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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
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THE STATE OF ARIZONA, Appellee, v. WILLIAM LEON CORRAL, Appellant.	)	2 CA-CR 2012-0483 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR201116114001

Honorable Christopher Browning, Judge

AFFIRMED IN PART; VACATED IN PART

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E C K E R S T R O M, Judge.

¶1 William Corral was convicted after a jury trial held in his absence of two counts of aggravated driving under the influence and was sentenced to concurrent, presumptive ten-year prison terms. On appeal, he argues that he was denied his Sixth

Amendment rights to a jury trial and to confront witnesses because his trial was held in his absence and that the court abused its discretion in imposing presumptive prison terms due to the mitigating evidence presented. We vacate the criminal restitution order (CRO) entered at sentencing but otherwise affirm Corral's convictions and sentences.

¶2 Corral did not appear for the first day of trial, and the trial court found his absence was voluntary and conducted the trial in his absence pursuant to Rule 9.1, Ariz. R. Crim. P. Corral does not claim on appeal that he was not voluntarily absent from trial, that the court's findings were incorrect, or that the court improperly applied Rule 9.1. And he acknowledges that the constitutionality of Rule 9.1 has been upheld. *See State v. Bible*, 175 Ariz. 549, 571, 858 P.2d 1152, 1174 (1993); *Brewer v. Raines*, 670 F.2d 117, 119-20 (9th Cir. 1982). Corral argues, however, that the constitutionality of Rule 9.1 "has [been] called into question" by the United States Supreme Court's decision in *Crosby v. United States*, 506 U.S. 255 (1993). In *Crosby*, the Court determined that Rule 43, Fed. R. Crim. P., does not permit a criminal trial to begin in a defendant's absence, although a trial could continue based on a voluntary absence. 506 U.S. at 262. The Court expressly declined to address Crosby's related constitutional claim. *Id.*

¶3 Corral asserts that, because Arizona's Rule 9.1 "was specifically patterned after Federal Rule 43," *Crosby* applies with equal force. But we reject the premise of Corral's argument. He relies on the comment to Rule 9.1, which states in pertinent part: "The first sentence of Rule 9.1 retains the waiver by voluntary absence of the defendant contained in the 1956 Ariz. Rules of Criminal Procedure, as amended, Rule 231(B) and Federal Rules of Criminal Procedure 43. No major change in the law is intended." This

phrase does not reasonably support the conclusion that our rule is "specifically patterned" after the federal rule, but instead demonstrates that the current version of Rule 9.1 is based on several previous rules and existing case law.

¶4 In any event, Arizona's Rule 9.1 does not contain the language on which the Court in *Crosby* relied in concluding Rule 43, Fed. R. Crim. P., does not permit trial to begin in a defendant's absence. Specifically, the Court found it critical that Rule 43, Fed. R. Crim. P., "does not specifically authorize the trial in absentia of a defendant who was not present at the beginning of his trial." *Crosby*, 506 U.S. at 258; *see also* Fed. R. Crim. P. 43(c)(1)(A) (permitting waiver of presence by "[a] defendant who was initially present at trial" if defendant "is voluntarily absent after the trial has begun"). In contrast, Rule 9.1's provision that a defendant may waive his right to be present by voluntarily absenting himself applies to "any proceeding." We therefore reject Corral's argument that conducting his trial in his voluntary absence violated his Sixth Amendment rights.

¶5 Corral next asserts the trial court abused its discretion by imposing presumptive, rather than mitigated, prison terms because he suffers from a psychotic disorder and from medical problems that cause him to have a significantly reduced life span.[1] "A trial court has broad discretion to determine the appropriate penalty to impose upon conviction, and we will not disturb a sentence that is within statutory limits . . .

[1]In support of these factual assertions, Corral refers to a "Mitigation Report" that does not appear in the record on appeal. Because the state does not suggest Corral's factual statements are false, and it appears a mitigation report was, in fact, provided to the trial court, we will assume these mitigating factors were properly presented for the court's consideration and are as Corral describes them.

unless it clearly appears that the court abused its discretion." *State v. Cazares*, 205 Ariz. 425, ¶ 6, 72 P.3d 355, 357 (App. 2003). The court expressly considered the mitigating factors presented by Corral in imposing sentence. And the court found several aggravating factors such as Corral's extensive criminal history and his "disrespect for the safety of the citizens of this community, the laws of this State, and the judicial process." Although Corral claims those factors do not "constitute a substantial aggravating circumstance" because some are not specifically enumerated by statute, he cites no authority suggesting a trial court is required to give less weight to non-enumerated factors when imposing a presumptive sentence. *See generally* A.R.S. § 13-701. The weighing of sentencing factors is best left to the trial court. *State v. Harvey*, 193 Ariz. 472, ¶ 24, 974 P.2d 451, 456 (App. 1998). We find no abuse of discretion.

¶6 At sentencing, the trial court imposed various fees and assessments, and the sentencing minute entry stated they were "reduced to a Criminal Restitution Order [CRO], with no interest, penalties or collection fees to accrue while the defendant is in the Department of Corrections." Although Corral does not raise this issue on appeal, this court has determined that in these circumstances, based on A.R.S. § 13-805(C),[2] "the imposition of a CRO before the defendant's probation or sentence has expired 'constitutes an illegal sentence, which is necessarily fundamental, reversible error.'"

[2]Section 13-805 has been modified three times since Corral committed his offenses, but none of those alterations are material here. 2012 Ariz. Sess. Laws, ch. 269, § 1; 2011 Ariz. Sess. Laws ch. 263, § 1; 2011 Ariz. Sess. Laws ch. 99, § 4.

State v. Lopez, 231 Ariz. 561, ¶ 2, 298 P.3d 909, 909 (App. 2013), *quoting State v. Lewandowski*, 220 Ariz. 531, ¶ 15, 207 P.3d 784, 789 (App. 2009).

¶7 For the reasons stated, the criminal restitution order is vacated; Corral's convictions and sentences are otherwise affirmed.

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

CONCURRING:

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge