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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
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THE STATE OF ARIZONA, Respondent, v. CHRISTOPHER CRUZ FIGUEROA, Petitioner.	2 CA-CR 2009-0211-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20063057

Honorable Stephen C. Villarreal, Judge

REVIEW GRANTED; RELIEF DENIED

Robert J. Hirsh, Pima County Public Defender
By M. Edith Cunningham
Tucson
Attorneys for Petitioner

B R A M M E R, Judge.

¶1 Pursuant to a plea agreement, Christopher Cruz Figueroa pled no contest to aggravated assault of a minor under fifteen years of age and aggravated assault with a deadly weapon or dangerous instrument. The trial court sentenced him to concurrent, aggravated

and slightly aggravated terms of 1.5 and five years in prison, respectively. It denied Figueroa's subsequent petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P., and this petition for review followed. We review a trial court's denial of post-conviction relief for an abuse of discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Finding none, we deny relief.

¶2 At his change-of-plea hearing, Figueroa agreed the state would be able to prove the following facts at trial. In August 2006, Figueroa opened the rear door of a vehicle that had stopped at a stop sign or red light and attempted to pull a nine-year-old girl out of the back seat. The girl's father, who had been driving, got out of the vehicle and confronted Figueroa. During that altercation, a police officer arrived, and Figueroa assaulted him, "grabb[ing] for and successfully releas[ing]" the officer's gun from his gun belt, "placing [the] officer . . . in fear of the handgun."

¶3 The prosecutor informed the court that "the reason for the no contest plea" was that Figueroa, who is a diabetic, claimed he had been in the midst of a hypoglycemic event at the time of the incident and did not remember what had occurred. Paramedics tested Figueroa's blood glucose level at the scene and determined it was in the low normal range. Later at the hospital, however, it dipped below normal. This and other information about Figueroa's condition and the effect of hypoglycemia in general was presented to the trial court for sentencing. In a supplemental report submitted with his petition for post-conviction relief, Figueroa's expert, Dr. David Alster, opined that Figueroa's low blood sugar level at

the hospital made it "more likely that his blood sugar was low at the time of the incident." But he also opined that, although "abrupt physical activity," like the confrontations in which Figueroa was involved before paramedics tested his blood, could raise his blood glucose level, "it is also possible it could lower the blood glucoses." Finally, he opined that the type of insulin program Figueroa had been using made him "more prone to low blood sugar," and a "better medical regimen could be developed for him," although it would be "expensive."

¶4 At sentencing, defense counsel had argued for the imposition of probation, based on Figueroa's medical condition, his contributions to society, and his willingness to work to control his diabetes. The trial court found Figueroa's medical condition was a mitigating circumstance, but expressed doubt as to whether the condition had caused Figueroa's behavior or was simply "an excuse for criminal conduct." The court found Figueroa's prior felony convictions and the impact on the victim were aggravating factors, and it stated: "bottom line that I see in Mr. Figueroa's case is that he presents a danger to public safety. I mean, no matter how you look at it, that seems to be rearing its ugly head."

¶5 As he did below, Figueroa contends that he received ineffective assistance from his trial counsel at sentencing, that the trial court failed to weigh sufficiently the mitigating circumstances and imposed excessive sentences, and that the court improperly considered in aggravation a 2008 arrest that had not resulted in a conviction. He also contends the court abused its discretion by denying his petition without first holding an evidentiary hearing.

¶6 "To avoid summary dismissal and achieve an evidentiary hearing on a post-conviction claim of ineffective assistance of counsel, Defendant must present a colorable claim (1) that counsel's representation was unreasonable or deficient under the circumstances and (2) that he was prejudiced by counsel's deficient performance." *State v. Fillmore*, 187 Ariz. 174, 180, 927 P.2d 1303, 1309 (App. 1996); *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984); Ariz. R. Crim. P. 32.6(c), 32.8(a). A colorable claim of post-conviction relief is "one that, if the allegations are true, might have changed the outcome" of the proceedings. *State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993).

¶7 Figueroa contended below his trial counsel had performed deficiently by failing to investigate fully the reasons his diabetes is so difficult to control and by failing to provide Dr. Alster with his hospital records from the day of the incident prior to his November 2007 report, in which he had opined it was "more than possible that [Figueroa's] glucose was low at the time of the event" in this case. The trial court found no deficient performance and, indeed, counsel had provided the court extensive information about Figueroa's condition and the effects of hypoglycemia before sentencing. But because the court also found no colorable claim of prejudice, which we understand to mean the court would have imposed the same sentence had counsel taken the actions Figueroa claims were lacking, even assuming some deficiency in counsel's presentation, we find no abuse of discretion in the court's ruling. *See State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985) (we will affirm summary

denial of relief if defendant fails colorably to claim either deficient performance or prejudice).

¶8 Likewise, the trial court did not abuse its discretion in denying Figueroa's claim it had relied on an improper aggravating factor in imposing sentence. Figueroa was arrested in January 2008 for trespass and disorderly conduct after he became disoriented and combative when he awoke from sleeping in a lobby. The charges that arose from that incident ultimately were dismissed, but the pre-sentence report in this case included a description of the incident, and the court questioned Figueroa about it at sentencing. But the court did not expressly find the 2008 incident was an aggravating circumstance in its sentencing minute entry or at the sentencing hearing. And it explained in its ruling denying relief that it had considered the incident not "as an aggravating factor" but only to the extent it shed light on the "mitigation the defense presented," Figueroa's danger to the community, and his contention he had his "condition under control" and could be "appropriately monitored." Contrary to Figueroa's suggestion on review, such consideration is not tantamount to the finding of a separate aggravating circumstance, and he has cited no authority prohibiting the court from considering the incident as it explained it did, essentially in determining probation was inappropriate and in considering the weight to give the mitigating circumstance of Figueroa's medical condition.

¶9 Finally, Figueroa contends the trial court failed to weigh properly the mitigating and aggravating circumstances, resulting in the court's imposition of an excessive

sentence in "violat[ion of] state and federal due process and the prohibition against cruel and unusual punishment." The court has broad discretion in determining the weight to assign aggravating and mitigating circumstances for sentencing purposes. *State v. Harvey*, 193 Ariz. 472, ¶ 24, 974 P.2d 451, 456 (App. 1998). As noted above, the court had before it substantial information about the circumstances of the offenses and Figueroa's condition and background, as well as information about the impact of the crime on the child victim. We cannot say the court abused its discretion in determining the aggravating circumstances outweighed the mitigating circumstance in this case. Nor can we say the sentences the court imposed, which were within the statutory limits and well below the maximum authorized under the plea agreement, either were excessive or cruel and unusual. *See State v. Little*, 121 Ariz. 377, 381, 590 P.2d 916, 920 (1979) (sentence within statutory limits not excessive); *see also State v. Davis*, 206 Ariz. 377, ¶ 34, 70 P.3d 64, 71 (2003) (cruel and unusual sentence must appear "grossly disproportionate to the offense").

¶10 Accordingly, although we grant Figueroa's petition for review, we deny relief.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge