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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OF ARIZONA, Respondent, v. CARLOS GERARDO VASQUEZ, Petitioner.	2 CA-CR 2010-0204-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20082642

Honorable Christopher Browning, Judge

REVIEW GRANTED; RELIEF DENIED

Isabel G. Garcia, Pima County Legal Defender
By Robb Holmes
Tucson
Attorneys for Petitioner

E S P I N O S A, Judge.

¶1 Petitioner Carlos Vasquez seeks review of the trial court's summary denial of his of-right petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. He asks that we vacate the partially aggravated sentence originally imposed by

the court and remand his case for resentencing. For the following reasons, we grant review but deny relief.

¶2 Pursuant to a plea agreement, Vasquez was convicted of attempted possession of a narcotic drug for sale. The trial court sentenced him to a partially aggravated prison term of six years after finding the aggravating circumstances of Vasquez's "lengthy and significant criminal history, including nonappearance and absconding" and his possession of a firearm while committing the offense, outweighed mitigating circumstances, including Vasquez's stated remorse and expressions of support from his family and the community.

¶3 In his petition for post-conviction relief, Vasquez argued the trial court lacked sufficient evidence to find his criminal history was an aggravating circumstance, because (1) charges had been dismissed or their disposition unavailable for seventeen offenses identified in his presentence report; (2) there was no evidence he had been provided with or validly had waived the assistance of counsel when convicted of the remaining fourteen misdemeanors reported; and (3) the three felony convictions included in the report occurred in 1992, 1994, and 2000 and, based on their age, should have been accorded "diminished force" in aggravation.

¶4 In its ruling denying relief, the trial court found Vasquez had "fail[ed] to provide any evidence that the Court relied on any improper information at sentencing" or "improperly weighed [his] criminal history at sentencing." This petition for review followed.

¶5 On review, Vasquez relies on the same arguments he raised below and maintains the trial court "improperly aggravate[d his] sentence based upon his criminal history." He contends the court's general reference at sentencing to his "lengthy and significant criminal history" was evidence that it had considered the entire history included in the presentence report, without disregarding dismissals, unavailable dispositions, or "uncounselled misdemeanors," and without considering the age of Vasquez's prior felony convictions.[1]

¶6 We will not disturb a trial court's summary denial of post-conviction relief absent an abuse of the court's discretion. *See State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006). Similarly, "[w]hen a sentence is within statutory limits, it will not be modified on review unless from the circumstances it clearly appears that the trial court abused its discretion by showing arbitrariness or capriciousness, or by failing to conduct

[1]Citing *State v. McCann*, 200 Ariz. 27, 21 P.3d 845 (2001), Vasquez argues the trial court could not presume his misdemeanor convictions were constitutionally valid "[a]bsent actual proof of the prior conviction." *See id.* ¶ 15 (presumption of regularity attaches to prior conviction whose existence proven by state; defendant must present credible evidence of constitutional infirmity to overcome presumption). We disagree. In his plea agreement, Vasquez waived his right to trial on aggravating factors, agreed the court could find aggravating and mitigating factors based on a preponderance of the evidence, and agreed the rules of evidence would not apply to those determinations. He did not object to the criminal history submitted with his presentence report; nor did he suggest to the court that the report was either incorrect or insufficient for sentencing purposes. *See* Ariz. R. Crim. P. 26.7, 26.8 (providing for challenges to presentence report). In light of Vasquez's waivers and agreements, his prior convictions were adequately established and are presumptively valid. *Cf. McCann*, 200 Ariz. 27, ¶ 15, 21 P.3d at 849 (state's proof of existence of prior felony conviction used to enhance sentence or as element of crime gives rise to rebuttable presumption of validity). Vasquez presented no credible evidence to rebut this presumption.

an adequate investigation into the facts." *State v. Fatty*, 150 Ariz. 587, 592, 724 P.2d 1256, 1261 (App. 1986).

¶7 As an initial matter, we conclude Vasquez has waived his claim by failing to raise it at sentencing.[2] It therefore is precluded, and the trial court could have denied relief for this reason alone. *See* Ariz. R. Crim. P. 32.2(a)(3) (claim precluded when "waived at trial, on appeal, or in any previous collateral proceeding").

¶8 In addition, Vasquez has failed to persuade us that his sentence was either illegal or an abuse of discretion, or that the trial court abused its discretion in denying post-conviction relief. He does not dispute that the aggravated sentence imposed by the court was within statutory limits, based on the court's finding that Vasquez possessed a firearm when he committed the offense. *See* A.R.S. § 13-701(D)(2)[3]; *State v. Schmidt*, 220 Ariz. 563, ¶ 11, 208 P.3d 214, 217 (2009) (court must find one statutorily enumerated factor to impose aggravated sentence; thereafter, court may consider additional "catch-all aggravator[s]"). As the court stated in its ruling, it properly considered Vasquez's three felony and fourteen misdemeanor convictions in finding Vasquez's criminal history was an aggravating circumstance and properly considered

[2]Indeed, at the sentencing hearing, Vasquez's counsel acknowledged Vasquez's history constituted an aggravating circumstance for sentencing purposes.

[3]The Arizona criminal sentencing code has been renumbered, effective "from and after December 31, 2008." *See* 2008 Ariz. Sess. Laws, ch. 301, §§ 1-120. For ease of reference and because no changes in the statutes are material to the issues in this case, *see id.* § 119, we refer in this decision to the current section numbers rather than those in effect when Vasquez committed this offense.

both aggravating and mitigating circumstances before imposing an aggravated term. *See* A.R.S. § 13-701(F) (to determine sentence, court considers aggravating circumstances and whether "sufficiently substantial" mitigating circumstances justify lesser term). We presume a court knows and correctly applies the law. *State v. Williams*, 220 Ariz. 331, ¶ 9, 206 P.3d 780, 783 (App. 2008). The court was not required to specify on the record that it would not consider dismissals and unavailable dispositions when assessing Vasquez's criminal history, as he now seems to suggest, and we will not infer error from the court's silence.

¶9 Vasquez's claim is precluded by waiver in his plea agreement and at sentencing and, as the trial court correctly concluded, also is without merit. Accordingly, we grant review but deny relief.

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

CONCURRING:

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

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