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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. RUDI ALFRED APELT, Appellant.	2 CA-CR 2009-0256 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR14946

Honorable Silvia R. Arellano, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Sherri Tolar Rollison — Phoenix
Attorneys for Appellee

Jon M. Sands, Federal Public Defender
By Sarah E. Stone — Phoenix
Attorneys for Appellant

H O W A R D, Chief Judge.

¶1 After a jury trial, appellant Rudi Apelt was convicted of first-degree murder and conspiracy to commit murder. The trial court originally sentenced him to death for the murder conviction and to a consecutive life sentence without the possibility of parole

for twenty-five years on the conspiracy count. Apelt later was found to be constitutionally exempt from the death penalty because he is mentally retarded. He therefore was resentenced to life imprisonment without the possibility of parole for twenty-five years for his murder conviction, which the court ordered him to serve consecutively to his sentence for conspiracy to commit murder. On appeal, Apelt contends the trial court erred in ordering that he serve his sentences consecutively rather than concurrently. For the following reasons, we affirm.

Factual and Procedural Background

¶2 The relevant facts are undisputed. More than ten years after Apelt was sentenced to death in 1991, the Supreme Court held that mentally retarded persons may not receive the death penalty. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002). Apelt then filed a petition for post-conviction relief claiming he was mentally retarded, *Atkins* was a significant change in the law, and his death sentence therefore should be vacated.

¶3 After an evidentiary hearing, the trial court determined that Apelt was indeed mentally retarded and vacated his death sentence for first-degree murder. At his resentencing, Apelt and the state agreed that "the only sentence . . . the [c]ourt c[ould] impose [for Apelt's murder conviction was] . . . life with the possibility of parole after twenty-five years." The parties therefore determined that the only issue at resentencing was "whether the [c]ourt ha[d] the jurisdiction" to order this sentence concurrent to his original life sentence for conspiracy.

¶4 After hearing argument from both parties, the trial court stated it did not believe it had jurisdiction to change Apelt's sentences from consecutive to concurrent.

The court also stated, however, that it did not "believe that the facts and circumstances of the case warrant[ed] concurrent" sentences in any event and determined that Apelt's sentences should be served consecutively to one another. Apelt appeals from this ruling.

Discussion

¶5 Apelt first argues the trial court erred in concluding it lacked jurisdiction to resentence him to concurrent terms. But the court stated that, even if it did have jurisdiction to order concurrent sentences, it would not do so in any event because it believed the "facts and circumstances of the case warrant[ed]" consecutive sentences. Thus, even if Apelt is correct that the court could have resentenced him to concurrent terms, because it explicitly stated consecutive terms were appropriate regardless, we need not address this issue. *See State v. Machado*, 224 Ariz. 343, n.9, 230 P.3d 1158, 1171 n.9 (App. 2010) (we may affirm trial court ruling on any basis).

¶6 Apelt further argues that the trial court abused its discretion in failing to consider additional "mitigating evidence presented [for the first time] in the evidentiary hearing" and in failing to make "specific findings as to whether [the new evidence] was sufficient to support concurrent sentences." "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). This discretion includes the latitude to weigh aggravating and mitigating factors during sentencing. *State v. Harvey*, 193 Ariz. 472, ¶ 24, 974 P.2d 451, 456 (App. 1998). And, although a trial court must consider all evidence offered in mitigation, it is not required to find the evidence mitigating. *State v.*

Long, 207 Ariz. 140, ¶ 41, 83 P.3d 618, 626 (App. 2004). An abuse of discretion is limited to "'an exercise of discretion which is manifestly unreasonable, exercised on untenable grounds or for untenable reasons.'" *State v. Wassenaar*, 215 Ariz. 565, ¶ 11, 161 P.3d 608, 613 (App. 2007), *quoting State v. Woody*, 173 Ariz. 561, 563, 845 P.2d 487, 489 (App. 1992).

¶7 Here, the trial court stated that it had considered "the files in connection with the preparation of the [petition for post-conviction relief] [r]uling, . . . the transcript of the original trial proceeding, all of the exhibits that were submitted[,] . . . the defense sentencing memoranda, the State's sentencing memoranda, [and] all the minute entries . . . issued in this case." In addition, the court considered "all of the information . . . presented" at the evidentiary hearing, which included new mitigating evidence. Therefore, its conclusion that consecutive sentences were appropriate was informed and not "manifestly unreasonable." *See Wassenaar*, 215 Ariz. 565, ¶ 11, 161 P.3d at 613. Accordingly, the court did not abuse its discretion in finding and weighing the sentencing factors. *See Long*, 207 Ariz. 140, ¶ 41, 83 P.3d at 626; *Harvey*, 193 Ariz. 472, ¶ 24, 974 P.2d at 456.

¶8 Moreover, Apelt cites no authority for his claim that the court was required to make specific findings as to the mitigating evidence presented at resentencing. This argument therefore is waived. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (issue waived for insufficient argument).

¶9 Apelt finally contends the trial court erred in resentencing him to consecutive prison terms because his original sentence for conspiracy was illegal and

therefore entitled to "no weight" during resentencing. But to challenge the legitimacy of his conspiracy sentence, Apelt was required to appeal it within twenty days of its imposition. *See* Ariz. R. Crim. P. 31.3 ("notice of appeal shall be filed . . . within 20 days after . . . sentence"). Although Apelt did appeal following his original sentencing, he challenged only his conviction and sentence for first-degree murder. *See State v. Apelt*, 176 Ariz. 369, 371-72, n.1, 861 P.2d 654, 656-57 n.1 (1993). He therefore waived the opportunity to challenge the sentence imposed for his conspiracy conviction. *See State v. Schackart*, 190 Ariz. 238, 258, 947 P.2d 315, 335 (1997) (issues not raised in first appeal waived on subsequent appeal).

Disposition

¶10 Based on the foregoing, we affirm Apelt's convictions and sentences.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge