IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

MARCOS CRUZ BROWN,
Petitioner.

No. 2 CA-CR 2017-0314-PR
Filed December 20, 2017

Petition for Review from the Superior Court in Maricopa County
No. CR2015119398001DT
The Honorable Pamela Gates, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

William G. Montgomery, Maricopa County Attorney
By Amanda M. Parker, Deputy County Attorney, Phoenix
Counsel for Respondent

Bruce F. Peterson, Maricopa County Office of the Legal Advocate
By Frances J. Gray, Deputy Legal Advocate, Phoenix
Counsel for Petitioner

MEMORANDUM DECISION

Presiding Judge Staring authored the decision of the Court, in which Judge Espinosa and Judge Brearcliffe concurred.

S T A R I N G, Presiding Judge:

¶1 Marcos Brown seeks review of the trial court's order summarily dismissing his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb the court's order unless the court clearly abused its discretion. *See State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). Brown has not demonstrated such abuse here.

¶2 Brown pled guilty to aggravated assault, based on his having threatened a convenience store clerk with a knife, and he additionally admitted having an historical prior felony conviction. Paragraph three of the plea agreement provided the state would dismiss "[t]he remaining allegations of prior felony convictions and the allegation of dangerousness." The agreement further provided, in paragraph seven, that Brown had "consent[ed] to judicial fact finding by preponderance of the evidence as to any aspect or enhancement of sentence, including aggravating circumstances and matters dismissed or not filed, without formal or written allegation." The agreement also informed Brown of the sentencing range, including that the maximum sentence was 16.25 years' imprisonment. At the plea colloquy, Brown was advised not only of the sentencing range but that, by pleading guilty, he was waiving his "right to . . . have a jury determine any factors which could aggravate [his] sentence."

¶3 The state filed a sentencing memorandum asking the trial court to consider, as aggravating factors, that the offense: (1) "involved the infliction or threatened infliction of serious physical injury"; (2) "involved the use, threatened use or possession of a deadly weapon"; (3) "was committed for pecuniary gain"; (4) "caused physical, emotional or financial harm to the victim." The state also asked the court to consider as an aggravating circumstance Brown's previous conviction. Brown's counsel did not address the aggravating factors in a sentencing memorandum or at sentencing. At sentencing, the court found in aggravation "the harm to the victim," that "a deadly weapon . . . was used in this case and the harm that caused the victim," "the threatened infliction of serious physical injury,"

and Brown's "prior felony convictions within the ten years pr[ece]ding the date of the offense." The court imposed a slightly aggravated 7.5-year prison term.

¶4 Brown sought post-conviction relief, arguing the aggravated sentence was improper because he was entitled to notice of alleged aggravating factors before entering his plea and had not waived that right, the state had violated the plea agreement by alleging aggravating factors, the factors were not supported by the record or were elements of the offense, and the trial court did not notify him before sentencing of its intent to impose an aggravated sentence. He also asserted trial counsel was ineffective for failing to raise these arguments. The court summarily dismissed the petition. This petition for review followed.

¶5 On review, Brown first repeats his claim that he was entitled to notice of the alleged aggravating factors before entering his guilty plea.[1] He is correct that Arizona law requires that a defendant be given notice of aggravating factors and the potential sentence the defendant could face upon conviction. *See State v. Conn*, 209 Ariz. 195, ¶¶ 8-10 (App. 2004). But, as we have pointed out, Brown was advised of the potential sentence and Arizona law does not require that notice be provided before a defendant pleads guilty. Notice is sufficient if provided before sentencing, as it was here.[2] *See State v. Jenkins*, 193 Ariz. 115, ¶ 21 (App. 1998) (notice in sentencing memorandum sufficient).

¶6 Brown contends, however, that because aggravating factors are the "functional equivalent" of an element of a greater offense, he "cannot make a constitutionally valid decision to waive" his jury trial rights

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[1]Brown did not raise the notice issue below. Normally, a claim not properly raised in the trial court is precluded pursuant to Rule 32.2(a)(3). But, we assume without deciding that if a right to notice of aggravating factors before pleading guilty exists, it is a right of sufficient constitutional magnitude to require a knowing, voluntary, and intelligent waiver. *See Stewart v. Smith*, 202 Ariz. 446, ¶¶ 9-10 (2002). We therefore address the merits of this claim.

[2]We reject Brown's related assertion that the state's allegation of prior convictions was insufficient notice that he could face an aggravated sentence. Even if we agreed that notice was insufficient, Brown was advised of the potential sentence resulting from his plea both at the plea colloquy and in the plea agreement.

unless he has notice of alleged aggravating circumstances. *See State v. Schmidt*, 220 Ariz. 563, ¶ 6 (2009). But our supreme court has determined there is no constitutional right to notice of aggravating factors beyond that which is required by Arizona law, even if such factors are the "'functional equivalent' of an element of the offense." *McKaney v. Foreman*, 209 Ariz. 268, ¶¶ 15-16 (2004). Nor is Brown correct that the state is precluded from alleging sentencing factors post-plea because jeopardy attached when he entered his plea. *See Jackson v. Schneider*, 207 Ariz. 325, ¶ 12 (App. 2004) (double jeopardy attaches when trial court accepts plea). "Double jeopardy principles generally do not apply to sentencing proceedings." *State v. Ring*, 204 Ariz. 534, ¶ 27 (2003). And, as we have explained, there is no constitutional barrier to the state's allegations of aggravating factors post-trial—long after jeopardy has attached. *See Jenkins*, 193 Ariz. 115, ¶ 21; *see also State v. Jorgenson*, 198 Ariz. 390, ¶ 4 (2000) (jeopardy attaches when jury is empaneled).

