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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STATE OF ARIZONA, Respondent, v. BENJAMIN HENRY TYAU, Petitioner.	2 CA-CR 2011-0294-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court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 No. CR20092314001

Honorable Deborah Bernini, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines
Tucson
Attorneys for Respondent

Benjamin H. Tyau
Florence
In Propria Persona

H O W A R D, Chief Judge.

¶1 Petitioner Benjamin Tyau seeks review of the trial court's order denying his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. "We will not disturb a trial court's ruling on a petition for post-conviction relief absent a clear

abuse of discretion." *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Tyau has not sustained his burden of establishing such abuse here.

¶2 Pursuant to a plea agreement, Tyau was convicted of kidnapping, two counts of criminal trespass, and burglary. The trial court imposed aggravated, consecutive terms of imprisonment totaling ten years on the first three counts and suspended the imposition of sentence and placed Tyau on a consecutive, five-year term of probation on the burglary count.

¶3 Thereafter, Tyau initiated post-conviction relief proceedings, and his attorney filed a notice stating she had reviewed the record and was "unable to find any claims to raise in Rule 32 post-conviction proceedings." In his pro se petition, Tyau argued (1) he had not admitted his "offenses were committed for sexual motivation" as the trial court had found at sentencing and that factor therefore had been erroneously considered in aggravation as to two of the counts; (2) there was no evidence the victim of one of the criminal trespass counts had sustained emotional harm; (3) the "repetitive nature of the crimes" should not have been considered in aggravation of the kidnapping count; (4) there were conflicting reports of his risk to reoffend and that factor therefore should not have been considered in aggravation; and (5) counsel had been ineffective by failing to object to the aggravating circumstance of emotional harm as to one of the victims, by failing to address the repetitive nature of the crimes, by failing to argue Tyau's age in mitigation, and by failing to "correct the sentencing judge's misunderstanding about the written materials" provided by the defense. The trial court summarily denied relief. On review, Tyau asserts the court "did not thoroughly review or

specifically address each of the claims" he had made in his petition and essentially reasserts the arguments he made below.

¶4 First, although the trial court did not specifically itemize each of Tyau's claims in its decision, it did address broadly both the legality of Tyau's sentence and his claims of ineffective assistance of counsel, determining that no claims relating to these issues had merit. We agree.

¶5 As the trial court pointed out, "[w]ithin statutory limitations, imposition of sentence is left to the discretion of the trial judge." *See State v. Myers*, 117 Ariz. 79, 90, 570 P.2d 1252, 1263 (1977). The court may "consider as an aggravating circumstance any 'factor[] which [it] may deem appropriate to the ends of justice.'" *State v. Shuler*, 162 Ariz. 19, 21, 780 P.2d 1067, 1069 (App. 1989), *quoting* former A.R.S. § 13-702(D)(13) (second alteration added, first alteration in *Shuler*). Furthermore, the court may consider "any evidence or information introduced or submitted to the court or the trier of fact before sentencing,"[1] A.R.S. § 13-701(C), as well as information within a presentence report to establish aggravating or mitigating circumstances, *see Shuler*, 162 Ariz. at 21, 780 P.2d at 1069.

¶6 In this case, the trial court cited several factors in mitigation, including Tyau's family and community support, "excellent employment history" and education, and his expressions of remorse. In aggravation, the court found Tyau's crimes repetitive

[1]Although a defendant is entitled to a jury determination of aggravating factors other than prior convictions, *see Blakely v. Washington*, 542 U.S. 296, 301, 303-04 (2004), Tyau waived that right in his plea agreement, agreeing that the court could find aggravating and mitigating circumstances without regard to the rules of evidence.

in nature, with "multiple victims and multiple incidents"; emotional harm to one of the victims; and Tyau's criminal history, which included a misdemeanor sex offense for which he had been "given treatment" that "didn't work" in light of the instant offense. The court also noted concern about his "risk to re-offend."

¶7 Tyau claims the trial court should not have aggravated the sentence for his kidnapping offense on the basis of the repetitiveness of his crimes because "it was [his] first felony conviction." But, although the defendant's conviction of a prior felony is required to establish the aggravating circumstance in § 13-701(D)(11), a prior felony conviction was not required here. Nothing in the record suggests the court meant to aggravate the sentence based on that subsection. Rather, the court apparently found the "repetitive nature" of Tyau's various offenses—including not only the string of offenses here, but an earlier misdemeanor conviction involving his displaying his penis to a fourteen-year-old girl—as an aggravating circumstance under the "catch-all" provision set forth in § 13-701(D)(24). Tyau has cited no authority to suggest the court abused its discretion in so doing.

¶8 We also reject Tyau's claim that the trial court erred in refusing to consider his age at the time of the offense as a mitigating factor. Tyau was twenty-six years old at the time of the earliest offense. "We have found age not to be a mitigating circumstance in cases involving defendants . . . younger than this defendant." *State v. Salazar*, 173 Ariz. 399, 414, 844 P.2d 566, 581 (1992) (age 22), *citing State v. Brewer*, 170 Ariz. 486, 506-07, 826 P.2d 783, 803-04 (1992) (age 22); *State v. Walton*, 159 Ariz. 571, 589, 769 P.2d 1017, 1035 (1989) (age 20); *State v. Gerlaugh*, 144 Ariz. 449, 460-61, 698 P.2d 694,

705-06 (1985) (age 19). And we see no evidence in the record on which to conclude the court abused its discretion in implicitly determining that Tyau's age had not caused him to lack "substantial judgment in committing the crime." *State v. Johnson*, 131 Ariz. 299, 305, 640 P.2d 861, 867 (1982).

