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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

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| THE STATE OF ARIZONA,<br><br>Appellee,<br><br>v.<br><br>JOSE RAMON VALENZUELA,<br><br>Appellant. | ) | 2 CA-CR 2008-0264<br>DEPARTMENT A<br><br>MEMORANDUM DECISION<br>Not for Publication<br>Rule 111, Rules of<br>the Supreme Court |

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-40561

Honorable Richard Nichols, Judge

AFFIRMED

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Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Diane Leigh Hunt
Tucson
Attorneys for Appellee

Robert J. Hirsh, Pima County Public Defender
By Kristine Maish
Tucson
Attorneys for Appellant

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E S P I N O S A, Presiding Judge.

**¶1** After a jury trial held in his absence in 1993, Jose Valenzuela was convicted of possession of eight pounds or more of marijuana and transporting marijuana for sale.

Valenzuela was eventually apprehended on a bench warrant in 2008, and the trial court sentenced him to presumptive, concurrent terms of imprisonment, the longer of which was seven years.[1]

**¶2** On appeal, Valenzuela claims the trial court abused its discretion in sentencing him to presumptive, rather than mitigated, terms of imprisonment. He argues the court committed legal error in concluding it could not consider, as a mitigating circumstance, Valenzuela's lack of a criminal record during the fifteen years since his conviction. He also contends the court abused its discretion because "substantial mitigating circumstances outweighed aggravating factors" and argues his sentences were excessive in comparison to sentences received by codefendants who played a greater role in the crimes. Finally, Valenzuela asks this court to reduce his sentence pursuant to A.R.S § 13-4037(B), which requires a finding that "the punishment imposed is greater than under the circumstances of the case ought to be inflicted."

**¶3** We will not disturb a sentence within statutory limits unless the trial court clearly abused its discretion by acting arbitrarily or capriciously. *State v. Cazares*, 205 Ariz. 425, ¶ 6, 72 P.3d 355, 357 (App. 2003). We find no abuse of discretion here.

**¶4** Each of the allegedly mitigating circumstances Valenzuela now raises had been argued by counsel at the sentencing hearing and were rejected by the trial court. Counsel had noted Valenzuela's "support from his family and from the community" and his "law-abiding

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[1]Valenzuela was sentenced in accordance with the version of A.R.S. § 13-701 effective when he committed the offenses. *See* 1988 Ariz. Sess. Laws, ch. 66, § 1.

lifestyle" since his conviction. He had also argued Valenzuela's "level of involvement was minim[al] compared to other people that were involved [in the crime]. He drove a vehicle that had the marijuana . . . [but had] no other involvement."[2] The court did not find either aggravating or mitigating factors before imposing presumptive terms, stating, "Mr. Valenzuela, I can't really consider that you've led a law-abiding life for the last 15 years because you've been on absconder status that entire period of time."

**¶5** According to Valenzuela, the trial court's comment is evidence it "fail[ed] to consider significant mitigating factors based upon a legal[ly] erroneous premise." *Cf. State v. Thurlow*, 148 Ariz. 16, 20, 712 P.2d 929, 933 (1986) (lack of prior record can constitute mitigating circumstance under "catch all" provision of A.R.S. § 13-701(E)(6)). We appreciate that "[e]ven when the sentence imposed is within the trial judge's authority, if the record is unclear whether the judge knew he had discretion to act otherwise, the case should be remanded for resentencing." *State v. Garza*, 192 Ariz. 171, ¶ 17, 962 P.2d 898, 903 (1998).

**¶6** We agree with the state that Valenzuela had an obligation to clarify the record below if he thought the trial court had erroneously concluded it was without authority to consider Valenzuela's lack of felony convictions during the fifteen years since his trial and, having failed to do so, has forfeited his right to relief for all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005)

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[2]One of Valenzuela's codefendants, Patrick Wayne Johnson, was found guilty of conspiring to commit an unlawful sale of marijuana and possessing marijuana for sale; Valenzuela was acquitted on those charges.

