

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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THE STATE OF ARIZONA,  
*Appellee,*

*v.*

USEF LATRICE SIMMONS II,  
*Appellant.*

No. 2 CA-CR 2016-0408  
Filed October 18, 2017

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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NOT FOR PUBLICATION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)(1); Ariz. R. Crim. P. 31.24.*

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Appeal from the Superior Court in Cochise County  
No. CR201300111  
The Honorable James L. Conlogue, Judge

**AFFIRMED**

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COUNSEL

Mark Brnovich, Arizona Attorney General  
Joseph T. Maziarz, Chief Counsel, Phoenix  
By Amy M. Thorson, Assistant Attorney General, Tucson  
*Counsel for Appellee*

Joel A. Larson, Cochise County Legal Defender, Bisbee  
*Counsel for Appellant*

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**MEMORANDUM DECISION**

Judge Eppich authored the decision of the Court, in which Presiding Judge Vásquez and Chief Judge Eckerstrom concurred.

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E P P I C H, Judge:

¶1 Usef Simmons appeals the trial court’s order clarifying sentences it had previously imposed, on remand by this court after we vacated five out of eleven drug-related convictions in a simultaneously issued published opinion and memorandum decision. *State v. Simmons*, 238 Ariz. 503, ¶ 1, 363 P.3d 120, 121 (App. 2015); *State v. Simmons*, No. 2 CA-CR 2014-0193 (Ariz. App. Nov. 23, 2015) (mem. decision). Simmons argues the prison terms, which total thirty-nine years, are clearly excessive and asks us to reduce them. We affirm for the reasons stated below.

**Factual and Procedural Background**

¶2 The facts relevant to the sentencing issues raised in this appeal are summarized below. “We view the facts in the light most favorable to sustaining the jury’s verdicts.” *State v. Wright*, 239 Ariz. 284, ¶ 2, 370 P.3d 1122, 1123 (App. 2016). A more detailed recitation of the facts supporting Simmons’s convictions is set forth in our prior opinion. *See Simmons*, 238 Ariz. 503, ¶¶ 2-5, 363 P.3d at 121-22.

¶3 Simmons was charged with multiple drug-related offenses following an undercover law-enforcement operation. Simmons sold methamphetamine to an officer on two occasions and on a third occasion an associate of Simmons’s sold an officer what was supposed to have been methamphetamine but was rock salt. The sales took place on separate days. When Simmons was arrested, officers found a baggie of marijuana in his pocket.

¶4 A jury found Simmons guilty of transportation of a dangerous drug for sale, two counts of sale of a dangerous drug, five counts of use of a wire or electronic communication in a drug-related transaction, possession of an imitation drug with the intent to

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distribute as methamphetamine, possession of marijuana, and conspiracy to sell a dangerous drug.

¶5 At sentencing, defense counsel argued that “an effective” prison term of 10.5 years was appropriate, essentially urging the court to impose concurrent terms. He pointed to Simmons’s difficult childhood, family support, and acceptance of responsibility, as mitigating factors, and minimized the seriousness of his prior felony convictions, characterizing Simmons as a “petty criminal.”

¶6 The state, however, asked the court to impose maximum or aggravated and consecutive prison terms, for a total of 203.25 years. The state relied upon Simmons’s prior criminal history, the presence of accomplices, and the nature of the offenses, as aggravating factors.

¶7 The trial court imposed a combination of concurrent and consecutive, presumptive prison terms, finding both mitigating and aggravating circumstances. The court found that Simmons was very much involved in the methamphetamine trade and found that a significant period of incarceration was necessary for community safety. The court stated further, “I see this essentially as four different incidents,” one incident for each of the three buys and the fourth as the possession of marijuana when Simmons was arrested. The court ordered the terms imposed for the separate incidents to be served consecutively but ordered concurrent terms on offenses that were part of the same incident. For the overall conspiracy to sell methamphetamine, the court imposed a term concurrent with the sentences related to the second sale of methamphetamine, which did not increase the overall sentence. The aggregate prison term was 45.25 years.

¶8 In his first appeal, Simmons raised a number of issues, including the claim that his sentences were excessive. *Simmons*, 238 Ariz. 503, 363 P.3d 120; *Simmons*, No. 2 CA-CR 2014-0193. This court vacated Simmons’s five wire communication convictions and remanded the case to the trial court to clarify the sentences on the remaining counts, finding Simmons’s excessive sentence claims premature. *Simmons*, 238 Ariz. 503, ¶ 31, 363 P.3d at 127; *Simmons*, No. 2 CA-CR 2014-0193, ¶¶ 8-9. On remand, the trial court clarified its intent to impose prison terms that totaled thirty-nine years for the

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remaining counts. In this appeal, Simmons asks us to modify his sentences and impose concurrent, rather than consecutive, prison terms. We have jurisdiction pursuant to Ariz. Const. art. VI, § 9, A.R.S. §§ 12-120.21(A)(1), 13-4031, and Ariz. R. Crim. P. 31.2.

