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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. SERGIO F. GONZALES BARRERA, Petitioner.	)	2 CA-CR 2013-0164-PR DEPARTMENT A O P I N I O N

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF YAVAPAI COUNTY

Cause No. P1300CR201000189

Honorable Celé Hancock, Judge

REVIEW GRANTED; RELIEF DENIED

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M I L L E R, Judge.

¶1 Pursuant to a plea agreement, petitioner Sergio Gonzales Barrera was convicted of sexual conduct with a minor under the age of fifteen ("count one"), sexual abuse, attempted sexual conduct with a minor, and luring a minor for sexual exploitation,

all dangerous crimes against children. The trial court sentenced him to prison for a presumptive, twenty-year term, to be served as "flat time" on count one, to be followed by intensive, sex-offender lifetime probation on the other counts. In this petition for review, Barrera challenges the court's summary dismissal of his of-right petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. He asks to be resentenced before a different judge and alternatively asks to withdraw from the plea agreement "if he chooses to do so." "We will not disturb a trial court's ruling on a petition for post-conviction relief absent a clear abuse of discretion."[1] *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We find no such abuse here.

¶2 The terms of Barrera's plea agreement provided a sentencing range of thirteen to twenty-seven years to be served as flat time on count one and included a promise that the state would recommend "a term of 13 years in the Department of Corrections" on that count.[2] Before accepting Barrera's guilty plea at the change-of-plea hearing, the trial court reviewed the sentencing range on all four counts, including the sentencing range on count one, the sentence Barrera now challenges.

¶3 At sentencing, defense counsel presented mitigating evidence, including testimony by Barrera's mother, brother, and aunt. And, although the prosecutor kept her promise to recommend that Barrera receive a thirteen-year prison term, she expressed

[1]Notwithstanding the abuse of discretion standard that applies here, and which Barrera did not cite, he asks us to "rule on the issues as a matter of appellate review."

[2]Because Barrera does not appear to challenge the imposition of probation on the other counts, we do not address that portion of his sentence.

concern that he did "not understand or [chose] not to understand how he played a role in this." Referring to Barrera's written statement that had been attached to the presentence report, the prosecutor pointed out that, even if the victim "put herself" in a dangerous situation by communicating with Barrera over the internet, the events that occurred were "not the victim's fault." In addition, the trial court noted it had reviewed the file, the psychological and presentence reports, Barrera's written statement, the victim impact statement, and comments from the attorneys and Barrera and his family. The court then told Barrera:

> I am extremely bothered by your demeanor in court today. You have been sitting in this courtroom smirking and rolling your eyes, and I'll tell you . . . when I read your statement, I wasn't sure what you were getting at . . . .
>
> After observing you here today, it is my opinion that you have not taken responsibility for this crime. You appear to be unmoved by the harm that you have done to this child. Your statement in and of itself indicates that you knew she was a child.
>
> Your comments about wanting to develop a relationship with this child are not well taken. You do not develop a relationship with a child at all. You certainly don't do that by taking her to a hotel room and committing these kinds of acts on her.

¶4 In addition, the author of the presentence report included the following relevant input from the prosecutor:

> The State respectfully recommends that the Defendant be sentenced to thirteen (13) years for Count 1 . . . . Defendant's behavior demonstrates extremely poor judgment and impulse control for someone of his age. He also showed a great deal

> of thought and planning in targeting his young victim,[3] and grooming her via the internet for his eventual clandestine sexual encounters with her. While it is known that the Defendant also targeted other young girls, it is the State's position that thirteen years flat time, followed by lifetime probation, is an appropriate sentence.

Discussion

¶5 On review, Barrera first contends the imposition of an enhanced sentence under A.R.S. § 13-705, the dangerous crimes against children statute, violates the Eighth Amendment's prohibition against cruel and unusual punishment. Barrera does not argue his convictions were not dangerous crimes against children; he instead asserts that "[t]he facts in this case are virtually identical" to those in *State v. Davis*, 206 Ariz. 377, 79 P.3d 64 (2003), and argues the enhanced, twenty-year prison term imposed on count one is grossly disproportionate to the offense for which it was imposed. *See also Solem v. Helm*, 463 U.S. 277, 284 (1983). He further maintains he should be sentenced under A.R.S. § 13-702 rather than § 13-705.