("defendant who fails to object at trial forfeits the right to obtain appellate relief" unless he can establish "'error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial'" and resulting prejudice), *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). In this case, we find no error, much less fundamental error.

**¶7** As the state observes, the trial court's statement, viewed in context, does not evince the court's conclusion that it lacked authority to consider Valenzuela's "law-abiding lifestyle" in mitigation. Instead, the court expressed its unwillingness to do so when Valenzuela had, in fact, been living as a fugitive from justice ever since his conviction. We find neither legal error nor an abuse of discretion in this decision. *See Thurlow*, 148 Ariz. at 20, 712 P.2d at 933 ("We are not stating that a sentencing judge must consider the lack of a prior record. . . . [I]t is only one of the many traditional circumstances a court *may* consider in determining punishment.").

**¶8** Nor do we agree with Valenzuela that the trial court abused its discretion in declining to impose a mitigated sentence based on Valenzuela's role in the crimes when compared to the culpability of codefendants who received the same or shorter sentences or based on the "substantial mitigating circumstances" he alleges. We have no way of knowing what factors the court considered in sentencing Valenzuela's codefendants, and we will not second-guess the court's broad discretion. *See*, *e.g.*, *State v. Collins*, 111 Ariz. 303, 308, 528 P.2d 829, 834 (1974) (noting "a difference in the background of the defendant and the

codefendant which merits a difference in their sentences"; "the trial judge is in the best position to evaluate the defendant's crime in light of the facts of the case and the defendant's background and character").

**¶9** As Division One of this court has explained, "'[T]he consideration of mitigating circumstances is solely within the discretion of the court.'" *State v. Long*, 207 Ariz. 140, ¶ 41, 83 P.3d 618, 626 (App. 2004), *quoting State v. Webb*, 164 Ariz. 348, 355, 793 P.2d 105, 112 (App. 1990) ("[I]t was not error for the trial judge to ignore defendant's lack of a criminal record as a mitigating circumstance."). "In other words, the trial court need only consider evidence offered in mitigation; it need not find the evidence mitigating." *Id.*, *citing State v. Fatty*, 150 Ariz. 587, 592, 724 P.2d 1256, 1261 (App. 1986). Moreover, "even when only mitigating factors are found, the presumptive term remains the presumptive term unless the court, in its discretion, determines that the amount and nature of the mitigating circumstances justifies a lesser term." *State v. Olmstead*, 213 Ariz. 534, ¶ 5, 145 P.3d 631, 632 (App. 2006); *see also* A.R.S. § 13-701(F) ("In determining what sentence to impose, the court shall take into account . . . whether the amount of mitigating circumstances is sufficiently substantial to justify the lesser term.").

**¶10** Finally, we do not find Valenzuela's sentences so excessive that they justify reduction by this court pursuant to § 13-4037(B). Although Valenzuela's role in a larger conspiracy may have been limited to knowingly driving a vehicle that carried marijuana, as he argued at sentencing, that very conduct is at the core of prohibitions found in A.R.S. § 13-3408(A)(7). His sentence to a presumptive term for that offense was therefore hardly

"inconsistent with statutory intent." *State v. Berger*, 209 Ariz. 386, ¶ 31, 103 P.3d 298, 307 (App. 2004), *vacated in nonrelevant part*, 212 Ariz. 473, ¶ 51, 134 P.3d 378, 388 (2006) ("Absent a trial court's abuse of discretion or the imposition of an unlawful sentence, we will not reduce a sentence [pursuant to § 13-4037(B)] unless such a reduction is warranted by such extraordinary circumstances as to make the sentence inconsistent with statutory intent.").

**¶11** For the foregoing reasons, we affirm Valenzuela's convictions and the sentences imposed.

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PHILIP G. ESPINOSA, Presiding Judge

CONCURRING:

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JOSEPH W. HOWARD, Chief Judge

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J. WILLIAM BRAMMER, JR., Judge