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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. CHARLES EDWARD FLOWERS, JR., Petitioner.	2 CA-CR 2011-0166-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court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 Nos. CR20074031, CR20083891, and CR20084929

Honorable Richard D. Nichols, Judge

REVIEW GRANTED; RELIEF DENIED

Robert J. Hirsh, Pima County Public Defender
By Michael J. Miller
Tucson
Attorneys for Petitioner

B R A M M E R, Judge.

¶1 Petitioner Charles Flowers, Jr. seeks review of the trial court's order summarily denying his of-right petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that ruling unless the court clearly has abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 Flowers pled guilty to seven counts of armed robbery and was sentenced to concurrent, aggravated, twenty-one year prison terms for each offense.[1] The plea agreement provided that the state "agrees to dismiss the allegation of prior felony conviction and the allegation of committing these crimes while on probation," and additionally stated that the agreement amended the charges filed in the case to the "offense[s] set forth above" and that "[a]ll other charges and allegations in this case are dismissed." The state requested at sentencing that the trial court impose aggravated sentences, noting the trauma caused two of the victims and the danger Flowers "present[s] to society if he is released." The state observed that one of the victims had been sexually assaulted and, although it acknowledged that charge had been dismissed, that Flowers's codefendant had been excluded as a contributor to deoxyribonucleic acid (DNA) evidence related to that charge.[2] The state did not argue Flowers's sentence should be aggravated on the basis of his previous conviction or that he was on probation at the time of his offenses. The trial court nonetheless found those facts to be aggravating factors, as well as emotional trauma to the victims.

¶3 Flowers filed a petition for post-conviction relief asserting the trial court had erred in imposing an aggravated sentence because it relied on aggravating factors that had been dismissed as part of the plea agreement and had not been alleged by the state.

[1]Flowers also pled guilty in another cause number to sexual conduct with a minor and was sentenced to a partially mitigated, eighteen-year prison term, to be served consecutively to his sentences for armed robbery.

[2]Flowers was charged with sexually assaulting that victim, but that charge was dismissed pursuant to the plea agreement.

He additionally argued that he must be resentenced because the state had breached the plea agreement by arguing at sentencing that he had sexually assaulted one of the robbery victims, and that his trial counsel had been ineffective for failing to raise those claims. The court summarily denied relief. It concluded, based on *State v. Marquez*, 127 Ariz. 3, 617 P.2d 787 (App. 1980), that a sentencing court is permitted to find aggravating factors from the record and is not limited by the factors alleged by the state, and that, although the state's decision to withdraw allegations was relevant to whether Flowers would have received an enhanced sentence, that did "not mean that those acts no longer constitute part of the factual basis for aggravation purposes."

¶4 As to Flowers's second claim, the trial court determined that, even assuming the state had breached the plea agreement, Flowers had failed to demonstrate prejudice because the court had not "indicate[d] [at sentencing] that the State's argument regarding the alleged sexual assault was persuasive [evidence of emotional trauma to the victims], or even considered." The court also rejected Flowers's claims of ineffective assistance of counsel, finding he had not demonstrated any basis for counsel to have objected to the court's consideration of aggravating factors and that Flowers had not shown prejudice resulting from the state's purported breach of the plea agreement.

¶5 Flowers reurges the same arguments on review. We first observe that his sentencing claims are precluded pursuant to Rule 32.2(a)(3) because he did not raise them at sentencing.[3] Accordingly, the trial court did not err in summarily denying those

[3]Indeed, Flowers's attorney commented at sentencing that Flowers had been on probation at the time of his offenses and acknowledged there were aggravating factors.

claims. However, Flowers also asserts a claim of ineffective assistance of trial counsel based on his counsel's failure to have raised these arguments at sentencing. To be entitled to post-conviction relief based on the ineffectiveness of counsel, a defendant must establish counsel's performance fell below prevailing professional norms and the deficient performance prejudiced the defense. *See Strickland v. Washington*, 466 U.S. 668, 687-92 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985) (adopting *Strickland* test in Arizona); *see also State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985) (defendant must prove both parts of *Strickland* test).

¶6 Flowers contends the trial court erred in rejecting his ineffective assistance of counsel claim based on his counsel's failure to object to the trial court's consideration of aggravating factors the state had not alleged. He argues the court erred in concluding that, because there was no error, there was no basis for his counsel to have brought the claim. Flowers reasons that, because former A.R.S. § 13-702(B)[4] refers to factors "alleged to be in aggravation of the crime" and "alleged aggravating factor[s]," the legislature intended to limit a sentencing court's consideration of aggravating factors to only those factors alleged by the state. And, Flowers urges, although Division One of

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Nor did Flowers object to the information in the presentence report, which included his previous conviction and probationary status. *See* Ariz. R. Crim. P. 26.8(a) ("party shall notify the court and all other parties of any objection it has to the contents of any [presentence] report").

