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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OF ARIZONA, Respondent, v. KATRINA MARIEL STRAUT, Petitioner.	2 CA-CR 2010-0137-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20092718001

Honorable Deborah Bernini, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
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By Ronald Zack
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V Á S Q U E Z, Presiding Judge.

¶1 Pursuant to a plea agreement, petitioner Katrina Straut was convicted of robbery, a class four felony. The trial court sentenced her to the presumptive, 2.5-year

prison term. Straut now petitions this court for review of the trial court's order summarily denying the relief requested in her of-right petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. She contends the court abused its discretion in finding her mental illness and drug addiction were not mitigating factors and in failing to vacate the order requiring her to pay attorney fees in the amount of $400. We will not disturb a trial court's denial of post-conviction relief absent a clear abuse of discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). We find no such abuse here.

¶2 Straut first challenges the trial court's rejection of her claim that the court had erred when it failed to treat her mental illness and drug addiction as mitigating factors when it initially sentenced her. She asserts, as she did at sentencing and in her petition below, that the court should have placed her on probation, which she contends would be both rehabilitative and punitive. She further argues the court abused its discretion in denying post-conviction relief when it found "[t]here are no factual or legal grounds presented that would warrant a new sentencing."

¶3 "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 . . . 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 abuses its discretion when it acts arbitrarily and capriciously or fails to adequately investigate the facts relevant to sentencing. *State v. Ward*, 200 Ariz. 387, ¶ 6, 26 P.3d 1158, 1160 (App. 2001). It is within the court's discretion to determine whether certain factors constitute aggravating

or mitigating circumstances for sentencing purposes and how much weight to give any such factors. *State v. Harvey*, 193 Ariz. 472, ¶ 24, 974 P.2d 451, 456 (App. 1998).

¶4 At sentencing, defense counsel described Straut's mental health and addiction problems. The trial court told Straut that, although it usually considers these types of problems as mitigating factors, based on Straut's failure to comply with the requirements of prior treatment plans, the court had "no reason to believe that would change given [Straut's] history." The court also noted, presumably as aggravating circumstances, the presence of an accomplice, that the offense was committed for pecuniary gain, and that "the whole plan was [Straut's] idea." The court concluded there was not sufficient evidence in mitigation to justify placing Straut on probation. The record is clear the court imposed the sentence only after considering Straut's mental illness and drug addiction. Because the record shows the court considered the facts relevant to sentencing and does not establish that it acted arbitrarily or capriciously, we cannot say it abused its discretion in the first instance or in denying post-conviction relief on this claim.

¶5 Moreover, to the extent Straut suggests the trial court was obligated to consider her substance abuse as a mitigating factor under A.R.S. § 13-701(E)(2),[1] she is incorrect, particularly where she has failed to show a connection between her substance abuse and her behavior at the time of the crime. *See State v. Williams*, 134 Ariz. 411,

[1]Section 13-701(E)(2), provides a trial court shall consider, as a mitigating circumstance, evidence that a defendant's "capacity to appreciate the wrongfulness of [her] conduct or to conform [her] conduct to the requirements of law was significantly impaired" at the time of offense.

414, 656 P.2d 1272, 1275 (App. 1982). In any event, the court was not required to find her substance abuse constituted a mitigating circumstance. Rather, all the court was required to do was consider the evidence, which it did. *See State v. Fatty*, 150 Ariz. 587, 592, 724 P.2d 1256, 1261 (App. 1986).

¶6 Straut next challenges the trial court's rejection of her claim that it had erred in ordering her to pay $400 in attorney fees. She raised this claim independently in her Rule 32 petition and asserted, albeit somewhat summarily, that trial counsel had been ineffective for failing to object to the imposition of fees at sentencing. Straut also contends on review as she did below that the court committed fundamental error when it imposed the assessment without considering her ability to pay, the financial hardship it would cause her, and without entering findings of fact in this regard. In denying Straut's claim, the court found its ruling at sentencing "was an affirmation of an order issued at [Straut's] arraignment . . . and not a new assessment [and n]othing in the record provides a legal basis that would justify vacating the arraignment judge's determination and order." Although the court did not specifically mention and address Straut's claim of ineffective assistance of counsel, it did so implicitly by finding no grounds for relief.

¶7 At the arraignment, the court appointed counsel and ordered Straut to offset the cost of her legal representation by paying $400 in attorney fees. Straut apparently did not object to the imposition of attorney fees at that time, nor did she object when the fees were reaffirmed at sentencing. Because Straut failed to object below, she was required to establish in her petition for post-conviction relief that the error was fundamental and prejudicial in order to be entitled to relief. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-

20, 115 P.3d 601, 607-08 (2005). An error is fundamental only if it affects a substantial right or the fairness of the proceeding. *See id.*

