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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STATE OF ARIZONA, Respondent, v. ERNEST RUSHING, III, Petitioner.	2 CA-CR 2009-0147-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR20071291

Honorable Janna L. Vanderpool, Judge

REVIEW GRANTED;
RELIEF GRANTED IN PART AND DENIED IN PART

Harriette P. Levitt — Tucson
Attorney for Petitioner

V Á S Q U E Z, Judge.

¶1 Pursuant to a plea agreement in this case, CR20071291, petitioner Ernest Rushing, III was convicted of attempted misconduct involving body armor, with two historical prior felony convictions. He was also convicted pursuant to a plea agreement of unlawful possession of marijuana in CR20071126. He was sentenced in this case to an enhanced, aggravated prison term of 7.5 years, and the court ordered him to pay a

prosecution fee of $1,000. At the same time he was sentenced in this case, Rushing was ordered to serve a consecutive, one-year term of probation for the marijuana charge in CR20071126 and ordered to pay a second prosecution fee. In his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P., Rushing challenged the sentence in this case, contending the trial court had not weighed properly the aggravating and mitigating circumstances and had relied on improper aggravating factors. He also challenged the prosecution fee, contending it was unlawful and, in any event, could not be charged twice. The court denied relief, and this petition for review followed.

¶2 The trial court agreed it had improperly considered, as an aggravating factor, Rushing's two prior felony convictions because his admission that he had those convictions was part of the plea agreement and the convictions were already used to enhance his sentence. But based on the remaining factors it had relied on, and reconsidering the propriety of the sentence without the two felony convictions "within the ten years immediately preceding sentencing," the court found the sentence was nevertheless appropriate. On review, Rushing contends the court erred in failing to reduce his sentence, insisting the court had relied on other inappropriate factors when it initially imposed and subsequently confirmed the aggravated prison term. But absent a clear abuse of discretion, we will not disturb a trial court's ruling on a petition for post-conviction relief. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). And Rushing has not established the court abused its discretion by confirming the propriety of the 7.5-year prison term. At sentencing, the court had found the following as additional aggravating circumstances: Rushing had possessed a deadly weapon or dangerous instrument; the presence of an

accomplice; "the conduct was not an isolated offense, [but part of] a continuing pattern of bevavior";[1] his "actions were unprovoked"; and he had "a lengthy prior record, as well as a lengthy prior juvenile record." As mitigating circumstances, the court had cited the facts that Rushing had children to support and there was no victim in this case. Rushing had admitted at sentencing he was on parole when he committed the offense. The other factors are supported by the presentence report, which includes a detailed recitation of the facts taken from the Arizona Department of Public Safety incident report. Based on the record before us, we cannot say the court abused its discretion.

¶3 However, this court found in *State v. Payne*, 561 Ariz. Adv. Rep. 11 (Ct. App. July 24, 2009), that a prosecution fee, imposed pursuant to a county ordinance, is not statutorily authorized and is void. Therefore, we vacate that portion of the sentencing order imposing the prosecution fee. In all other respects, although we grant the petition for review, we deny relief.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

_____
J. WILLIAM BRAMMER, JR., Judge

[1]The transcript states that Rushing's conduct was "not an isolated incident or a continuing type of behavior." But the court had adopted the aggravating circumstances that were in the presentence report. Given that report and considering the context, the transcript is incorrect.