[4]The Arizona criminal sentencing code has been amended and renumbered, *see* 2008 Ariz. Sess. Laws, ch. 301, §§ 1-120, effective "from and after December 31, 2008," *id.* § 120. We refer in this decision to the sentencing statute in force at the time of Flowers's offenses. *See* 2005 Ariz. Sess. Laws, ch. 20, § 1, ch. 133, § 1, ch. 166, § 1; 2006 Ariz. Sess. Laws, ch. 104, § 1, ch. 148, § 1.

this court concluded in *Marquez* that the word "alleged" does not prevent a sentencing court's sua sponte consideration of aggravating factors, that decision's reasoning is no longer sound in light of the statutory changes made in response to *Blakely v. Washington*, 542 U.S. 296 (2004), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

¶7 In *Marquez*, Division One rejected the argument that the word "alleged" as used in § 13-702 meant a sentencing court lacked authority to find aggravating circumstances sua sponte. 127 Ariz. at 5, 617 P.2d at 789. At that time, the applicable subsection provided that a sentence could be adjusted within the statutory range based on the trial court's findings of "'circumstances alleged to be in aggravation or mitigation of the crime.'" *Id.*, *quoting* A.R.S. § 13-702(C). The court reasoned that, in contrast to the death penalty statute, § 13-702 did not require a "separate sentence hearing" and did not "plac[e] the burden of proof of aggravating circumstances on the prosecution." *Id.* at 5-6, 617 P.2d at 789-90.

¶8 Section 13-702, however, was amended in 2005 to provide that at least one aggravating factor must be "found to be true by the trier of fact beyond a reasonable doubt."[5] 2005 Ariz. Sess. Laws, ch. 20, § 1. Flowers asserts that, in light of that change, the burden now rests on the state to prove aggravating factors beyond a reasonable doubt.

[5]That provision was modified in 2006 to exclude the fact of a prior conviction or any factors admitted by the defendant. 2006 Ariz. Sess. Laws, ch. 148, § 1.

Thus, he reasons, *Marquez*'s reasoning no longer applies, and the court's consideration of unalleged aggravating factors violated § 13-702(B)'s "plain language."[6]

¶9 We reject Flowers's interpretation. First, nothing in the legislative history of § 13-702 suggests the legislature intended to limit *Marquez* or, more generally, to limit further a sentencing court's discretion to consider aggravating factors beyond the limits imposed by *Blakely* and *Apprendi*. Instead, as Flowers points out, the intent of the 2005 revisions to § 13-702 was to comply with that authority. Senate Fact Sheet, H.B. 2522, 47th Leg., 1st Reg. Sess. (April 12, 2005). Nothing in *Blakely* or *Apprendi* purport to limit a sentencing court's discretion once a *Blakely*-compliant aggravating factor has been found. *See State v. Martinez*, 210 Ariz. 578, ¶ 27, 115 P.3d 618, 625-26 (2005). Additionally, our supreme court tacitly has approved *Marquez*'s view that a sentencing court has discretion to consider factors not alleged by the state. *See id.* ¶¶ 2-3, 27 (no error for trial court to rely on unalleged aggravating factors when jury implicitly finds one aggravating factor). Flowers identifies no legislative efforts to limit the holding of *Martinez*.

¶10 Further, subsection (D) of § 13-702 clearly contemplates that a trial court continues to have broad discretion in sentencing; it specifically permits the court to find, "by a preponderance of the evidence[,] additional aggravating circumstances" once a jury

[6]To the extent Flowers asserts that Rule 13.5, Ariz. R. Crim. P., required the state to allege the aggravating factors, we disagree. That rule applies only to "non-capital sentencing allegations that must be found by a jury." Ariz. R. Crim. P. 13.5(a). Flowers waived his right to a jury determination of aggravating factors. And Flowers does not assert that he lacked adequate notice the state would seek an aggravated sentence.

has found one aggravating circumstance beyond a reasonable doubt. This discretion is reinforced by the evidentiary basis for the finding of aggravating factors, which remained essentially unchanged when the statute was revised, permitting the court or trier of fact to consider any information submitted before sentencing or presented at trial. *See* 2005 Ariz. Sess. Laws, ch. 20, § 1; 1978 Ariz. Sess. Laws, ch. 201, § 106. Finally, the statute also permits the court to find aggravating factors based on evidence and opinions presented by the victims, additionally suggesting the court is not constrained by the state's allegation of factors. § 13-702(E). The court's authority to consider a broad range of information during sentencing and to find aggravating factors based on that information is inconsistent with the suggestion that a court may consider only factors the state expressly has alleged.

