

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.

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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, |) | |
| |) | |
| Respondent, |) | 2 CA-CR 2009-0164-PR |
| |) | DEPARTMENT A |
| |) | |
| v. |) | <u>MEMORANDUM DECISION</u> |
| |) | Not for Publication |
| LEE HOLMEN LACEY, |) | Rule 111, Rules of |
| |) | the Supreme Court |
| Petitioner. |) | |
| _____ |) | |

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20071978

Honorable Michael J. Cruikshank, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
Attorneys for Respondent

The Hopkins Law Office, P.C.
By Cedric Hopkins

Tucson
Attorneys for Petitioner

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

¶1 Pursuant to a plea agreement, petitioner Lee Holmen Lacey was convicted of second-degree burglary, a class three felony, with one historical prior felony conviction. The

trial court sentenced him to a partially mitigated prison term of six years, to be served concurrently with the term imposed in another cause. In this petition for review, Lacey challenges the trial court's denial of the petition for post-conviction relief he filed pursuant to Rule 32, Ariz. R. Crim. P., in which he challenged the prison term, insisting the court had failed to consider evidence in mitigation that was before it. Absent a clear abuse of discretion, we will not disturb the trial court's ruling. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 In sentencing Lacey to a partially mitigated prison term, the trial court found his poor health to be the only mitigating circumstance. Lacey asserted in his petition for post-conviction relief that the court erred by not finding additional mitigating circumstances existed, including what defense counsel had characterized at sentencing as Lacey's "horrific childhood." Lacey argued in his petition that defense counsel had pointed out to the court Lacey had been the subject of four dependency proceedings as a child, his "mother beat him, failed to protect him, and failed to provide proper medical care for him." Additionally, Lacey contended that, despite defense counsel's urging at sentencing, the court failed to consider his community support as a mitigating circumstance. Relying on former A.R.S. § 13-701(E)(6), Lacey contended the court was required to find these were mitigating circumstances that justified a lesser sentence. He reiterates these claims in his petition for review.

¶3 Denying Lacey's petition, the trial court noted the evidence in mitigation that had been presented. But, as the court correctly observed, the mere fact that such evidence

was presented did not require the court to find that evidence constituted a mitigating circumstance under the statute. *See State v. Fatty*, 150 Ariz. 587, 592, 724 P.2d 1256, 1261 (App. 1986). The court is only required to consider the evidence that has been offered in mitigation. *Id.* Not only do we presume the court considered the evidence that was before it, *State v. Cid*, 181 Ariz. 496, 501, 892 P.2d 216, 221 (App. 1995), the court made clear in denying Lacey’s petition for post-conviction relief that it had considered the evidence presented, including the information about Lacey’s “troubled background and his community support.”

¶4 Like the determination of the appropriate sentence generally, “[t]he consideration of mitigating circumstances is solely within the discretion of the court.” *State v. Webb*, 164 Ariz. 348, 355, 793 P.2d 105, 112 (App. 1990). Based on the record before us, we conclude the trial court neither abused its discretion when it initially sentenced Lacey to a partially mitigated prison term, nor did it do so when it reconsidered the propriety of Lacey’s sentence in light of the arguments raised in the Rule 32 petition. Therefore, although we grant Lacey’s petition for review, we deny his request for relief.

PHILIP G. ESPINOSA, Presiding Judge

CONCURRING:

JOSEPH W. HOWARD, Chief Judge

J. WILLIAM BRAMMER, JR., Judge