

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.**
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

JUL 16 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2010-0065-PR
)	DEPARTMENT B
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
JESUS RAMON CUEVAS,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20082922

Honorable Clark W. Munger, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
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Tucson
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ECKERSTROM, Judge.

¶1 Pursuant to a plea agreement, petitioner Jesus Cuevas was convicted of attempted possession of more than four pounds of marijuana for sale, a class three felony. According to the terms of the plea agreement, Cuevas waived the right to have a jury determine aggravating factors. The trial court imposed an aggravated, seven-year prison term, the longest sentence permitted under the plea agreement. Cuevas filed a petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., in which he argued his sentence is illegal because the court failed to articulate at sentencing the mitigating factors it had considered, and it relied on an improper aggravating factor. The court dismissed the petition without conducting an evidentiary hearing, and this petition for review followed. 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 abuse here.

¶2 “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). We will find an abuse of sentencing discretion only if the court acted arbitrarily and capriciously or failed to adequately investigate the facts relevant to sentencing. *State v. Ward*, 200 Ariz. 387, ¶ 6, 26 P.3d 1158, 1160 (App. 2001).

¶3 At sentencing, defense counsel presented mitigating evidence, and the trial court noted it had considered mitigating evidence included in the presentence report and that it had read the letters submitted on Cuevas’s behalf for sentencing. The court stated that, having considered both aggravating and mitigating factors, it found the aggravating factors outweighed the mitigating factors. The court then found the following

aggravating circumstances: Cuevas’s “repeated involvement in the drug transportation activity . . . and his apparent unwillingness to abide by the laws of this country and this [s]tate.” Cuevas contends the aggravated sentence imposed was illegal because the court’s failure to articulate on the record the mitigating factors it had considered was in contravention of *State v. Harrison*, 195 Ariz. 1, ¶¶ 11-13, 985 P.2d 486, 489 (1999) (§ 13-702 requires sentencing court to set forth at sentencing aggravating and mitigating factors considered in imposing aggravated or mitigated sentence). When Cuevas was sentenced in 2008, former A.R.S. § 13-702(B) required a court to state “on the record at the time of sentencing” the reasons for imposing a sentence other than the presumptive term. 2006 Ariz. Sess. Laws, ch. 148, § 1.

¶4 Here, the trial court expressly found and articulated at sentencing aggravating circumstances to support the aggravated sentence it imposed. And, although the court noted that the aggravating factors outweighed the mitigating factors, it did not specify it had found any mitigating factors. Nor did the court articulate any mitigating factors in the sentencing minute entry. Moreover, in its denial of post-conviction relief, the court again noted it had considered the mitigating factors advanced by counsel at sentencing and those provided in the presentence report, but did not state it had found any specific mitigating factors. Therefore, we can infer the court considered but did not find any mitigating circumstances and thus conclude *Harrison* is not implicated.

¶5 The trial court was required only to consider the evidence that had been offered in mitigation. *See State v. Fatty*, 150 Ariz. 587, 592, 724 P.2d 1256, 1261 (App. 1986). Not only do we presume the court considered the evidence that was before it, *see State v. Everhart*, 169 Ariz. 404, 407, 819 P.2d 990, 993 (App. 1991), but the court made it clear it had done so in denying Cuevas’s petition for post-conviction relief. Based on

the record before us, we conclude the court neither abused its discretion when it initially sentenced Cuevas to an aggravated sentence, nor when it denied post-conviction relief.

¶6 Cuevas also asserts the trial court abused its discretion in denying his claim that the court had found and relied on an improper aggravating circumstance: his unwillingness to abide by the law. He contends as he did below, that this is not only redundant in light of other circumstances the court had found in aggravation (his prior involvement in illegal drug activity), but is also an essential element of virtually every criminal offense. In its order dismissing the petition, the court clearly identified this claim and correctly ruled on it in a manner that permits this court and any future court to understand its resolution, and, because the court's resolution of the claim is correct, we adopt the its ruling on this claim. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993).

¶7 Because Cuevas has not sustained his burden of establishing the trial court abused its discretion by dismissing the petition for post-conviction relief, we grant the petition for review but deny relief.

/s/ Peter J. Eckerstrom

PETER J. ECKERSTROM, Judge

CONCURRING:

/s/ Garye L. Vásquez

GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly

VIRGINIA C. KELLY, Judge