

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

CHRISTOPHER JOE LYONS,
Petitioner.

No. 2 CA-CR 2014-0257-PR
Filed January 16, 2015

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Cochise County

No. CR201200542

The Honorable Karl D. Elledge, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Peter A. Kelly
Counsel for Petitioner

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MEMORANDUM DECISION

Presiding Judge Miller authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Espinosa concurred.

M I L L E R, Presiding Judge:

¶1 Pursuant to a plea agreement, petitioner Christopher Lyons was convicted of first-degree burglary. The agreement required Lyons to “testify truthfully in the trial” of co-defendant Carlos Guerrero. The trial court imposed a slightly aggravated six-year prison term with credit for 401 days served. Lyons filed a petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P. Therein, he argued the court had failed to consider his testimony at Guerrero’s trial as a mitigating factor and had imposed a disparate sentence from co-defendant Alicia Davila. The court summarily dismissed his petition and this petition for review followed. We will not disturb a trial court’s denial of post-conviction relief absent a clear abuse of discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We find no such abuse here.

¶2 At the change-of-plea hearing, the trial court informed Lyons it had the “discretion to impose the sentence in this case,” and at a hearing held one week before sentencing, the court informed the prosecutor it had received the prosecutor’s “letter”¹ and had made it part of Lyons’s file. At sentencing, the court noted it had read and considered the presentence report, which also had referred to Lyons’s agreement to testify at Guerrero’s trial, and defense counsel again pointed out Lyons’s cooperation with the state and informed

¹In a letter dated November 12, 2013, the prosecutor informed the trial court Lyons had been “fully cooperative and candid” in his testimony at Guerrero’s trial and asked that he “receive every possible consideration due him at sentencing.”

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the court the prosecutor had been pleased with Lyons's testimony. However, the court, who had been the judge at Guerrero's trial and thus had heard Lyons's testimony firsthand, provided a different viewpoint:

I did have a little bit of a perspective on this case, given the fact I sat through the Guerrero trial and listened to [Lyons's] testimony. . . . [I]t was apparent to me that there was an attempt to downplay any kind of involvement in this offense. Meaning that . . . Mr. Lyon[s]'s testimony was that he essentially really didn't know what was going to happen until the time it was actually happening and that he followed . . . Carlos Guerrero into the [victim's] trailer during what essentially was the Guerrero assault That actually was different than what the victim was telling everybody from the beginning, that three or four people burst into the trailer; that it could not have been one person committing an assault; that there were other participants in the assault.

....

I think there were some credibility issues . . . concerning [Lyons's] testimony and, obviously, at some point in time the jurors possibly felt the same way.[²]

My other concerns are this: At every step of Mr. Lyons's life some of the violent acts, as pointed out in the presentence

²According to the unsupported facts in the petition for review, Guerrero "was acquitted on all counts."

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report, are escalating. They're not de-escalating. In fact, they're going the other way around. And there's already been a violation of some of the conditions of probation when Mr. Lyons was placed on probation for a misdemeanor.

¶3 The trial court found aggravating circumstances which included the following: presence of accomplices; physical and financial harm to the victim; residual impact on the victim; property damage; and, placement of a stolen gun in commerce. Noting that Lyons was only twenty years old, the court then determined that the mitigating circumstances did not outweigh the aggravating circumstances. After the sentence was pronounced, Lyons's counsel asked, "Am I correct in concluding that the assistance that [Lyons] gave to the State was not considered a mitigating factor?" The court responded that its "assessment" of Lyons's testimony at Guerrero's trial differed from the prosecutor's, and then concluded, "[e]ven if [it] were to be considered a mitigating factor . . . that still wouldn't be sufficient to outweigh the aggravating factors that I've cited on the record here in court."

¶4 On review, Lyons argues the trial court abused its discretion by failing to consider as a mitigating factor his testimony at Guerrero's trial.³ "A trial court has broad discretion to determine the appropriate penalty to impose upon conviction, and we will not disturb a sentence that is within statutory limits . . . unless it clearly appears that the court abused its discretion." *State v. Cazares*, 205 Ariz. 425, ¶ 6, 72 P.3d 355, 357 (App. 2003). We will find an abuse of

³We do not address the new arguments and federal cases Lyons cites for the first time in his petition for review. *Cf. State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (court of appeals does not address issues raised for first time in petition for review); *see also* Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review should contain "issues which were decided by the trial court and which the defendant wishes to present to the appellate court for review").

