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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STATE OF ARIZONA, Respondent, v. JASON PAUL BIERE, Petitioner.	2 CA-CR 2013-0050-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF MOHAVE COUNTY

Cause No. CR200901154

Honorable Rick A. Williams, Judge

REVIEW GRANTED; RELIEF DENIED

Jill L. Evans, Mohave County Appellate Defender
By Diane S. McCoy
Kingman
Attorneys for Petitioner

M I L L E R, Judge.

¶1 Petitioner Jason Biere seeks review of the trial court's order denying his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. Because Biere has been released from custody, his claims as to the length of his sentence are moot. And, because he has not shown the trial court abused its discretion in denying relief concerning any other aspect of his sentence, we deny relief.

¶2 After entering a plea pursuant to *North Carolina v. Alford*, 400 U.S. 25, 37 (1970), Biere was convicted of one count of child abuse. The trial court sentenced him to an aggravated 3.5-year term of imprisonment. Biere thereafter initiated a post-conviction relief proceeding, arguing in his petition that he "received an excessive sentence not authorized by law and . . . ineffective assistance of counsel at sentencing due to counsel's failure to object to the trial court's improper finding of aggravating factors and imposition of an exceptionally aggravated sentence in the absence of required aggravating circumstances." The court summarily dismissed the petition.

¶3 On review, Biere essentially repeats his arguments made below and asks this court to remand for a resentencing hearing. In light of the fact that Biere has been released from custody during the pendency of this review, his challenges to the length of his prison term and related claims of ineffective assistance of counsel are moot. *See State v. Hartford*, 145 Ariz. 403, 405, 701 P.2d 1211, 1213 (App. 1985) ("[W]hen an entire sentence has been served prior to consideration of that sole issue on appeal, the validity of its imposition is a moot question.") (emphasis omitted).

¶4 To the extent Biere's claims could impact other aspects of his sentence, we find them without merit. Relying on *State v. Schmidt*, 220 Ariz. 563, 208 P.3d 214

(2009), and *State v. Harrison*, 195 Ariz. 1, 985 P.2d 486 (1999), Biere argues the trial court erred in imposing "an exceptionally aggravated sentence based upon only one statutorily enumerated aggravated factor" and should have granted him relief on that claim. At sentencing, the state argued "harm to the victim" as an aggravating circumstance, noting that the victim suffered from nightmares and would urinate on herself when she saw someone who looked like Biere. In imposing a 3.5-year sentence,[1] in addition to citing Biere's prior convictions, the court cited the "severity of the abuse" as an aggravating circumstance. Biere argues the court was required to state specifically it was finding the enumerated circumstance of physical or emotional harm, A.R.S. § 13-701(D)(9), and its failure to do so meant it was relying solely on the "catch-all" provision in A.R.S. § 13-701(D)(24).

¶5 But, in *State v. Bonfiglio*, No. CR-12-0018-PR, 2013 WL 812414, ¶ 10 (Ariz. Mar. 6, 2013), our supreme court clarified that

> *Schmidt* does not require a trial court to state that it relied on one of the specifically enumerated factors to aggravate a defendant's sentence in order to use the "catch-all" aggravator. Rather, *Schmidt* permits a trial court to use a "catch-all" aggravator to impose a sentence up to the statutory maximum as long as a properly found specifically enumerated aggravating factor made the defendant eligible for a sentence greater than the presumptive.

In its order denying relief, the trial court stated its finding at sentencing regarding the "'severity of the abuse,' while perhaps inartful, is synonymous with a finding of

[1]Biere entered his plea to child abuse as a nondangerous, nonrepetitive, class four felony. The statutory sentencing range thus provided for a presumptive 2.5-year term, a maximum three-year term, and a 3.75-year aggravated term. A.R.S. § 13-702(D).

'emotional or physical harm to the victim,'" a specifically enumerated aggravating circumstance. *See* § 13-701(D)(9). In view of the state's argument and the court's own comment at sentencing that it viewed this case as "pretty high up there as far as serious child abuse cases," the record supports the court's conclusion that in citing the "severity of the abuse" as an aggravating circumstance, it had been "considering the degree of harm inflicted on the victim." Because "the sentencing transcript [therefore] identif[ied] the court's reasons for imposing an aggravated sentence," *id.* ¶ 12, we cannot say the court abused its discretion in denying relief on this ground.

¶6 We likewise reject Biere's claim that he was entitled to relief because the trial court improperly considered three prior felony convictions instead of one in imposing an aggravated sentence. Even assuming that, as Biere asserts, two of his out-of-state convictions would not have been felonies if committed in Arizona, the court made clear it nonetheless would have imposed the same sentence had it found only one felony conviction, and any error was therefore harmless. *See State v. Pena*, 209 Ariz. 503, ¶ 24, 104 P.3d 873, 879 (App. 2005) (sentencing error harmless if trial court would have imposed same sentence absent inappropriate aggravating factor). Accordingly, the court did not abuse its discretion in denying relief.

¶7 Based on our rejection of both sentencing claims, Biere has not established he suffered prejudice as a result of any alleged deficiency in trial counsel's performance, and we find no merit in his claim of ineffective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984) (to succeed on ineffective assistance claim, defendant must show prejudice).

¶8 For the reasons stated, the petition for review is granted, relief denied.

/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