¶9 Tyau also argues the trial court erred in rejecting his claim that it had aggravated two of his sentences improperly on the ground that he had committed all of the offenses for sexual gratification. As Tyau asserts, the court stated at sentencing: "You further admitted as part of your plea that all of these offenses were committed for sexual motivation." But, it did not later enumerate that factor as an aggravating circumstance either orally or in the sentencing minute entry. Therefore any alleged error in the statement was harmless.

¶10 Tyau next challenges the sufficiency of the evidence to establish two of the aggravating circumstances—his likelihood to reoffend and emotional harm to one of the victims. We will find evidence insufficient to support an aggravating factor only where it "clearly appear[s] that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached." *See State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987).

¶11 As to his risk to reoffend, Tyau's argument centers on an inconsistency in the "risk/need assessment" in his presentence report. That assessment included a table showing that a male with a score of eighteen to forty-two was considered a high risk to reoffend. Tyau's score was listed as "10," but that score was stated as "High Risk." But this assessment, which Tyau characterizes as "potentially erroneous," was not the only

evidence or information available to the trial court as to Tyau's risk to reoffend. *See* § 13-701(C) (court may consider "any evidence or information introduced or submitted to the court or the trier of fact before sentencing"). In a "confidential criminal history information" report submitted to the court, "Pretrial Services" noted that Tyau's actions were "significantly impulsive-driven" and that, in light of his prior criminal history and "his own admissions of his [sexual] addictions," he was at "risk to re-offend." These facts apparently led the drafter of the report to recommend Tyau not be granted "recognizance or third-party release."

¶12 Additionally, Tyau had been in treatment for what he acknowledged was an "addiction" in relation to this behavior, and yet had reoffended four times in three years. And the presentence report indicated he had, "by his own admission" "been committing sexual offenses [of] . . . varying degrees since age 15." Therefore, there was more than sufficient evidence from which the trial court could conclude Tyau was at high risk to reoffend, even without considering the risk assessment to which he objects.

¶13 We also reject Tyau's claim that "emotional harm to [the] victim should never have been considered" as an aggravating factor on the second criminal trespass conviction "because there was no proof." We agree with Tyau that the state did not present evidence of emotional harm to this victim beyond a few bare assertions by the state unsupported by any indication of the victim having given such statements herself. *Cf. State v. Jones*, 147 Ariz. 353, 355, 710 P.2d 463, 465 (1985) ("[T]he 'evidence or information introduced or submitted' to the court must be made part of the record.").

¶14 But, in a letter addressed to the trial court, Tyau personally admitted he had "caus[ed] incredible pain to the[] victims and their families" and had "invaded their privacy and personal space" and "robbed them of their sense of security and peace of mind." And, at sentencing, he acknowledged he had harmed the victims and, "it is significant the way that I harmed them." As part of his plea agreement, Tyau waived his right to "any jury determination of aggravating factors beyond a reasonable doubt." Thus, because Tyau properly admitted that he had caused emotional harm to the victims, the court could consider that factor in aggravation. *See* § 13-701(C) (aggravated term may be imposed "if one or more of the circumstances alleged to be in aggravation of the crime . . . are admitted by the defendant"); *State v. Brown*, 212 Ariz. 225, ¶ 26, 129 P.3d 947, 953 (2006) ("[T]he Sixth Amendment right to jury trial with respect to an aggravating factor necessary to impose a sentence remains inviolate unless . . . the defendant has appropriately waived his right to jury trial with respect to these aggravating factors.").

¶15 Tyau's claims of ineffective assistance of counsel likewise are without merit. To present a colorable claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient under prevailing professional norms and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *State v. Ysea*, 191 Ariz. 372, ¶ 15, 956 P.2d 499, 504 (1998). Trial counsel is presumed to have acted properly unless a petitioner can show that counsel's decisions were not tactical, "but, rather, revealed ineptitude, inexperience or lack of preparation." *State v. Goswick*, 142 Ariz. 582, 586, 691 P.2d 673, 677 (1984).

¶16 As noted above, Tyau raised several claims of ineffective assistance of counsel related to his claims that the trial court abused its discretion in finding the aggravating circumstances of emotional harm to one of the victims and the repetitive nature of his offenses and in failing to find his age to be a mitigating circumstance. But, because we reject those claims, he cannot establish that counsel's failure to object on or raise those grounds either constituted deficient performance or caused him prejudice.

¶17 Tyau further argues about counsel's failure to "object [to] or correct the sentencing judge's misunderstanding about the written materials [h]e had provided her." He claims the trial court erroneously assumed that, because he had included general letters of recommendation along with the letters submitted in his support for sentencing, he had intended to deceive the court or the writers of the letters, who apparently were unaware of his offenses. He maintains that had his attorney clarified for the judge that the letters of recommendation had not been intended as letters of support or had clearly labeled them as separate from the letters of support, that "it is probable that the outcome would have been different."

¶18 In its ruling denying relief on Tyau's petition for post-conviction relief, however, the trial court made clear that it still had "consider[ed] that the Defendant did have family and community support" as a mitigating circumstance. Therefore, we cannot say Tyau was prejudiced by counsel's actions in this regard. And, in any event, Tyau has not established that the decision to submit all of the letters or to submit them together, was anything other than a tactical decision. *Goswick*, 142 Ariz. at 586, 691 P.2d at 677 (trial counsel presumed to have acted properly unless petitioner can show counsel's

decisions not tactical). And, "[m]atters of trial strategy and tactics are committed to defense counsel's judgment" and cannot serve as the basis for a claim of ineffective assistance of counsel. *State v. Beaty*, 158 Ariz. 232, 250, 762 P.2d 519, 537 (1988).

¶19 For all these reasons, although we grant the petition for review, we deny relief.

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

CONCURRING:

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

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