FILED BY CLERK
MAY 14 2009
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. CYNTHIA D. JOHNSON, Appellant.	2 CA-CR 2008-0335 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR200400309

Honorable Gilberto V. Figueroa, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Joseph T. Maziarz
Tucson
Attorneys for Appellee

Harriette P. Levitt
Tucson
Attorney for Appellant

B R A M M E R, Judge.

¶1 In this appeal from her resentencing, appellant Cynthia Johnson challenges the trial court's reimposition of a presumptive, 10.5-year prison sentence for Johnson's conviction of conspiracy to commit kidnapping, a class two felony and dangerous-nature

offense. She contends the court wrongly "refused to impose a mitigated sentence," failed to give sufficient mitigating weight to the evidence of her mental illness, and resentenced her to a presumptive term after improperly considering aggravating factors that had neither been found by a jury nor admitted by Johnson. We affirm.

¶2 Following a jury trial, Johnson had been convicted of first-degree felony murder and conspiracy to commit kidnapping. On appeal, this court overturned the felony-murder conviction and vacated the attendant sentence of life imprisonment but affirmed Johnson's conviction and presumptive, 10.5-year sentence for conspiracy to commit kidnapping. *State v. Johnson*, 215 Ariz. 28, ¶ 28, 156 P.3d 445, 451 (App. 2007). Subsequently, Johnson filed a petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., asserting the court had improperly considered aggravating factors at sentencing in violation of *Blakely v. Washington*, 542 U.S. 296 (2004), and claiming she was entitled to a mitigated term. The state responded by "conced[ing]" that Johnson was "entitled to be resentenced."

¶3 At a resentencing hearing held on September 22, 2008, the trial court reimposed the presumptive, 10.5-year sentence it had originally imposed. The court acknowledged but declined to follow the recommendations of the probation department and the prosecutor in favor of a mitigated, nine-year term. This appeal followed.

¶4 Relying entirely on *Blakely* and its precursor, *Apprendi v. New Jersey*, 530 U.S. 466 (2000), Johnson first contends the trial court improperly considered various aggravating factors "in rejecting [Johnson]'s mitigating evidence in favor of a presumptive term of

imprisonment." We need not address the specifics of her argument, however, because the law does not support her position.

¶5 In *State v. Miranda-Cabrera*, 209 Ariz. 220, 99 P.3d 35 (App. 2004), the defendant complained that the trial court had "found and weighed" certain aggravating factors, not found by a jury, against other mitigating factors. *Id.* ¶ 31. Although the court had imposed a mitigated sentence, the defendant claimed his sentence might have been even shorter "had the trial court not set off aggravating factors against the mitigating factors in imposing the mitigated sentence." *Id.* ¶ 32. The appellate court rejected this contention, holding: "Once a jury has found all of the facts required for the court to impose a punishment . . . , the judge is free to consider any other factors, both aggravating and mitigating, in imposing a lesser sentence." *Id.* ¶ 34. Because the defendant's sentence did not exceed the presumptive term, the court "was entitled to impose based on 'the facts reflected in the jury verdict or admitted by the defendant,' the sentence imposed does not violate the Sixth Amendment." *Id.* ¶ 32, *quoting Blakely*, 542 U.S. at 303.

¶6 Although the defendant in *Miranda-Cabrera* received a mitigated sentence, the same principles apply when the court imposes a presumptive term. In *State v. Kevin Johnson*, 210 Ariz. 438, 111 P.3d 1038 (App. 2005), the defendant had received presumptive sentences, *id.* ¶ 1, but nonetheless claimed he had been sentenced in violation of *Blakely* because the court had "'improperly found and weighed the aggravating factor of emotional harm to the victim in determining [his] sentence[s].'" *Johnson*, 210 Ariz. 438, ¶ 9, 111 P.3d at 1040. After carefully analyzing the Supreme Court's language and rationale in *Apprendi*,

Blakely, and *United States v. Booker*, 543 U.S. 220 (2005), as well as the holdings of Arizona courts in *Miranda-Cabrera* and *State v. Munninger*, 209 Ariz. 473, 104 P.3d 204 (App. 2005), *abrogated on other grounds by State v. Martinez*, 210 Ariz. 578, 115 P.3d 618 (2005), this court held "the trial court did not err when it considered an aggravating circumstance not found by the jury in sentencing Johnson, because it did not rely on that circumstance to increase his punishment beyond the maximum authorized by the jury verdicts alone." *Johnson*, 210 Ariz. 438, ¶ 13, 111 P.3d at 1042.