**Modification of a Clearly Excessive Sentence**

¶9 “A trial court has broad discretion in sentencing and, if the sentence imposed is within the statutory limits, we will not disturb the sentence unless there is a clear abuse of discretion.” *State v. Ward*, 200 Ariz. 387, ¶ 5, 26 P.3d 1158, 1160 (App. 2001). An abuse of discretion includes the failure to consider the factors relevant to determining the appropriate sentence. *State v. Vermuele*, 226 Ariz. 399, ¶ 15, 249 P.3d 1099, 1103 (App. 2011). If a sentence is within the permissible statutory parameters, this court will not modify or reduce that sentence unless it is clearly excessive. *State v. Gillies*, 142 Ariz. 564, 573, 691 P.2d 655, 664 (1984). This court has the authority to reduce a sentence “if, in [our] opinion, . . . the punishment imposed is greater than under the circumstances of the case ought to be inflicted.” A.R.S. § 13-4037(B).<sup>1</sup>

¶10 “Except as otherwise provided . . . if multiple sentences of imprisonment are imposed on a person at the same time, the . . . sentences imposed . . . shall run consecutively unless the court expressly directs otherwise, in which case the court shall set forth on the record the reason for its sentence.” A.R.S. § 13-711(A). It is for the trial court to determine, in the exercise of its discretion, whether to impose concurrent or consecutive prison terms, and absent an abuse of that discretion, we will not disturb the court’s decision. *See Ward*, 200 Ariz. 387, ¶ 5, 26 P.3d at 1160.

¶11 Simmons concedes his presumptive, enhanced prison terms “are obviously within permissible statutory limits,” but argues the issue here “is whether the trial court abused its discretion by imposing consecutive sentences as a means to achieve its stated goals

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<sup>1</sup>While § 13-4037(B) specifically allows for the “supreme court” to modify a sentence, § 12-120.21 vests the same authority in the court of appeals.

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of proportionality and protection of the community.” He also asserts the court failed to consider certain facts relevant to sentencing, including his background and the purpose of the drug-offense sentencing statutes for serious drug offenders.

¶12 We reject Simmons’s claim that the trial court failed to consider facts relevant to sentencing and to its determination that a combination of consecutive and concurrent prison terms were warranted. Unless the court imposed concurrent sentences, it was not required to state its reasons for imposing consecutive terms. *See* A.R.S. § 13-711(A). The record reflects that the court considered a variety of facts relevant to its sentence, both originally and on remand. Even if the record did not reflect the court’s thoughtful consideration, we presume the court considered all of the relevant information that was before it. *State v. Cazares*, 205 Ariz. 425, ¶ 7, 72 P.3d 355, 357 (App. 2003).

¶13 With respect to his claim that the overall sentence is excessive, Simmons relies on two decisions from other jurisdictions, *Beno v. State*, 581 N.E.2d 922 (Ind. 1991), and *Gregory v. State*, 644 N.E.2d 543 (Ind. 1994), in support of his argument that consecutive sentences are clearly excessive under these facts. We are not bound by these decisions, nor do we find them persuasive.

¶14 In both cases, the Indiana Supreme Court reduced prison terms that it found excessively lengthy because the terms were consecutive. *Gregory*, 644 N.E.2d at 546; *Beno*, 581 N.E.2d at 924. In those cases, the offenses were committed during undercover sting operations by law enforcement officers. *Gregory*, 644 N.E.2d at 544; *Beno*, 581 N.E.2d at 923. The court found lengthy consecutive sentences that resulted from a series of sales of the same drugs to the same informant over a short period of time to be inappropriate. *Gregory*, 644 N.E.2d at 546; *Beno*, 581 N.E.2d at 924. Notwithstanding these factual similarities, the cases are nonetheless distinguishable.

¶15 First, both cases involved substantially longer sentences than were imposed here (seventy-four years in *Beno* and 120 years in *Gregory*). *Gregory*, 644 N.E.2d at 544; *Beno*, 581 N.E.2d at 923. Second, even Indiana courts have declined to extend *Beno* to every case where the court imposes consecutive sentences for offenses committed as

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part of the same sting operation. See *Weaver v. State*, 676 N.E.2d 22, 25 (Ind. 1997) (declining to extend *Beno* where defendant received consecutive sentences after pleading guilty to two sales of marijuana to the same undercover informant).<sup>2</sup> Third, part of the court's decision in *Beno* relied on the trial court's improper motive of imposing its sentence, to make an example of the defendant, a factor that is not present here. 581 N.E.2d at 924. Finally, neither case references a statute analogous to § 13-711, Arizona's statutory presumption in favor of consecutive sentences. *Gregory*, 644 N.E.2d 543; *Beno*, 581 N.E.2d 924.

¶16 Here, we conclude that the trial court acted within its discretion in imposing consecutive sentences. The court imposed consecutive terms for four separate incidents. Simmons was convicted of two offenses for the first sale of methamphetamine, and the court made those terms concurrent. The court also ran the overall conspiracy offense concurrent with the sentence for the second sale of methamphetamine. The only sentences that were imposed consecutive to one another dealt with offenses committed days apart from one another.

**Disposition**

¶17 For the foregoing reasons, we affirm the trial court's sentences.

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<sup>2</sup>In *Weaver*, the court distinguished *Beno* and *Gregory* largely based on the difference in the length of the prison terms, refusing to modify a fifteen-year term. *Weaver*, 676 N.E.2d at 25.