¶6 Unlike the defendant in *Davis*, who was found guilty by a jury, Barrera entered into a plea agreement. 206 Ariz. 377, ¶ 9, 79 P.3d at 67. By pleading guilty, a defendant waives the Fifth Amendment privilege against self-incrimination, the Sixth Amendment right to confront one's accusers, and the right to a trial by jury. *State v. Allen*, 223 Ariz. 125, ¶ 13, 220 P.3d 245, 247 (2009). In addition to this inherent relinquishment of rights, the state may impose conditions that require the defendant to give up additional rights. "The most basic rights of criminal defendants are . . . subject to

[3]The victim was thirteen years old when the offenses occurred.

waiver," *Peretz v. United States*, 501 U.S. 923, 936 (1991), and "[a]ny right, even a constitutional right, may be surrendered in a plea agreement if that waiver was made knowingly and voluntarily," *United States v. Ashe*, 47 F.3d 770, 775-76 (6th Cir. 1995). Thus, we have held that a plea of guilty also waives all of a defendant's non-jurisdictional defenses and defects. *State v. Hamilton*, 142 Ariz. 91, 94, 688 P.2d 983, 986 (1984) (voluntariness of confession waived); *State v. Carter*, 151 Ariz. 532, 533-34, 729 P.2d 336, 337-38 (App. 1986) (speedy trial issue waived); *State v. Webb*, 140 Ariz. 321, 323, 681 P.2d 473, 475 (App. 1984) (claim of vindictive prosecution waived); *Dominguez v. Meehan*, 140 Ariz. 329, 332, 681 P.2d 912, 915 (App. 1983), *aff'd*, 140 Ariz. 328, 681 P.2d 911 (1984) (double jeopardy violation waived).

¶7 No Arizona decision has addressed whether a defendant waives his right to object to the proportionality of his sentence by entering a guilty plea. In *United States v. Bascomb*, 451 F.3d 1292 (11th Cir. 2006), the court reinforced the notion "that knowingly and voluntarily entered plea agreements containing appeal waivers are like contracts in which the government and the defendant have bargained for a deal." *Bascomb*, 451 F.3d at 1296; *see also Coy v. Fields*, 200 Ariz. 442, ¶ 9, 27 P.3d 799, 802 (App. 2001) ("Plea agreements are contractual in nature and subject to contract interpretation."). Acknowledging that to hold otherwise might "undermin[e] the enforceability of [plea] bargains [and] harm[] all parties that use them," the court decided that "a defendant may, and this one did, knowingly and voluntarily waive his right to

appeal a sentence on the ground that its length . . . renders it cruel and unusual." *Bascomb*, 451 F.3d at 1296-97. We find the Eleventh Circuit's reasoning persuasive.

¶8 Here, pursuant to his plea agreement, Barrera "waive[d] and [gave] up any and all motions, defenses, objections, or requests which he[] has made or raised, or could assert hereafter, to the Court's . . . imposition of a sentence upon him[] consistent with this Plea Agreement." Not only did the trial court impose a sentence consistent with the plea agreement, but that agreement also referred several times to the fact that Barrera was pleading guilty to dangerous crimes against children and that he agreed to be bound by the sentencing range set forth in § 13-705, the same statute he now asserts should not apply to him.

¶9 At the change-of-plea hearing, the trial court confirmed that the state had recommended a thirteen-year sentence and that Barrera was pleading guilty to offenses that were dangerous crimes against children. The court stated that before deciding what sentence it would impose, it would hear from all the participants:

> I don't have any problem with any 13 year sentence with a lifetime probation tail. However, I have a duty to hear from the victim which I intend to do.
>
> I have a responsibility and always look at the presentence report and any information that is provided to this court from [the prosecutor and defense counsel] in deciding what an appropriate sentence would be in this case. So it's important that you understand.
>
> I understand your case. I've had these discussions with the attorneys, but I cannot promise you what your sentence is going to be today.

> . . . I'm influenced by what everybody says to me. [The prosecutor] has agree[d] she would recommend 13 years. That certainly is going to carry some weight with this court.

In addition, the plea agreement provided that the parties understood and agreed "it is the Court's duty to impose sentence . . . and that any sentence either stipulated to or recommended . . . is not binding upon the Court [which] . . . is bound only by the limits set forth in [the agreement] and the applicable statutes." Barrera acknowledged he understood the plea agreement and how the court intended to proceed at sentencing and stated he had no questions at the conclusion of the change-of-plea hearing.

¶10 As conditioned in his plea agreement, Barrera knowingly and voluntarily waived his right to challenge his sentence as cruel and unusual, and he thus is precluded from post-conviction relief on the claim.[4] *See* Ariz. R. Crim. P. 32.2(a)(3); *see also State v. Espinosa*, 200 Ariz. 503, ¶¶ 7, 10, 29 P.3d 278, 280-81 (App. 2001). Such a claim is among those that Barrera traded for the dismissal of several counts brought in the original indictment and the state's promise to recommend a thirteen-year sentence. Barrera was free to bargain away his right to raise constitutional issues in negotiating a plea agreement, and he did so here.

¶11 In its ruling denying post-conviction relief, the trial court found the twenty-year sentence to be "well within the guidelines established by A.R.S. § 13-705 . . . [and]

[4]Although Barrera suggests in his reply to the state's response to his petition for review that he would like to "withdraw from the plea if he chooses to do so," he does not appear to assert that his guilty plea was not entered knowingly, voluntarily, and intelligently.

not a violation of the [E]ighth [A]mendment." As previously noted, Barrera's sentence was imposed in accordance with the plea agreement, including the condition that § 13-705 applied to him. Although the court could have rejected this claim solely on the ground of preclusion, we nonetheless find it did not abuse its discretion by denying relief for a different reason. *See State v. Oakley*, 180 Ariz. 34, 36, 881 P.2d 366, 368 (App. 1994).

