norms, and that this deficiency was prejudicial. The court correctly identified Sepulveda's claim and noted the portions of the record that were relevant to its evaluation, including the transcript of the January 7, 2010 settlement conference; it showed Cotto had referred to a confession letter Sepulveda had sent to the state that was crucial to Cotto's evaluation of the plea offer. The court also summarized the material portions of the testimony at the evidentiary hearing. The court concluded there was "nothing to indicate Mr. Cotto's performance was deficient or that his performance fell below an objective standard of reasonableness."

¶5 In the petition for review filed by counsel, Sepulveda contends the trial court reached an incorrect conclusion given the evidence presented and the record before it.<sup>1</sup> He reasserts his claim

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<sup>1</sup>In his pro se supplemental petition for review, Sepulveda cites additional authority and makes further arguments regarding this issue. As we discuss below, Sepulveda is not entitled to hybrid representation. See *State v. Cook*, 170 Ariz. 40, 48, 821 P.2d 731, 739 (1991). But even after considering these authorities and arguments, we are not persuaded the trial court abused its discretion.

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and maintains the court misinterpreted the evidence, particularly Cotto's testimony. We disagree.

¶6 The trial court has broad discretion to determine whether post-conviction relief is warranted and unless the court clearly abuses that discretion, we will not disturb its ruling on review. *See State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006). It was Sepulveda's burden to establish by a preponderance of the evidence the factual allegations of his petition for post-conviction relief. Ariz. R. Crim. P. 32.8(c). And it is his burden on review to show that the court abused its discretion by denying his petition for post-conviction relief. *See State v. Poblete*, 227 Ariz. 537, ¶ 1, 260 P.3d 1102, 1103 (App. 2011) (defendant has burden of establishing abuse of discretion on review).

¶7 We review the trial court's factual findings after a Rule 32 evidentiary hearing for clear error. *See State v. Herrera*, 183 Ariz. 642, 648, 905 P.2d 1377, 1383 (App. 1995); *see also State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). In evaluating the court's denial of relief, we "view the facts in the light most favorable to sustaining the lower court's ruling, and . . . resolve all reasonable inferences against the defendant." *State v. Sasak*, 178 Ariz. 182, 186, 871 P.2d 729, 733 (App. 1993). Thus, when "the trial court's ruling is based on substantial evidence, this court will affirm." *Id.* It is for the trial court, not this court, to assess and weigh the evidence presented at an evidentiary hearing based on its evaluation of the witnesses' credibility. *See State v. Hoskins*, 199 Ariz. 127, ¶ 97, 14 P.3d 997, 1019 (2000); *State v. Fritz*, 157 Ariz. 139, 141, 755 P.2d 444, 446 (App. 1988) (trial court sole arbitrator of witness credibility). We will not reweigh the evidence on review. *See Sasak*, 178 Ariz. at 186, 871 P.2d at 733.

¶8 The record before us includes the transcripts of the October 5, 2012 evidentiary hearing and the January 7, 2010 settlement conference, as well as the email exchanges between Cotto and the prosecutor regarding the video recording. The court clearly credited Cotto's testimony and weighed it accordingly. The court noted Cotto's testimony that he did not specifically recall when he had told Sepulveda there was no video; but, as the court also noted,

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Cotto explained that, based on his normal practices during his many years as a criminal defense lawyer and the significance of the video to this case from the outset, he was “very confident” he had told Sepulveda there was no video after the prosecutor finally told this to Cotto but before all plea offers expired.

¶9 We will not reweigh the evidence on review, which is what Sepulveda is essentially asking us to do. Rather, to the extent there were conflicts in the testimony, we defer to the trial court with respect to the resolution of those conflicts. *See Sasak*, 178 Ariz. at 186, 871 P.2d at 733 (appellate court reviews evidence at post-conviction-relief hearing favorable to trial court’s ruling and defers to trial court in resolving conflicts in evidence). It was for that court, not this court, to determine the credibility of the witnesses and determine what inferences could be drawn from the record and the testimony. We have no basis for interfering here. And to the extent Sepulveda is arguing the court erred as a matter of law, we disagree, given the record before us.

¶10 In his supplemental petition for review filed in propria persona, Sepulveda contends the trial court erred in finding his claim of ineffective assistance of appellate counsel precluded and denying relief summarily on that claim. But Sepulveda is represented on review by counsel, who filed the petition for review. “Arizona does not recognize a right to hybrid representation.” *State v. Cook*, 170 Ariz. 40, 48, 821 P.2d 731, 739 (1991). There is neither a state nor federal “constitutional right to hybrid representation.” *State v. Stone*, 122 Ariz. 304, 307, 594 P.2d 558, 561 (App. 1979). We need not, therefore, consider the supplemental petition. In any event, even if we were to regard the supplement as properly filed, Sepulveda has failed to sustain his burden of establishing the court abused its discretion in denying relief summarily on this ground.

¶11 We agree with Sepulveda that claims of ineffective assistance of counsel, which are distinct from the claims upon which they are based, must be raised in a Rule 32 proceeding and cannot be raised on direct appeal. *See State v. Spreitz*, 202 Ariz. 1, ¶ 9, 39 P.3d 525, 527 (2002). But Sepulveda nevertheless has failed to establish the court erred in denying relief on his appellate-counsel claim

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summarily. And this court may sustain a trial court's ruling if it reached the correct result, albeit for a different reason. *See State v. Oakley*, 180 Ariz. 34, 36, 81 P.2d 366, 368 (App. 1994).

¶12 To establish a claim of ineffective assistance of appellate counsel, a defendant must show counsel's performance was deficient and there is a "reasonable probability . . . but for counsel's unprofessional errors, the outcome of the appeal would have been different." *Herrera*, 183 Ariz. at 647, 905 P.2d at 1382. In his Rule 32 petition, Sepulveda did not support, with affidavits or other documentation, his assertion that appellate counsel's performance fell below prevailing professional norms. Nor did he raise a colorable claim that there is a reasonable probability this court would have reversed the conviction and granted him a new trial because (1) Sepulveda did not specify, with citations to the record, when he objected to the admission of the evidence and the arguments he made below; (2) although we have reviewed portions of the record the state pointed to in which this issue was discussed, Sepulveda did not establish the court's ruling was erroneous, given the reasons the court gave on the record for overruling the objection and the applicable law<sup>2</sup>; and, (3) even assuming *arguendo* the ruling was incorrect, he has not shown the error was so prejudicial that a new trial would have been warranted and relief would therefore have been granted on appeal.

¶13 The record contains reasonable evidence to support the trial court's rulings in this post-conviction proceeding. Consequently, we grant the petition for review but deny relief.

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<sup>2</sup>After listening to the 9-1-1 recording and considering this court's decision in *State v. King*, 212 Ariz. 372, 132 P. 3d 311 (App. 2006), the trial court concluded the statements were not testimonial, commenting: "Let me make the record clear that when you listen to the 911 call the caller is panting, breathing, saying there are two guys here, they had a knife. And just so my record is clear, I think it's pretty clear that it's in response to an emergency."