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
DEC 28 2012
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. RAUL ANTONIO ACOSTA, Petitioner.	2 CA-CR 2012-0374-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20102954001

Honorable Scott Rash, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
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Attorneys for Respondent

Lori J. Lefferts, Pima County Public Defender
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H O W A R D, Chief Judge.

¶1 Petitioner Raul Acosta seeks review of the trial court's order denying his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. "We will not disturb a trial court's ruling on a petition for post-conviction relief absent a clear

abuse of discretion." *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Acosta has not sustained his burden of establishing such abuse here.

¶2 Pursuant to a plea agreement, Acosta was convicted of aggravated driving under the influence (DUI) while his license was suspended, revoked, or restricted and four counts of aggravated DUI while under the extreme influence of liquor while a minor is present. The trial court imposed enhanced, concurrent, maximum sentences, the longest of which was six years' imprisonment.

¶3 Acosta thereafter initiated a proceeding for post-conviction relief, arguing in his petition that the trial court had wrongly considered prior convictions not alleged by the state in aggravation at sentencing and had "erred in weighing the aggravating and mitigating factors by considering as a prior conviction [a] federal illegal reentry conviction, which is not a felony in Arizona as required by A.R.S. § 13-701(D)(11)." The court summarily denied relief. On review, Acosta repeats the arguments he made below and maintains the court abused its discretion because it did not address whether his "contentions were correct but rather held that because the sentence was within the range permitted by the one felony [he had] admitted the sentence was not improper."

¶4 In sentencing Acosta to maximum terms, the trial court found Acosta's criminal history, including "[fifteen] misdemeanors and two prior felonies," as an aggravating circumstance and found no mitigating circumstances. It determined "the aggravating factors of [Acosta's] criminal history outweigh any mitigating factors." The two prior felonies included a burglary conviction for crimes committed in 2003, which

the state had alleged at the time of Acosta's indictment, and a conviction for "re-entry after deportation" in 2006.

¶5 We find no merit in Acosta's argument that the legislature's use of the word "alleged" in § 13-701(C) indicates the legislature intended to require the prosecutor to make allegations of aggravating circumstances before trial. We have previously rejected a similar argument with respect to a predecessor statute, and see no reason to revisit our opinion. *See State v. Marquez*, 127 Ariz. 3, 5-6, 617 P.2d 787, 789-90 (App. 1980). Indeed, although Acosta argues that *Marquez* is no longer good law in light of *Blakely v. Washington*, 542 U.S. 296 (2004), our supreme court tacitly has approved *Marquez*'s view that a sentencing court has discretion to consider factors not alleged by the state. *See State v. Martinez*, 210 Ariz. 578, ¶¶ 2-3, 27, 115 P.3d 618, 619-20, 625-26 (2005) (no error for trial court to rely on unalleged aggravating factors when jury implicitly finds one aggravating factor). We therefore cannot say the trial court abused its discretion in implicitly rejecting this argument.

¶6 Acosta also relies on Rule 13.5, Ariz. R. Crim. P., and case law citing thereto in support of his argument. But, that reliance is misplaced because he ignores the impact on the sentencing proceedings of the trial court's finding the existence of a prior felony conviction within ten years. The plain terms of Rule 13.5 apply only to prior convictions and "other non-capital sentencing allegations that must be found by a jury." Under *Blakely* and the Arizona sentencing scheme, however, the court was entitled to find Acosta's prior convictions; no jury finding was necessary. Thus, the provisions of Rule 13.5 did not apply.

¶7 Likewise, the trial court properly implicitly rejected Acosta's argument that it could not consider his prior federal conviction or misdemeanor offenses because they did not fall under § 13-701(D)(11). A court may properly consider a defendant's illegal entry into the United States to the extent it constitutes evidence of unlawful activity. *See Yemson v. United States*, 764 A.2d 816, 819 (D.C. 2001) (court not required to "close its eyes to the defendant's status as an illegal alien and his history of violating the law, including any law related to immigration" if that information may reasonably bear on sentencing decision). For all these reasons, although we grant the petition for review, relief is denied.

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

CONCURRING:

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