DIVISION ONE
FILED: 09/15/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	No. 1 CA-CR 11-0018
	)	
Appellee,	)	DEPARTMENT D
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
RAYMOND ALMENDAREZ,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Coconino County

Cause No. CR2010-00119

The Honorable Charles D. Adams, Judge Pro Tempore

AFFIRMED AND REMANDED

Thomas C. Horne, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Division
And Liza-Jane Capatos, Assistant Attorney General
Attorneys for Appellee

H. Allen Gerhardt, Coconino County Public Defender — Flagstaff
Attorney for Appellant

S W A N N, Judge

¶1 Raymond Almendarez ("Defendant") appeals the sentences imposed after his conviction of two class 2 felonies. He contends the trial court erred in considering two aggravating

factors during sentencing and in imposing a presumptive term in the absence of any aggravating factors. We affirm Defendant's sentences for the reasons set out below. But as we explain, we remand for the trial court to correct its sentencing minute entry.

FACTS AND PROCEDURAL HISTORY

¶2 On January 21, 2010, Defendant arranged to sell methamphetamine to an undercover police officer, and on January 25 the sale occurred. Defendant was arrested and indicted for conspiracy to commit sale of dangerous drugs ("Count 1") and sale of dangerous drugs ("Count 2").

¶3 Before trial, the state disclosed to Defendant five certified document packets containing his Arizona Department of Corrections ("ADOC") records, including the ADOC "master file" summarizing various convictions and sentences. The state also filed a motion alleging six prior felony convictions it intended to use at trial to enhance Defendant's sentence, and the indictment was amended to add those felonies "as to all Counts." The state also filed a motion to admit six previous drug-related offenses as "other . . . acts" pursuant to Ariz. R. Evid. 404(b) and a motion to impeach Defendant with seven specific felony convictions committed from 1994 through 2008. The state also alleged as an aggravating factor that Defendant had acted for pecuniary gain.

¶4 A jury convicted Defendant of both counts and found the aggravating factor of pecuniary gain proved. At a trial on his priors, the trial court found that the state had proved beyond a reasonable doubt that Defendant had committed five previous felonies.

¶5 In its sentencing memorandum, the state urged the court to consider four additional aggravating factors during sentencing.[1] At sentencing, the court used two historical priors to enhance Defendant's sentence on both counts.[2] On Count 2, the court also found three aggravating and three mitigating factors. The court imposed a presumptive term of 15.75 years for Count 1 to run concurrently with an aggravated term of 18 years for Count 2.

¶6 Defendant timely appeals his sentence. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and -4033(A).

---

[1] The proposed factors were: (1) three felony convictions that the court found beyond a reasonable doubt; (2) Defendant's involvement in multiple drug transactions; (3) the sentence's deterrent effect; and (4) the danger to the community created by Defendant's drug sales.

[2] The convictions were two separate charges of possession of drug paraphernalia, both class 6 felonies, committed in 2006 (CR 2006-1130) and 2008 (CR 2008-0611).

DISCUSSION

¶7 Because Defendant failed to object to his sentences at the time of sentencing, we review only for fundamental error.[3] *See State v. Henderson,* 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). An illegal sentence is a form of fundamental error, and therefore is not waived by the failure to raise it in the trial court. *See State v. Alvarez,* 205 Ariz. 110, 116, ¶ 18, 67 P.3d 706, 712 (App. 2003). To prevail under fundamental error review, "a defendant must establish both that fundamental error exists and that the error in his case caused him prejudice." *Henderson,* 210 Ariz. at 567, ¶ 20, 115 P.3d at 607.

[3] In his opening brief, Defendant generally asserts that the sentencing process violated his due process rights, but he does not further develop this issue. *See* ARCAP 13(a)(6), (b)(1) (requiring opening briefs to present significant arguments, supported by authority, setting forth a party's position on the issues raised). Defendant therefore waives any due process argument. *See State v. Moody,* 208 Ariz. 424, 452 n.9, ¶ 101, 94 P.3d 1119, 1147 n.9 (2004) (stating that the failure to appropriately argue a claim on appeal usually constitutes abandonment and waiver of that claim). Regardless, as we explain above, we find no error in the sentences imposed. We also note that the state's pre-trial motions notified Defendant that the state would use his prior criminal history to affect sentencing, as did its sentencing memorandum. *See State v. Jenkins*, 193 Ariz. 115, 121, ¶ 21, 970 P.2d 947, 953 (App. 1998) (stating that the notice of aggravating factors in the state's presentence memorandum satisfied due process); *State v. Ford*, 125 Ariz. 8, 9, 606 P.2d 826, 827 (App. 1979) (finding no due process violation when trial court sua sponte finds aggravating factors in the presentence report).

I. COUNT 1

¶8 Defendant contends that the trial court committed fundamental error when it imposed a presumptive term on Count 1, asserting that "[o]nce mitigation is found, some reduction from the presumptive [term] is justified when no aggravating factor exists."