¶7 Brown next argues that paragraph seven of the plea agreement "is not a constitutionally valid waiver of [his] sentencing rights," apparently because it does not explain which rights he waived—he lists the right to a jury finding of aggravating factors beyond a reasonable doubt, the right to due process, the right to the effective assistance of counsel, and the right to pre-plea notice of aggravating factors. Even were paragraph seven deficient, however, Brown has ignored the plea colloquy in which his right to a jury finding of aggravating factors was explained. And there is no reason paragraph seven should contain information about the waiver of the right to effective counsel, as Brown did not waive that right as part of his plea. Finally, as we have explained, Brown does not have a constitutional right to notice of aggravating factors before pleading guilty.[3]

¶8 Brown also reasserts his claim the state violated the plea agreement by "arguing as aggravation circumstances it had agreed to dismiss." As he did below, he points to paragraph three of the plea agreement, in which the state agreed to dismiss "[t]he following charges," listing "[t]he remaining allegations of prior felony convictions and the allegation of dangerousness." The state argued below that paragraph three

[3]Brown additionally contends the waiver provision in paragraph seven "vitiates the entire plea agreement" because it "overrid[es]" other provisions. Brown did not raise this argument below and it is therefore precluded. Ariz. R. Crim. P. 32.2(a)(3). Nor does he include it in his claim of ineffective assistance of counsel.

refers to allegations for sentence enhancement, not aggravating factors, because it refers only to "charges."

¶9 We need not resolve this issue because Brown did not object below. The claim is thus precluded. Ariz. R. Crim. P. 32.2(a)(3). Although Brown also couches this claim in terms of ineffective assistance of counsel, he has not cited any authority or evidence suggesting that no competent defense attorney could agree with the state's interpretation. Thus, he has not presented a colorable claim of ineffective assistance on this issue. *State v. Bennett*, 213 Ariz. 562, ¶ 21 (2006) ("To state a colorable claim of ineffective assistance of counsel, a defendant must show both that counsel's performance fell below objectively reasonable standards and that this deficiency prejudiced the defendant."); *accord State v. Kolmann*, 239 Ariz. 157, ¶ 9 (2016); *see also State v. Salazar*, 146 Ariz. 540, 541 (1985) ("In deciding an ineffectiveness claim, this court need not approach the inquiry in a specific order or address both prongs of the inquiry if the defendant makes an insufficient showing on one.").

¶10 Brown repeats his argument that the aggravating circumstances found by the trial court were improper and unsupported by the record. Again, however, this claim is precluded because Brown did not object below. Ariz. R. Crim. P. 32.2(a)(3). And, although he argues counsel was ineffective in failing to do so, he is not entitled to relief. First, to the extent he claims the court was required to find those circumstances beyond a reasonable doubt, he unambiguously waived that right when he pled guilty. Further, the court could properly rely on the presentence report as proof of aggravating factors. *See State v. Shuler*, 162 Ariz. 19, 21 (App. 1989). Brown has not identified any reason for counsel to have raised these arguments. *See Bennett*, 213 Ariz. 562, ¶ 21; *Salazar*, 146 Ariz. at 541.

¶11 Brown additionally asserts, however, that three aggravating factors were impermissible because they were elements of the offense—harm to the victim, the threatened infliction of serious physical harm, and the use of a deadly weapon. "An element of an offense may be used as an aggravating factor if the legislature has specified that it may be so used." *State v. Tschilar*, 200 Ariz. 427, ¶ 33 (App. 2001). Also, a court may consider an element "if it involves conduct that rises to a level beyond that merely necessary to establish the underlying crime." *Id.* The elements of aggravated assault, relevant here, are that Brown intentionally caused the victim to be in "reasonable apprehension of imminent physical injury" by using a dangerous weapon or dangerous instrument. A.R.S. §§ 13-1203(A)(2), 13-1204(A)(2).

¶12 Harm to the victim, including emotional harm, is an aggravating factor pursuant to A.R.S. § 13-701(D)(9). The presentence report specified that the victim was emotionally harmed beyond the apprehension of physical injury. Thus, this aggravating factor was proper. The threat of serious physical injury is an aggravating factor under § 13-701(D)(1), and that subsection specifically provides it does not apply "if this circumstance is an essential element of the offense." But the threat of *serious* physical injury is not an element of aggravated assault. Thus, the trial court could find the threatened harm to the victim was an aggravating factor.

¶13 We agree with Brown, however, that his use of a deadly weapon was an improper aggravating factor for his conviction of aggravated assault with a deadly weapon or dangerous instrument. *See* § 13-701(D)(2), 13-1204(A)(2). But Brown has not established any likelihood the absence of this aggravating factor would have altered the trial court's sentencing calculus. His claim that counsel was ineffective for failing to raise this issue therefore fails. *See Bennett*, 213 Ariz. 562, ¶ 21; *Salazar*, 146 Ariz. at 541. For the same reason, we reject his argument that his sentence was improper because the court referred to "prior felony convictions within the ten years pr[ece]ding the date of the offense" when, in fact, only one of Brown's previous convictions was within the last ten years.

¶14 Brown's sole remaining allegation of ineffective assistance is that counsel should have objected pursuant to A.R.S. § 13-702(E) because the trial court did not inform the parties before sentencing of its intent to impose an aggravated sentence. Brown does not develop this argument in any meaningful way, and we therefore decline to address it. *See State v. Stefanovich*, 232 Ariz. 154, ¶ 16 (App. 2013) (insufficient argument waives claim on review).

¶15 We grant review but deny relief.