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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. RICHARD HERRERA, Appellant.	)	2 CA-CR 2012-0342 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF GREENLEE COUNTY

Cause No. CR201000081

Honorable D. Corey Sanders, Judge Pro Tempore

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani, Joseph T. Maziarz, and
Andrew Reilly
Phoenix
Attorneys for Appellee

Lynn T. Hamilton
Mesa
Attorney for Appellant

M I L L E R, Judge.

¶1 In 2010, Richard Herrera was convicted pursuant to a guilty plea of false swearing, a class six felony, and interfering with judicial proceedings, a class one misdemeanor. The trial court suspended the imposition of sentence and placed Herrera on a three-year term of probation. In 2012, the state filed a petition to revoke that probation based on allegations of attempted murder and aggravated assault stemming from a domestic violence incident, as well as Herrera having left Arizona without permission from his probation officer. After a hearing, the court found Herrera had violated conditions of his probation, terminated that probation, and sentenced him to the statutory maximum prison term of 1.5 years for false swearing. The court found as aggravating factors that Herrera had been convicted of a felony within the previous ten years and had committed false swearing for pecuniary gain. It found as a mitigating factor Herrera's previous military service. This appeal followed.

¶2 Herrera argues on appeal that, in imposing the 1.5-year prison term, the trial court gave improper weight to facts related to Herrera's probation violation instead of facts related to his original offense and gave inadequate weight to his military service as a mitigating factor. He further asserts the sentence is "unconstitutionally excessive." We affirm.

¶3 "A trial court has broad discretion in determining the appropriate penalty to impose upon conviction, and we will not disturb a sentence that is within the statutory limits . . . unless it clearly appears that the court abused its discretion." *State v. Cazares*, 205 Ariz. 425, ¶ 6, 72 P.3d 355, 357 (App. 2003). We will find an abuse of discretion if the court acted arbitrarily or capriciously or failed to adequately investigate the facts

relevant to sentencing. *State v. Ward*, 200 Ariz. 387, ¶ 6, 26 P.3d 1158, 1160 (App. 2001).

¶4 First, we summarily reject Herrera's argument that the trial court improperly considered the allegations related to the domestic violence incident. The court expressly and clearly stated it would not consider that incident in determining Herrera's sentence.[1] Herrera's claim that the court was nonetheless swayed by "passion and prejudice" due to that incident is entirely speculative and unsupported by the record. The two aggravating factors found by the court—which were unrelated to Herrera's probation violation—were sufficient to support its decision to impose the maximum prison term. *See* A.R.S. §§ 13-701(D)(6), (11); 13-702(A), (D).

¶5 Herrera additionally claims the trial court gave insufficient weight to the single mitigating factor—Herrera's military service. But the weight that is to be given to any mitigating circumstances is for the court to decide in the exercise of its sound discretion; we will not reweigh sentencing factors on appeal. *See State v. Towery*, 186 Ariz. 168, 189, 920 P.2d 290, 311 (1996). Nor do we find convincing Herrera's claim that his sentence was improper because his probation officer had stated the domestic violence incident was the primary reason he had requested that Herrera serve time in prison. Whether to revoke probation and impose a prison sentence is within the court's discretion. *See State v. Sanchez*, 19 Ariz. App. 253, 254, 506 P.2d 644, 645 (1973)

[1]In any event, it would not have been improper for the trial court to rely on factors related to Herrera's probation violation, as long the court did not "impose punishment for violation of probation alone." *State v. Rowe*, 116 Ariz. 283, 284, 569 P.2d 225, 226 (1977).

("[T]he revocation of probation has always been deemed to lie within the sound discretion of the trial court."); *see also* A.R.S. § 13-901(C) (trial court may revoke probation in its discretion and impose prison term as authorized by law). Herrera cites no authority, and we find none, suggesting that discretion is somehow limited to the state's reasons for seeking a prison term upon the revocation of probation.

¶6 Finally, Herrera argues his sentence was "unconstitutionally excessive." Although he cites *State v. Hurley*, 154 Ariz. 124, 741 P.2d 257 (1987), for the proposition that a "sentence must be proportionate to the offense," he does not adequately develop this argument. In *Hurley*, our supreme court stated that, "[t]o evaluate whether a sentence is unconstitutionally excessive," a court should "weigh the gravity of the offense against the harshness of the penalty, and then consider the sentences imposed on similarly situated defendants in this and other jurisdictions." 154 Ariz. at 133, 741 P.2d at 266. But Herrera merely summarily claims his conduct in committing false swearing was "not an event which . . . merited a maximum prison term." We have already rejected Herrera's argument that the court erred in imposing the maximum sentence. And Herrera does not attempt to demonstrate that his sentence was disproportionate when compared to similarly situated defendants. Accordingly, we do not address this argument further. *See State v. Moody*, 208 Ariz. 424, n.9, 94 P.3d 1119, 1147 n.9 (2004) ("Merely mentioning an argument is not enough: 'In Arizona, opening briefs must present significant arguments, supported by authority, setting forth an appellant's position on the issues raised. Failure to argue a claim usually constitutes abandonment and waiver of that claim.'"), *quoting State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989); *see*

also Ariz. R. Crim. P. 31.13(c)(1)(vi) (opening brief must include "[a]n argument which shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on.").

¶7 For the reasons stated, we affirm the trial court's revocation of Herrera's probation and the sentence imposed.

/s/ Michael Miller
MICHAEL MILLER, Judge

CONCURRING:

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

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