¶11 We also reject Flowers's argument that the trial court's consideration of unalleged factors violates Arizona's constitutional separation of powers because it removes the prosecutor's discretion in determining what offenses to charge. *See State v. Hankins*, 141 Ariz. 217, 221, 686 P.2d 740, 744 (1984) ("It is clearly within the sound discretion of the prosecutor to determine whether to file charges and which charges to file."); *see also* Ariz. Const. art. III. Although the United States Supreme Court has described aggravating factors as the "functional equivalent" of elements of a crime, *Apprendi*, 530 U.S. at 494 n.19, to assume prosecutors therefore have the sole discretion whether to permit the consideration of such factors reads too much into that description. As we have explained, our case law holds otherwise. Further, the discretion whether to impose an aggravated sentence rests with the trial court. *See* § 13-702(B). Although

"[c]ontrol of the sentencing process" is "distributed among all branches of government," "[t]he legislature cannot empower the executive branch to interfere with the judiciary's discretion to impose an authorized sentence." *Andrews v. Willrich*, 200 Ariz. 533, ¶¶ 12-13, 29 P.3d 880, 883-84 (App. 2001). We decline to read the Supreme Court's description of aggravating factors as the "functional equivalent" of an element—in a context wholly unrelated to the separation of powers—to alter that distribution of authority.

¶12 Moreover, as part of his plea agreement, Flowers waived his right to a jury determination of aggravating factors as well as his right to have those factors proven beyond a reasonable doubt. He instead agreed that the trial court, "using a standard of preponderance of the evidence, may find the existence of aggravating or mitigating factors which may impact my sentence or disposition." That is precisely what occurred here. For these reasons, we agree with the court that Flowers's counsel had no basis to object to the court's consideration of aggravating factors, and that his claim of ineffective assistance of counsel on that basis therefore fails.

¶13 Flowers next asserts the trial court erred in rejecting his claim that his trial counsel had been ineffective for failing to object to the state's alleged breach of the plea agreement's provision stating that it dismissed "[a]ll other charges and allegations in this case." According to Flowers, the state breached that provision by commenting at sentencing about the alleged sexual assault of one of the victims—a charge dismissed pursuant to the plea. The court reasoned that, even assuming the state had breached the plea agreement, Flowers had not demonstrated prejudice because the court had not

considered the state's assertion and, in any event, that information was contained in the presentence report. Thus, the court concluded, Flowers had not demonstrated "the State's alleged improper conduct contributed to the sentence he ultimately received."

¶14 As we understand his argument, Flowers asserts he was not required to show prejudice because prejudice is presumed in these circumstances, relying on *Santobello v. New York*, 404 U.S. 257 (1971). There, the state violated its agreement to make no sentencing recommendation, requesting the trial court impose the maximum available sentence. *Id.* at 259. Upon counsel's objection, the trial court stated it had not been influenced by the state's recommendation, but nonetheless imposed the maximum sentence based on Santobello's criminal history. *Id.* at 259-60. The Supreme Court determined that, despite the court's avowal, it must remand the case to determine whether the appropriate relief was specific performance of the plea agreement—accomplished by resentencing by a different judge, or to give Santobello the opportunity to withdraw from the plea. *Id.* at 262-63. Thus, Flowers reasons, the Supreme Court "implicitly recognized" the trial court was "subconsciously" affected by the state's breach.

¶15 We disagree. First, the Supreme Court later determined plain error review—requiring a showing of prejudice—was appropriate in similar circumstances when the defendant had not objected to the state's breach of the plea agreement, just as Flowers did not object here. *Puckett v. United States*, 556 U.S. 129, ___, 129 S. Ct. 1423, 1433 (2009). And the Court pointed out in *Puckett* that its ruling in *Santobello* was not based on presumed prejudice, but rather upon "a policy interest in establishing the trust between defendants and prosecutors that is necessary to sustain plea bargaining—an

'essential' and 'highly desirable' part of the criminal process." *Puckett*, 556 U.S. at ___, 129 S. Ct. at 1432, *quoting Santobello*, 404 U.S. at 261-62. Thus, Flowers is incorrect that prejudice in these circumstances is presumed.

¶16 And, in any event, because Flowers's claim is cognizable only as a claim of ineffective assistance of trial counsel, he must show he was prejudiced by counsel's allegedly improper conduct. *See Strickland*, 466 U.S. at 694. He has not done so because he has not demonstrated a reasonable probability he would have received a lesser sentence had his counsel raised this objection below. *See id.* (defendant must show reasonable probability that outcome of case would have been different absent counsel's deficient performance). Flowers's aggravated sentence was not based solely on the alleged sexual assault. Indeed, even assuming the court considered it at all, it was not the sole basis for the court's finding that his conduct caused emotional harm to the victims. The trial court did not err in rejecting this claim.

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

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

CONCURRING:

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

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