¶8 In *State v. Moreno-Medrano*, 218 Ariz. 349, 185 P.3d 135 (App. 2008), we addressed essentially the same issue Straut has raised in this post-conviction proceeding. Like Straut, Moreno-Medrano did not object to the fees in the trial court; rather, he challenged the imposition of attorney fees for the first time on appeal on the ground that the trial court had failed to first ascertain his ability to pay them. *See id.* ¶ 7. As we noted in that case, before imposing fees pursuant to A.R.S. § 11-584 and Rule 6.7(d), Ariz. R. Crim. P., a trial court is required to make specific factual findings regarding a defendant's ability to pay the fees imposed and must find that the fees will not cause a substantial hardship. *Moreno-Medrano*, 218 Ariz. 349, ¶ 9, 185 P.3d at 139. *See* A.R.S. § 11-584(B)(3) (defendant may be required to "repay . . . a reasonable amount . . . for the cost of the person's legal services")[2]; § 11-584(C) (when requiring defendant to repay costs of legal defense, court "shall take into account the financial resources of the defendant and the nature of the burden that the payment will impose"); Ariz. R. Crim. P. 6.7(d) (permitting court to impose costs of legal services on defendant in "such amount as it finds he or she is able to pay without incurring substantial hardship to himself or to his or her family"). *See also State v. Taylor*, 216 Ariz. 327, ¶ 25, 166 P.3d 118, 125-26 (App. 2007).

[2]Section 11-584 was amended in April 2010, *see* 2010 Ariz. Sess. Laws ch. 195, § 1, after Straut committed the instant offense. We therefore refer to the version of the statute that existed at the time of her offense. *See State v. Coconino County*, 139 Ariz. 422, 427, 678 P.2d 1386, 1391 (1984).

¶9 In *Moreno-Medrano*, like here, the fees were imposed at arraignment and confirmed at sentencing, and the sentencing judge made no findings on the record regarding the defendant's ability to pay attorney fees without causing the defendant undue hardship. 218 Ariz. 349, ¶ 7, 185 P.3d at 138. Nevertheless, we concluded that the trial court's failure to make the requisite findings was not error that could be characterized as fundamental.[3] *Id*. ¶¶ 12-13. Based on that decision, we reach the same conclusion here.

¶10 We also concluded in *Moreno-Medrano* that the defendant had not sustained his burden of establishing the trial court had committed fundamental error by not considering his financial ability to pay before imposing the fees. *Id*. ¶ 14. First, we noted the court had before it information regarding his financial situation. *Id*. And, we stated, "[n]othing in the record indicates that the court failed to consider this information." *Id*. The same can be said here. Indeed, the record from the sentencing hearing and the court's minute entry denying post-conviction relief make clear the court did review the presentence report, which addressed Straut's financial status. And from the court's finding in the post-conviction proceeding that it saw no legal reason to change the imposition of fees at arraignment, we can infer that nothing in the presentence report changed its view that the imposition and affirmation of the fees were appropriate.

[3]In so holding, we expressly disagreed with the contrary conclusion reached by Division One in *State v. Lopez*, 175 Ariz. 79, 82, 853 P.2d 1126, 1129 (App. 1993). *See Moreno-Medrano*, 218 Ariz. 349, ¶ 12, 185 P.3d at 139. We decline Straut's request that we follow the reasoning in *Lopez* notwithstanding our decision in *Moreno-Medrano*.

¶11 Second, we rejected Moreno-Medrano's argument, based on *State v. Torres-Soto*, 187 Ariz. 144, 927 P.2d 804 (App. 1996), that because the record established he did not have the ability to pay, requiring him to pay was so egregious an error that it amounted to fundamental error. 218 Ariz. 349, ¶ 15, 185 P.3d at 139-40. We conclude here, as we did in *Moreno-Medrano*, that this case is not like *Torres-Soto*. Although the presentence report did indeed paint a bleak picture of Straut's financial circumstances, she did have certain sources of income and had been able to pay her liabilities. The amount awarded here, $400, the same as in *Moreno-Medrano*, cannot be compared to the $85,500 surcharge in *Torres-Soto* that the defendant in that case clearly could not pay. *See Moreno-Medrano*, 218 Ariz. 349, ¶ 15, 185 P.3d at 139-40; *Torres-Soto*, 187 Ariz. at 146, 927 P.2d at 806. Because any error here could not be characterized as fundamental, we cannot say the trial court abused its discretion when it denied relief on this claim.

¶12 Similarly, Straut has not persuaded us that the trial court abused its discretion when it denied relief on her related claim of ineffective assistance of counsel. In order to state a colorable claim of ineffective assistance of counsel, a defendant must establish that counsel's performance fell below an objectively reasonable professional standard and that the deficient performance caused prejudice to the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). Even assuming counsel had performed deficiently by failing to object at sentencing, failing to ask the court to consider Straut's financial circumstances, and

failing to argue that imposition of the attorney fee assessment would cause her hardship, Straut nevertheless failed to raise a colorable claim for relief.

¶13 Implicit in the trial court's ruling denying relief is the finding that Straut was not prejudiced by counsel's failure to object. The court concluded, "Nothing in the record provides a legal basis that would justify vacating the arraignment judge's determination and order." Thus, based on the record before the court at sentencing, which included the presentence report, the court clearly would not have ruled any differently. Implicitly, it found that Straut had failed to raise a colorable claim that the outcome probably would have been different, had counsel objected. Even though the presentence report establishes Straut's financial circumstances were difficult and the author of the report did not recommend assessing any fees, the assessment of fees is within the court's discretion. We have no basis for interfering with the court's exercise of its discretion. *See Watton*, 164 Ariz. at 325, 793 P.2d at 82.

¶14 Straut has failed to show the trial court abused its discretion by denying her claims. Accordingly, although we grant the petition for review, we deny relief.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

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

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