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sentencing discretion only if the court acted arbitrarily and capriciously or failed to adequately investigate the facts relevant to sentencing. *State v. Ward*, 200 Ariz. 387, ¶ 6, 26 P.3d 1158, 1160 (App. 2001).

¶5 The trial court is only required to consider evidence offered in mitigation; it is not required to find the evidence mitigating. *State v. Long*, 207 Ariz. 140, ¶ 41, 83 P.3d 618, 626 (App. 2004). Not only do we generally presume the court considered evidence that was before it, see *State v. Everhart*, 169 Ariz. 404, 407, 819 P.2d 990, 993 (App. 1991), but the record here shows the court expressly considered the fact that Lyons had testified at Guerrero’s trial.⁴ Having done so, it was not required to – nor did it – find that fact a mitigating circumstance. See *Long*, 207 Ariz. 140, ¶ 41, 83 P.3d at 626. Moreover, the court observed that Lyons’s cooperation, as it was perceived during the trial, was not sufficient to overcome the aggravating factors. Therefore, based on the record before us, we conclude the court did not abuse its discretion when it initially sentenced Lyons or when it denied post-conviction relief.

¶6 Lyons also asserts the trial court failed to consider as mitigating the disparity between co-defendant Davila’s 4.5-year sentence and his six-year sentence. He points out that Davila, “the undisputed mastermind of the plot,” pled guilty to kidnapping and also testified at Guerrero’s trial.⁵ Relying on *State v. Marlow*, 163 Ariz. 65, 71-72, 786 P.2d 395, 401-02 (1989), Lyons contends that a “substantial disparity in sentences of accomplices must be considered as mitigating factors.”

⁴Lyons appears to argue that the trial court failed to comply with or was somehow bound by the practice in federal courts, but he cites no authority that supports this suggestion.

⁵Although we accept the factual assertions regarding Davila’s guilty plea and sentence as true for purposes of addressing Lyons’s argument, they are not supported by evidence in the record before us. See Ariz. R. Crim. P. 32.9(c)(1).

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¶7 In its ruling denying post-conviction relief, the trial court noted it had “conducted a proportionality review,” and “[i]n weighing the relevant circumstances,” it found “the sentence imposed is not excessive or disproportionate.” Disparity in sentencing is generally only considered between co-defendants in a capital case, *State v. Schurz*, 176 Ariz. 46, 57, 859 P.2d 156, 167 (1993), but even assuming without deciding that such a rule applies to non-capital cases, a disparity in sentences between co-defendants is significant only if it is unexplained. *See id.* And, although the court did not explain in detail its reasoning in denying this claim below, it clearly considered and rejected Lyons’s argument.

¶8 Lyons has not pointed to any evidence supporting his claim that the trial court abused its discretion by imposing the sentence it did and by rejecting his claim below. Notably, he has failed to explain why a 1.5-year difference between the sentences constitutes a significant disparity. *Cf. Marlow*, 163 Ariz. at 71-72, 786 P.2d at 401-02 (disparity between death sentence and accomplice’s four-year sentence could be considered as mitigating factor in determining appropriateness of death sentence). And even assuming without deciding that the difference between the sentences created such a disparity, other than asserting that he and Davila were convicted of offenses arising from the same underlying event, Lyons has failed to provide any information regarding Davila’s history, the nature of the testimony she provided at Guerrero’s trial, the sentencing provisions in her plea agreement, or any other relevant information to explain why the imposition of different sentences was an abuse of discretion.⁶ Lyons has therefore failed to sustain his burden of showing the court abused its discretion by rejecting this claim below. *See Ariz. R. Crim. P.* 32.9(c)(iv).

¶9 Accordingly, we grant review but deny relief.

⁶It appears different judges sentenced Lyons and Davila.