FILED BY CLERK
NOV 27 2012
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

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| THE STATE OF ARIZONA,<br><br>Respondent,<br><br>v.<br><br>MARSHALL LEE PATRICK,<br><br>Petitioner. | 2 CA-CR 2012-0282-PR<br>DEPARTMENT A<br><br>MEMORANDUM DECISION<br>Not for Publication<br>Rule 111, Rules of<br>the Supreme Court |

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20082833

Honorable Richard D. Nichols, Judge

REVIEW GRANTED; RELIEF DENIED

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Barbara LaWall, Pima County Attorney
By Jacob R. Lines
Tucson
Attorneys for Respondent

Marshall Patrick
Florence
In Propria Persona

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E C K E R S T R O M, Presiding Judge.

**¶1** Petitioner Marshall Patrick seeks review of the trial court's denial of his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. We grant review but, for the following reasons, deny relief.

**¶2** Pursuant to a plea agreement, Patrick was convicted of a preparatory offense involving child molestation, a second-degree, dangerous crime against children, and sentenced to a partially mitigated prison term of seven years. In his pro se petition for post-conviction relief, Patrick maintained the trial court had erred in sentencing him to an aggravated prison term because no jury had made findings that would support an aggravated sentence. In support of his petition, he attached a single page of his plea agreement that included the following paragraph:

> A. Prison. If the defendant is sentenced to prison by the Court, the following statutory sentencing range applies:
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> | | |
> |---|---|
> | 1. Substantial Mitigated Sentence: | n/a years |
> | 2. Mitigated Sentence: | n/a years |
> | 3. Presumptive Sentence: | 5.00 years |
> | 4. Aggravated Sentence: | 7.00 years |
> | 5. Substantially Aggravated Sentence | n/a years |

He argued that "by current case law it is required to have a jury impose an aggravated sentence, even when a defendant enters into a plea agreement with the state."

**¶3** In its ruling denying relief, the trial court explained the plea agreement had mischaracterized the statutory sentencing range, and instead had reflected the agreement, between Patrick and the state, that the court would sentence him to no less than five years and no more than seven years. The court wrote,

> The statutory sentencing range was five (minimum) to ten (presumptive) to fifteen (maximum) years. In exchange for pleading guilty, [Patrick] only faced a sentence of five to seven years. The characterization of the sentencing range on the plea agreement was inaccurate, but the actual range of five to seven years was accurate. For instance, the five year term was incorrectly characterized as the "presumptive sentence[";] in reality, the five year term was the statutory

> minimum. Similarly, the seven year term was incorrectly characterized as an "aggravated sentence" when it was actually a partially mitigated sentence.

The court further explained that, contrary to Patrick's assertion, he had waived his right to have a jury find aggravating factors beyond a reasonable doubt by express terms in his plea agreement.

**¶4** On review, Patrick urges this court to vacate his sentence and order him re-sentenced "to the 5 year mi[tiga]ted term as per the plea [a]greement." He contends the trial court "led [him] to believe through the language of said [p]lea agreement that he would be sentenced to a term of 5 years not 7." He cites *Cunningham v. California*, 549 U.S. 270 (2007), for the proposition that "it is not within the court's power to waive a defend[a]nt[']s constitution[al] [r]ights."

**¶5** We review a court's summary denial of post-conviction relief for an abuse of discretion. *State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006). We find none here. Pursuant to *Apprendi v. New Jersey*, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. 466, 490 (2000). In Arizona, "[t]he 'maximum sentence' for *Apprendi* analysis" is the presumptive sentence established by statute. *State v. Brown*, 209 Ariz. 200, ¶ 12, 99 P.3d 15, 18 (2004). As Patrick seems to acknowledge in his petition for review, his seven-year sentence did not exceed the presumptive, ten-year term provided by former A.R.S. § 13-604.01(I), 2001 Ariz. Sess. Laws, ch. 334, § 7. Notwithstanding the mischaracterization

of the statutory range in his plea agreement, the trial court did not impose an aggravated sentence in excess of the presumptive term, and *Apprendi* does not apply.[1]

**¶6** Patrick does not seek to withdraw from his plea agreement or argue he was prejudiced by misinformation about the statutory range of sentences for his offense. *See, e.g.*, *State v. Ellis*, 117 Ariz. 329, 333, 572 P.2d 791, 795 (1977) (plea subject to rescission for misinformation about sentencing statute only when defendant prejudiced thereby). And, to the extent Patrick contends he was misled into believing his sentence would be no greater than five years, his claim is belied by the record. At Patrick's change-of-plea hearing, the trial court informed him, "No one can promise you this afternoon exactly what the sentence will be, five years or seven years or something in between. That will depend on the facts of the case and on you and your background and any other criminal history that you might have." Patrick responded that he understood, and he has submitted no evidence to the contrary. *See* Ariz. R. Crim. P. 32.5 ("Affidavits, records, or other evidence currently available to the defendant supporting the allegations of the petition shall be attached to it.").

**¶7** At the sentencing hearing, the trial court imposed a partially mitigated, seven-year prison term after "finding that the impact on the victim is more substantial" than Patrick had suggested, but also finding his "responsibility in taking a plea agreement

[1]As the trial court observed, Patrick's plea agreement clearly provided that he waived any right to a jury trial on aggravating factors. Thus, even if *Apprendi* were to apply, "'nothing prevents a defendant from waiving his *Apprendi* rights' and . . . the State may condition a defendant's guilty plea on his willingness to waive his right to a jury trial both on elements of the crime charged and on aggravating factors." *State v. Brown*, 212 Ariz. 225, ¶ 27, 129 P.3d 947, 953 (2006), *quoting Blakely v. Washington*, 542 U.S. 296, 310 (2004).

constitutes a mitigating factor." The sentence imposed was within the range of sentences to which Patrick had agreed and consistent with statutory authority. The court did not abuse its discretion in summarily denying post-conviction relief. *See* Ariz. R. Crim. P. 32.6(c) (court shall dismiss petition upon determination "no [non-precluded] claim presents a material issue of fact or law which would entitle the defendant to relief . . . and that no purpose would be served by any further proceedings").

**¶8** Accordingly, we grant review but deny relief.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge*

*A retired judge of the Arizona Court of Appeals authorized and assigned to sit as a judge on the Court of Appeals, Division Two, pursuant to Arizona Supreme Court Order filed August 15, 2012.