

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

JIMMY SEBASTIAN VENEGAS,
Petitioner.

No. 2 CA-CR 2013-0350-PR
Filed December 2, 2013

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION.

See Ariz. R. Sup. Ct. 111(c); Ariz. R. Crim. P. 31.24

Petition for Review from the Superior Court in Maricopa County
No. CR2010147587001DT
The Honorable Cynthia J. Bailey, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

William G. Montgomery, Maricopa County Attorney
By Catherine Leisch, Deputy County Attorney, Phoenix
Counsel for Respondent

Jimmy S. Venegas, Florence
In Propria Persona

STATE v. VENEGAS
Decision of the Court

MEMORANDUM DECISION

Judge Miller authored the decision of the Court, in which Chief Judge Howard and Presiding Judge Vásquez concurred.

M I L L E R, Judge:

¶1 Jimmy Venegas petitions this court for review of the trial court's order summarily denying his of-right petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that ruling unless the court clearly has abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Venegas has not met his burden of demonstrating such abuse here.

¶2 Venegas pled guilty to aggravated driving under the influence (DUI) with an offense date of September 7, 2010, and admitted a previous aggravated DUI conviction for an offense committed on November 18, 2000. The trial court sentenced him to an enhanced, maximum six-year prison term. Venegas filed a notice of post-conviction relief, and appointed counsel filed a notice stating she had reviewed the record but was "unable to find any claims for relief to raise in post-conviction relief proceedings."

¶3 Venegas filed a pro se petition arguing he should have received a presumptive, 4.5-year prison term because of various mitigating factors such as his maintaining full-time employment and providing for his son as a single parent. He additionally claimed his previous DUI conviction could not be used to enhance his sentence because it had occurred more than eighty-four months before his current offense, citing A.R.S. § 28-1387. The trial court summarily denied his petition, concluding that "[a]ggravation and mitigation information was provided and considered at sentencing" and that Venegas's prior conviction was properly used to enhance his sentence.

STATE v. VENEGAS
Decision of the Court

¶4 On review, Venegas repeats his claim that a presumptive sentence was warranted based on various mitigating circumstances, additionally claiming that he has been “a model inmate” since his incarceration. He also argues his prior DUI conviction could not be used to enhance his sentence pursuant to § 28-1387.

¶5 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. *See State v. Cazares*, 205 Ariz. 425, ¶ 6, 72 P.3d 355, 357 (App. 2003). Venegas has identified no abuse of discretion or legal error in the trial court’s imposition of the maximum sentence. There is no basis under Rule 32 for a trial court to reconsider the sentence imposed based on a defendant’s conduct while incarcerated or, absent a claim of ineffective assistance of counsel or newly discovered evidence, based on mitigating evidence not presented at sentencing. *See generally* Ariz. R. Crim. P. 32.1.

¶6 Finally, Venegas misapprehends § 28-1387 and the law governing his enhanced sentence. Section 28-1387(A) addresses the use of prior convictions in support of a conviction for aggravated DUI pursuant to A.R.S. § 28-1383(A)(2). It has no application to Venegas’s conviction, which was based on § 28-1383(A)(1)—his having violated A.R.S. § 28-1381 while his license to drive was suspended, cancelled, revoked, or restricted. Venegas was properly sentenced as a repeat offender based on his previous DUI conviction. *See* A.R.S. §§ 13-105(22)(a)(iv), 13-703(B)(2), (I).

¶7 For the reasons stated, we find no error in the trial court’s summary denial of Venegas’s petition for post-conviction relief. Thus, although review is granted, relief is denied.