¶9 "In determining what sentence to impose, the court shall take into account the amount of aggravating circumstances and whether the amount of mitigating circumstances is sufficiently substantial to justify the lesser term." A.R.S. § 13-701(F). A trial court has considerable discretion to decide whether mitigating factors do or do not justify a mitigated sentence. *State v. Olmstead,* 213 Ariz. 534, 535, ¶ 6, 145 P.3d 631, 632 (App. 2006).

¶10 Here, the trial court found three mitigating factors: (1) Defendant's incapacity to conform his conduct to the requirements of the law due to drug impairment; (2) Defendant's "low functioning . . . fourth to sixth grade" reading and math level; and (3) the presence of Defendant's family in court. But the court concluded that those factors did not "carry much weight" because: (1) Defendant's conduct was affected by "self-induced" addiction for which he had "years of opportunity to seek help"; (2) evidence demonstrated that Defendant "consciously participated" in the drug buys and "knew at the

time . . . they were against the law"; and (3) "the potential of methamphetamine and drugs" were part of Defendant's family life.

¶11 Defendant recognizes that *Olmstead* upheld the imposition of a presumptive term even though mitigating factors were found, but nevertheless asks us to reconsider that holding. We decline to do so, continuing to apply a fundamental error analysis when the sentence imposed is within the statutory range and supported by the record. *See State v. Dungan*, 149 Ariz. 357, 361, 718 P.2d 1010, 1014 (App. 1985) ("The principle of *stare decisis* dictates that previous decisions of this court are considered highly persuasive and binding, unless we are convinced that the prior decision is clearly erroneous or conditions have changed so as to render the prior decision inapplicable.").

II. COUNT 2

¶12 Defendant contends that this case must be remanded for new sentencing because the court applied inappropriate aggravating factors.

¶13 As a category three repetitive offender, the court could have sentenced Defendant to a presumptive term of 15.75 years, a 28-year maximum term, or a 35-year aggravated term for each of the class 2 felony convictions.[4] A.R.S. § 13-703(J). To

[4] Defendant does not challenge the factors the trial court used to enhance his sentence, i.e., the jury's finding of guilt or

impose a sentence greater than the presumptive, the jury or the court must find aggravating circumstances, and the court must determine that those aggravators outweigh any mitigating circumstances. *See State v. Johnson,* 210 Ariz. 438, 441, ¶ 10, 111 P.3d 1038, 1041 (App. 2005) ("[T]he maximum punishment authorized by a jury verdict alone, without the finding of any additional facts, is the presumptive term."); *Alvarez,* 205 Ariz. at 112 n.1, ¶ 4, 67 P.3d at 708 n.1 ("Sentence enhancement elevates the entire range of permissible punishment while aggravation and mitigation raise or lower a sentence within that range.").

¶14 Here, the court imposed an "aggravated" term of 18 years for Count 2 -- a term slightly greater than the 15.75 years the sentencing statute allowed for the presumptive term, but significantly less than either the 28-year "maximum" term or 35-year "aggravated" term. That sentence is supported in this case by the jury's finding that Defendant committed Count 2 for pecuniary gain. *See* A.R.S. § 13-701(C) (allowing "maximum" term to be imposed "only if *one or more"* alleged aggravating

---

the court's use of two prior historical felonies. *See* A.R.S. § 13-703(C) (defining a category three repetitive offender as one who "stands convicted of a felony and has two or more historical prior felony convictions"), -703(J) (prescribing a mandatory sentencing range for category three repetitive offenders). Those issues are therefore waived. *See Schabel v. Deer Valley Unified Sch. Dist. No. 97,* 186 Ariz. 161, 167, 920 P.2d 41, 47 (App. 1996) ("Issues not clearly raised and argued in a party's appellate brief are waived.").

circumstances is found to be true beyond a reasonable doubt) (emphasis added), (D)(6) (defining pecuniary gain as an aggravating factor).

A. Additional Aggravators

¶15 Defendant concludes that "no other" aggravating factor could be found except pecuniary gain because no other factor was alleged by the state. We disagree.

¶16 Aggravating circumstances may be found "on any evidence or information introduced or submitted to the court . . . before sentencing or any evidence presented at trial." A.R.S. § 13-701(C). A trial judge may "sua sponte find aggravating circumstances in the record." *State v. Marquez*, 127 Ariz. 3, 5-6, 617 P.2d 787, 789-90 (App. 1980). *See also* A.R.S. § 13-703(F) ("If the trier of fact finds at least one aggravating circumstance, the trial court may find by a preponderance of the evidence additional aggravating circumstances."); c*f. Ford*, 125 Ariz. at 12, 606 P.2d at 830 (finding no due process violation when trial court sua sponte finds aggravating factors in the presentence report).

¶17 Here, the jury found one aggravating factor, which allowed the court to find additional factors. The state's sentencing memorandum -- filed before sentencing –- suggested additional aggravators for the court's consideration.

¶18 Defendant asserts that the use of the terms "alleged" and "alleges" in A.R.S. § 13-701(C) and -701(D)(24)[5] "demonstrates a legislative intent to require allegations of aggravating factors." We disagree.