¶7 In so holding, we noted expressly "that the aggravating factors [had] played an essential role in the punishment the trial court chose for Johnson." *Id.* ¶ 11. But, unless the sentence imposed exceeds the presumptive term authorized for the offense, no constitutional violation results from a court's consideration of aggravating sentencing factors not found by a jury. *Id.* ¶ 12. As Cynthia Johnson likewise received the presumptive sentence in this case, the trial court's consideration of other factors it deemed aggravating did not violate *Blakely* or *Apprendi*

¶8 Johnson contends the court violated a "mandatory duty" imposed by former A.R.S. § 13-702(D)[1] to consider evidence of her mental illness "as it related to the instant offenses to be a mitigating factor." According to the transcript of her original sentencing hearing in June 2005, Johnson suffers from bipolar disorder. Although she has not developed

[1]The sentencing provisions in Arizona's criminal code were renumbered effective December 31, 2008. *See* 2008 Ariz. Sess. Laws, ch. 301, §§ 1-120. We refer in this decision to the statutes as they were numbered when Johnson was sentenced, rather than by their current section numbers.

the argument in any meaningful way in this appeal, she suggests that her illness was responsible for significantly diminishing her "capacity to appreciate the wrongfulness of [her] conduct or to conform [her] conduct to the requirements of law." § 13-702(D)(2).

¶9 Johnson acknowledges in her opening brief that, to establish impaired capacity as a mitigating factor, she was required to demonstrate a causal link between her illness and her commission of the crime. *See State v. Henry*, 189 Ariz. 542, 552-53, 944 P.2d 57, 67-68 (1997). As the trial court noted, however, Johnson's counsel presented no such evidence, choosing instead only to "make some remarks in mitigation." Even had Johnson presented such evidence, the court was required only to consider it; a court is not obliged to find mitigating circumstances exist simply because mitigating evidence is presented. *State v. Cazares*, 205 Ariz. 425, ¶ 8, 72 P.3d 355, 357 (App. 2003); *State v. Fatty*, 150 Ariz. 587, 592, 724 P.2d 1256, 1261 (App. 1986).

¶10 A trial court has considerable latitude in determining an appropriate sentence. *State v. Patton*, 120 Ariz. 386, 388, 586 P.2d 635, 637 (1978); *State v. Cameron*, 146 Ariz. 210, 215, 704 P.2d 1355, 1360 (App. 1985). A reviewing court will not modify or reduce a sentence that is within statutory limits, as Johnson's is, unless the trial court has clearly abused its broad discretion. *Cameron*, 146 Ariz. at 215, 704 P.2d at 1360. A court abuses its sentencing discretion by acting arbitrarily or capriciously or failing to investigate relevant facts. *State v. Ward*, 200 Ariz. 387, ¶ 6, 26 P.3d 1158, 1160 (App. 2001).

¶11 The record reflects the trial court here reviewed and considered all available information in making its sentencing decision in this case. Rarely in such circumstances will

we find an abuse of the court's discretion. *See State v. Webb*, 164 Ariz. 348, 354-55, 793 P.2d 105, 111-12 (App. 1990). The court duly considered, but was not bound to follow, the sentencing recommendations of the prosecutor and the probation department in favor of a mitigated, nine-year sentence rather than the 10.5-year term the court deemed appropriate. *See Patton*, 120 Ariz. at 389-90, 586 P.2d at 638-39.

¶12 The weight to be given any factor asserted in mitigation rests "[]in the sound discretion of the sentencing judge." *State v. Towery*, 186 Ariz. 168, 189, 920 P.2d 290, 311 (1996). For that reason and the other reasons stated, we reject Johnson's contention that the trial court "erred in failing to give substantial weight to [her] mental condition as it related to the instant offenses" as a mitigating factor upon resentencing. The record does not demonstrate that the court failed to investigate relevant aggravating and mitigating factors or acted arbitrarily or capriciously in weighing them before reaching its decision. We therefore have no basis on which to conclude the court abused its discretion. *See Ward*, 200 Ariz. 387, ¶ 6, 26 P.3d at 1160.

¶13 The judgment and sentence entered on September 22, 2008, are affirmed.

_____
J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

_____
PETER J. ECKERSTROM, Presiding Judge

_____
GARYE L. VÁSQUEZ, Judge