

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

APR 20 2011

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2010-0404-PR
)	DEPARTMENT A
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
JORDAN CHAVIRA,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. S1100CR200601598

Honorable Robert C. Brown, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

Jordan Chavira

San Luis
In Propria Persona

H O W A R D, Chief Judge.

¶1 Petitioner Jordan Chavira seeks review of the trial court's summary denial of his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb this ruling unless the court clearly abused its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 Chavira pled guilty in 2007 to sale of a narcotic drug, attempted sale of a dangerous drug, misconduct involving weapons, and child abuse. The trial court sentenced him to concurrent two-year prison terms for weapons misconduct and child abuse, but, for the drug convictions, suspended the imposition of sentence and placed Chavira on concurrent terms of probation to begin after he completed his prison terms. After Chavira was released from prison, the state filed a petition to revoke his probation. Chavira admitted violating his probation, and the court revoked it, sentencing him to presumptive, consecutive prison terms totaling 8.5 years.

¶3 Through counsel, Chavira filed a petition for post-conviction relief, arguing the trial court had erred by imposing a presumptive sentence, that the imposition of consecutive prison terms was, in effect, an improper aggravated sentence, and that his trial counsel had been ineffective by failing to bring certain matters to the court's attention at sentencing. The court summarily denied relief.

¶4 In his pro se petition for review, Chavira argues for the first time that the trial court erred in disregarding his reduced "mental capacity to make rational decisions" resulting from his "8th grade education." Because Chavira did not raise this argument in his petition for post-conviction relief, we do not address it on review. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (reviewing court will not consider for first time on review issues not presented to trial court); *see also* Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review shall contain "[t]he issues which were decided by the trial court . . . which the defendant wishes to present" for review).

¶5 Chavira further argues that the trial court "disregard[ed] mitigating factors," specifically his age—Chavira was sixteen at the time of the offenses—and his drug

addiction.¹ Although the court found no mitigating factors, it discussed his age, expressly rejecting it as a mitigating factor. The predisposition report noted Chavira’s claims of drug addiction, and Chavira also discussed his drug use with the court at sentencing. We presume trial courts “consider all relevant sentencing information before them.” *State v. Medrano*, 185 Ariz. 192, 196, 914 P.2d 225, 229 (1996). “[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.” *State v. Cazares*, 205 Ariz. 425, ¶ 8, 72 P.3d 355, 357 (App. 2003). And “[t]he weight to be given any factor asserted in mitigation rests within the trial court’s sound discretion.” *Id.*

¶6 Chavira also asserts the trial court improperly made a “psychological determination without the benefit of a mental examination pursuant to Rule 11.2[, Ariz. R. Crim. P.,]” because the court commented that his conduct was not that “of a 16-year-old kid” but was more like “the behavior of a grown adult.” Because Chavira did not raise this argument in his petition for post-conviction relief, we do not address it on review. *See Ramirez*, 126 Ariz. at 468, 616 P.2d at 928

¶7 Finally, Chavira argues his trial counsel was ineffective in failing to object to the trial court’s comments that it probably would not have accepted Chavira’s original plea agreement and characterizing that agreement as being “sweet [and] generous.”² He asserts the court’s comments showed “undu[e] bias and prejudice” and his counsel should have “requested the judge . . . disqualify himself from the hearing.” *See State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006) (“To state a colorable claim of ineffective

¹Chavira has abandoned his argument made below that the trial court relied on several sentencing factors that were unsupported by the evidence.

²Chavira does not reiterate his argument in his petition for post-conviction relief that counsel was ineffective for failing to bring certain sentencing issues to the trial court’s attention.

assistance of counsel, a defendant must show both that counsel’s performance fell below objectively reasonable standards and that this deficiency prejudiced the defendant.”); *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984). But nothing about the court’s comments suggest any improper bias or prejudice. *See State v. Schackart*, 190 Ariz. 238, 257, 947 P.2d 315, 334 (1997) (court presumed to be free of bias; party needed to show “extrajudicial source of bias [or] . . . deep-seated favoritism”). Instead, the court’s statements, viewed in context, reflect its concern that Chavira had violated his probation immediately after his release from prison and had not benefitted from the opportunity to rehabilitate, and that a reduced sentence was therefore inappropriate. *Cf. State v. Baum*, 182 Ariz. 138, 140, 893 P.2d 1301, 1303 (App. 1995) (trial court may treat probationary failure as aggravating factor). Accordingly, Chavira has not presented a colorable claim of ineffective assistance of counsel.

¶8 For the reasons stated, although we grant review, we deny relief.

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

CONCURRING:

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

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