

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

OCT -5 2012

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	2 CA-CR 2012-0075
	)	DEPARTMENT B
Appellee,	)	
	)	<u>MEMORANDUM DECISION</u>
v.	)	Not for Publication
	)	Rule 111, Rules of
NICHOLAS ANDREW NARCHO,	)	the Supreme Court
	)	
Appellant.	)	
_____	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20112151001

Honorable Michael O. Miller, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General  
By Kent E. Cattani, Joseph T. Maziarz, and  
Kathryn A. Damstra

Tucson  
Attorneys for Appellee

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V Á S Q U E Z, Presiding Judge.

¶1 After a jury trial, appellant Nicholas Narcho was convicted of aggravated driving under the influence of intoxicants and aggravated driving with an alcohol concentration of .08 or more, both while his driver license was suspended, cancelled, or revoked. The trial court found he had three historical prior felony convictions and sentenced him to enhanced, partially mitigated, concurrent prison terms of eight years. On appeal, Narcho argues the court abused its discretion “by failing to consider all the mitigating factors presented at sentencing.” For the following reason, we affirm Narcho’s convictions and sentences.<sup>1</sup>

¶2 Before sentencing, Narcho asserted numerous mitigating circumstances and asked the trial court to impose the shortest prison term available under A.R.S. § 13-703(J). The court found Narcho’s remorse and his commitment to engage in treatment to be mitigating circumstances that were “sufficiently substantial” to justify a partially mitigated, “minimum” term. A.R.S. §§ 13-701(F), 13-703(J). But Narcho argues the other mitigating circumstances he had alleged “were uncontested” and “[t]here was no reason [for the court] to reject the other six factors” he had proposed.<sup>2</sup>

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<sup>1</sup>Narcho has waived appellate review of his convictions because he does not challenge them on appeal. *See* Ariz. R. Crim. P. 31.13(c)(1)(v), (vi) (appellate brief must contain “statement of the issues presented for review” and “contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on”); *cf. State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989) (“Failure to argue a claim [on appeal] usually constitutes abandonment and waiver of that claim.”).

<sup>2</sup>According to Narcho, the other circumstances he had proposed in mitigation were his age; his commitment to his family obligations; his good disciplinary record while incarcerated; his dysfunctional childhood and upbringing; the possibility that he suffered

¶3 “A trial court has broad discretion to determine the appropriate penalty to impose upon conviction.” *State v. Cazares*, 205 Ariz. 425, ¶ 6, 72 P.3d 355, 357 (App. 2003). Accordingly, “we will not disturb a sentence that,” like Narcho’s, “is within statutory limits . . . unless it clearly appears that the court abused its discretion.” *Id.* “[A] reviewing court may find abuse of discretion when the sentencing decision is arbitrary or capricious, or when the court fails to conduct an adequate investigation into the facts relevant to sentencing.” *State v. Fillmore*, 187 Ariz. 174, 184, 927 P.2d 1303, 1313 (App. 1996).

¶4 But, as we explained in *Cazares*, “a sentencing court is not required to find that mitigating circumstances exist merely because mitigating evidence is presented; the court is only required to give the evidence due consideration.” 205 Ariz. 425, ¶ 8, 72 P.3d at 357; *see also State v. Fatty*, 150 Ariz. 587, 592, 724 P.2d 1256, 1261 (App. 1986). Moreover, “we presume the court considered any evidence relevant to sentencing that was before it.” *Cazares*, 205 Ariz. 425, ¶ 7, 72 P.3d at 357.

¶5 Here, Narcho presented evidence before sentencing that he believed to be relevant in mitigation. On appeal, he offers nothing to rebut the presumption that the trial court fully considered that evidence before imposing sentence, and it appears the court did so. We find no merit to Narcho’s implicit and unsupported suggestion that, because the evidence he presented was “uncontested,” the court was required to find such evidence constituted mitigating circumstances warranting a lesser sentence. *See id.* ¶ 8.

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from traumatic brain injury; and the care he had afforded his grandmother during her final illness and the trauma he suffered when she died.

¶6 The trial court did not abuse its discretion in sentencing Narcho to enhanced, partially mitigated prison terms, as authorized by statute. See A.R.S. § 13-703(J). Accordingly, Narcho's convictions and sentences are affirmed.

/s/ Garye L. Vásquez  
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Philip G. Espinosa  
PHILIP G. ESPINOSA, Judge

/s/ Virginia C. Kelly  
VIRGINIA C. KELLY, Judge