¶12 Barrera next argues that statements made by the prosecutor at the sentencing hearing "violated the spirit" of the state's agreement to recommend the minimum, thirteen-year prison term. Relying on *State v. Ross*, 166 Ariz. 579, 804 P.2d 112 (App. 1990), Barrera asserts that because the prosecutor made "negative statements" about his written statement and "highlighted" the views of the victim's parents at sentencing, she essentially failed to "live up to her promise" to recommend the minimum sentence.[5] However, *Ross* is distinguishable because the prosecutor in that case had taken a much more adversarial stance than did the prosecutor here. There, "the prosecutor rigorously cross-examined the defendant's witnesses" during the mitigation hearing and at sentencing, and "also argued against the mitigated sentence sought by the defendant and suggested that an aggravated sentence would be appropriate." *Id.* at

[5]To the extent Barrera argued for the first time in his reply to the state's response to his petition for post-conviction relief and in his reply to its response to the petition for review that the prosecutor was "required to advocate on behalf of the mitigated term" (emphasis omitted), we do not address this argument. *See* Ariz. R. Crim. P. 32.5 (requiring post-conviction petitioner to include in petition "every ground known to [petitioner] for vacating, reducing, correcting or otherwise changing all judgments or sentences imposed.").

581-83, 804 P.2d at 114-16. Here, in contrast, the prosecutor did not cross-examine Barrera's mitigation witnesses, and despite her concerns, she nonetheless did exactly what she had promised to do—she recommended the thirteen-year sentence. Nor does the plea agreement prohibit the prosecutor from commenting on Barrera's conduct. In its ruling denying post-conviction relief, the trial court made the following finding, which the record supports:

> The State made it clear, both at the change of plea hearing and at the sentencing hearing, that it was recommending a mitigated 13 year sentence. The prosecutor's statement regarding her concern after reading the presentence report [does] not rise to the level of *Ross*. In *Ross*, the prosecutor had promised not to make a recommendation at all. Here, the prosecutor agreed to recommend a 13 year flat-time sentence and in fact did recommend that sentence. Her comment consists of one statement regarding her concerns about the Defendant's statement from the presentence report. She recommended 13 years flat-time and did not deviate from her recommendation.

¶13 Finally, Barrera argues the trial court abused its discretion by failing to give sufficient weight to mitigating factors in sentencing. Generally, trial courts have broad discretion in imposing a sentence, and we will not disturb a sentence within the statutory range unless the court clearly has abused that discretion. *State v. Cazares*, 205 Ariz. 425, ¶ 6, 72 P.3d 355, 357 (App. 2003). A trial court abuses its discretion in sentencing when it acts "arbitrarily or capriciously or fail[s] to adequately investigate the facts relevant to sentencing." *Id.* But, we generally find no such abuse when the court "fully considers the factors relevant to imposing sentence." *Id.*; *see also State v. Ward*, 200 Ariz. 387, ¶ 6, 26 P.3d 1158, 1160 (App. 2001). We additionally presume the court considers all

relevant sentencing evidence presented, *State v. Everhart*, 169 Ariz. 404, 407, 819 P.2d 990, 993 (App. 1991), but the "weight to be given any factor asserted in mitigation rests within the trial court's sound discretion." *Cazares*, 205 Ariz. 425, ¶ 8, 72 P.3d at 357.

¶14 The trial court was presented with mitigating evidence that included Barrera's written statement and testimony by several family members on his behalf, as well as defense counsel's lengthy argument in favor of mitigation. But a trial court "is not required to find mitigating factors just because evidence is presented; [it] is only required to consider them." *State v. Fatty*, 150 Ariz. 587, 592, 724 P.2d 1256, 1261 (App. 1986); *see also Cazares*, 205 Ariz. 425, ¶ 8, 72 P.3d at 537. Here, the court not only stated at sentencing that it had considered all of the evidence presented, but subsequently found there was "no basis for post conviction relief regarding the assessment of mitigating factors" because it had "more than adequately considered *all* the factors involved in the case and concluded that a 20 year flat-time sentence was appropriate." (Emphasis in original.) We therefore cannot say the court abused its discretion in imposing the presumptive sentence and denying relief on this claim.

Disposition

¶15 Having considered Barrera's post-conviction arguments and having reconsidered the presumptive sentence it had imposed, the trial court rejected his arguments and ratified its initial sentencing decision as appropriate under the circumstances of the case. Nothing in the record suggests the court abused its discretion

in denying post-conviction relief. Therefore, although we grant the petition for review, we deny relief.

/s/ Michael Miller
MICHAEL MILLER, Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief 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 December 12, 2012.