¶19 "The minimum or maximum term . . . may be imposed only if one or more of the circumstances *alleged to be in aggravation of the crime* are found to be true by the trier of fact beyond a reasonable doubt . . . on any evidence or information introduced or submitted to the court or the trier of fact before sentencing or any evidence presented at trial, and factual findings and reasons in support of such findings are set forth on the record at the time of sentencing." A.R.S. § 13-701(C) (emphasis added).

¶20 The language at issue here mirrors that discussed in *State v. Marquez*. There, we disagreed with appellant's assertion that the use of the word "alleged" indicated "a legislative intention that in the absence of a specific allegation by the prosecutor charging aggravating circumstances, the trial judge would not have jurisdiction to find such

[5] Defendant cites § 13-701(D)(22) as "the 'catch-all' provision that relates to '[a]ny other factor that the state alleges is relevant.'" But it is actually § 13-701(D)(24) that "catches all" potential aggravating factors not enumerated in 701(D)'s list and that contains the disputed term "alleges."

circumstances for the purpose of increasing the presumptive sentence."[6] 127 Ariz. at 5, 617 P.2d at 789.

¶21 As we pointed out in *Marquez,* nothing in A.R.S. § 13-701(C) places the burden on the prosecution to raise any allegation of an aggravating factor. *Id.* at 5-6, 617 P.2d at 789-90. Additionally, A.R.S. § 13-701(C), like the statute at issue in *Marquez,* requires that the aggravating factor be proved by "evidence or information introduced or submitted . . . before sentencing or . . . at trial." We therefore adopt the principles expressed in *Marquez* and hold that A.R.S. § 13-701(C) allows the trial court, in its discretion, to deviate from the presumptive term within the statutory limits if aggravating or mitigating circumstances appear in the evidence. 127 Ariz. at 6, 617 P.2d at 790.

¶22 Finally, Defendant asserts that the trial court erred because the third aggravating circumstance it found (the "need

---

[6] The relevant language from A.R.S. § 13-702(C) (1980) quoted in *Marquez* is:

> The upper or lower term . . . may be imposed only if the circumstances *alleged to be in aggravation* or mitigation of the crime are found to be true by the trial judge upon any evidence or information introduced or submitted to the court prior to sentencing or any evidence previously heard by the judge at the trial, and factual findings and reasons in support of such findings are set forth on the record at the time of sentencing.

127 Ariz. at 5, 617 P.2d at 789 (emphasis added).

to deter Defendant from committing additional crimes") is not a true aggravating circumstance.

¶23 We find no error. *See State v. LeMaster*, 137 Ariz. 159, 166, 669 P.2d 592, 599 (App. 1983) ("The trial court should specifically consider the need for deterrence in imposing sentence."). The record here demonstrates that the court considered Defendant's individual need for deterrence based on his significant criminal history. The need to deter Defendant, therefore, was an appropriate factor for the court to consider in reaching its sentencing decision within the range already permitted by the existence of statutorily enumerated aggravators. *See id.* ("In light of the past criminal history and character of appellant, the trial court did not err in considering the need for deterrence as an aggravating factor.").

B. Prior Criminal History

¶24 We also find no error in the court's use of Defendant's prior criminal history as an aggravating circumstance.

¶25 For the purpose of determining the sentence, A.R.S. § 13-701(D)(11) states that the court shall consider "[t]he [fact that the] defendant was previously convicted of a felony within the ten years immediately preceding the date of the offense," as an aggravating circumstance.

¶26 Here, the state's sentencing memorandum urged the court to use three prior felonies as a single additional aggravating factor.[7] One of those felonies occurred outside the statutory time frame. But using that older felony as an aggravating factor does not constitute error. *See State v. Romero,* 173 Ariz. 242, 243, 841 P.2d 1050, 1051 (App. 1992) (holding that language identical to that found in A.R.S. § 13-701(D)(11) does not "mean that the judge cannot consider *any* felony that is more than ten years old") (emphasis added). Although the age of the older conviction could "diminish its force as an aggravating factor," *id.*, the record here evidences that the court considered that conviction in conjunction with the two more recent felonies.

III. SENTENCING MINUTE ENTRY

¶27 Defendant correctly points out that the sentencing minute entry inappropriately includes A.R.S. § 13-709.03 as a legal basis for both sentences. That statute sets out special sentencing provisions for drug offenses involving methamphetamine. Although the drug at issue here was methamphetamine, the state chose to prosecute Defendant as a repetitive offender. We therefore remand so that the trial court can modify its minute entry to remove its reference to

[7] These are additional felonies from the two used to enhance Defendant's sentence.

A.R.S. § 13-709.03. *See* Ariz. R. Crim. P. 31.17(b) (allowing appellate court to modify actions of the trial court); *State v. Sands,* 145 Ariz. 269, 278, 700 P.2d 1369, 1378 (App. 1985) (correcting an "inadvertent error" in a sentencing minute entry).

CONCLUSION

¶28 For the foregoing reasons we affirm Defendant's sentences but remand so that A.R.S. § 13-709.03 can be deleted from the sentencing minute entry.

/s/
_____
PETER B. SWANN, Presiding Judge

CONCURRING:

/s/
_____
JON W. THOMPSON, Judge

/s/
_____
JOHN C. GEMMILL, Judge