FILED BY CLERK
JAN 16 2007
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	2 CA-CR 2006-0075-PR
Respondent,	)	DEPARTMENT B
	)	
v.	)	MEMORANDUM DECISION
	)	Not for Publication
TROY ALEXANDER BERTLING,	)	Rule 111, Rules of
	)	the Supreme Court
Petitioner.	)	
	)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-67115

Honorable Howard Fell, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

Robert J. Hooker, Pima County Public Defender
By Rose Weston — Tucson
Attorneys for Petitioner

B R A M M E R, Judge.

¶1 Troy Bertling was convicted of second-degree murder pursuant to a plea agreement. The trial court sentenced him to an aggravated prison term of twenty-two years. The court later denied relief on Bertling's petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P., 17 A.R.S., and this court denied relief on review. *State v.*

Bertling, No. 2 CA-CR 2003-0051-PR (order filed June 16, 2004). Bertling then filed a second post-conviction petition on which the trial court also denied relief. Bertling now seeks review of that ruling. We review for an abuse of discretion a trial court's ruling on a post-conviction petition, *State v. Decenzo*, 199 Ariz. 355, ¶ 2, 18 P.3d 149, 150 (App. 2001), but find none here.

¶2 In his petition, Bertling asserted that the holding in *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), applied to his case as a significant change in the law pursuant to Rule 32.1(g). The trial court agreed, as do we. Bertling's first post-conviction proceeding was an of-right proceeding because he had pled guilty. *See* Ariz. R. Crim. P. 32.4(c)(2). *Blakely* was decided on June 24, 2004, eight days after this court denied relief on Bertling's first petition for review, but we did not issue our mandate until November 26, 2004. Therefore, his case was still pending at the time *Blakely* was decided, and its holding applies to his case. *See State v. Ward*, 211 Ariz. 158, ¶¶ 8-11, 118 P.3d 1122, 1125-26 (App. 2005); *see also State v. Towery*, 204 Ariz. 386, ¶ 8, 64 P.3d 828, 831-32 (2003) (a defendant's conviction is final after judgment of conviction is entered, availability of appeal is exhausted, and petition for certiorari is denied or time for filing one has passed).

¶3 But it is undisputed Bertling did not raise his *Blakely* claim until his second petition for post-conviction relief. Because he did not raise the issue at the time he was sentenced, he is therefore entitled to relief only if he establishes that fundamental error occurred and that he was prejudiced by that error. *See State v. Henderson*, 210 Ariz. 561,

¶¶ 19-20, 115 P.3d 601, 607 (2005). In conducting that analysis below, however, the trial court found that Bertling's admission of guilt at his change-of-plea hearing also constituted admission of *Blakely*-compliant factors on which the court had properly aggravated Bertling's sentence. We disagree.

¶4 As Bertling correctly notes, our supreme court held in *State v. Brown*, 212 Ariz. 225, ¶ 24, 129 P.3d 947, 952 (2006), that a defendant's admissions in pleading guilty do not affect the defendant's right to a jury trial on the existence of aggravating circumstances; instead, they admit only the elements of the offense to which the defendant is pleading guilty.

¶5 As it read at the time of the victim's murder in this case, A.R.S. § 13-1104 provided that a person commits second-degree murder by, without premeditation,

> intentionally caus[ing] the death of another person; or
>
> . . . [k]nowing that his conduct will cause death or serious physical injury, . . . caus[ing] the death of another person; or
>
> . . . [u]nder circumstances manifesting extreme indifference to human life, . . . recklessly engag[ing] in conduct which creates a grave risk of death and thereby caus[ing] the death of another person.

1993 Ariz. Sess. Laws, ch. 255, § 19. In aggravating Bertling's sentence, the trial court cited "[t]he involvement of accomplices, [Bertling's] continued use of drugs, the particularly cruel infliction of harm by Mr. Averett," and Bertling's "knowledge of the proposed infliction of

harm by Averett." None of those factors is an element of the offense as defined in the applicable version of § 13-1104.

¶6 We nevertheless conclude the trial court did not abuse its discretion in rejecting Bertling's claim for post-conviction relief. Unlike the defendant in *Brown*, who asserted his *Blakely* rights before sentencing, 212 Ariz. 225, ¶¶ 2-10, 129 P.3d at 948-50, Bertling first raised the issue in his second post-conviction proceeding and was thus required to show the *Blakely* error was both fundamental and prejudicial, *see Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607. Because that standard applies, to obtain relief, he was required to show that "'a reasonable jury, applying the appropriate standard of proof, could have reached a different result [in finding an aggravator] than did the trial judge.'" *State v. Cleere*, 213 Ariz. 54, ¶ 11, 138 P.3d 1181, 1185 (App. 2006), *quoting Henderson*, 210 Ariz. 561, ¶ 27, 115 P.3d at 609 (alteration in *Cleere*); *see also Brown*, 212 Ariz. 225, n.5, 129 P.3d at 953 n.5 ("[J]udicial factfinding may be harmless error when no reasonable jury could have reached a determination contrary to that made by the judge.").

¶7 We conclude that no reasonable jury could have found differently as to one of the aggravating factors relied on by the trial court. In sentencing Bertling, the court considered defense counsel's sentencing memorandum, the mitigation testimony of eight witnesses, the presentence report, the report of a psychological evaluation of Bertling, and a number of letters, including one Bertling had written that he read aloud at the sentencing

hearing.[1] In his sentencing memorandum, defense counsel conceded the existence of the statutory aggravating circumstance listed in A.R.S. § 13-702(C)(4), "[p]resence of an accomplice." And counsel referred to that concession at the hearing in attempting to persuade the court to impose the minimum prison term of ten years. Moreover, both defense counsel's questions and the answers of the witnesses presented in mitigation accepted as a given that Bertling had been involved with others in planning the victim's murder. Because Bertling did not contest the existence of this statutory factor in a proceeding wherein he had every motivation to do so and because his own witnesses testified about facts implicitly supporting the existence of that factor, we do not believe a jury could have reasonably concluded that Bertling committed the offense alone.

¶8 Once a trial court finds at least one *Blakely*-compliant or *Blakely*-exempt factor exists, it is entitled to find additional aggravating factors by a preponderance of the evidence. *See State v. Martinez*, 210 Ariz. 578, ¶ 26, 115 P.3d 618, 625 (2005). Therefore, the trial court did not err in finding additional aggravating factors. As a result, albeit for the

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[1]The trial court correctly denied post-conviction relief on Bertling's claim that the court had improperly considered evidence presented at the trials of two of Bertling's codefendants, at which Bertling had also testified pursuant to the terms of his plea agreement. As the court found, that claim was precluded because Bertling had not raised it in his first post-conviction proceeding. *See* Ariz. R. Crim. P. 32.2(a)(3). The court also stated in its ruling that it had heard both aggravating and mitigating evidence at the sentencing hearing. Bertling correctly notes that the state did not present any witnesses in aggravation at the sentencing hearing. In light of our conclusion that no reasonable jury could have reached a different result on the existence of the presence-of-accomplices aggravating factor, we find no merit to Bertling's assertion that the misstatement is material.

wrong reason, *see State v. Saiers*, 196 Ariz. 20, ¶ 16, 992 P.2d 612, 616 (App. 1999), the trial court did not abuse its discretion in denying post-conviction relief on Bertling's *Blakely* claim. Because we find no fundamental error in the imposition of the aggravated sentence, we need not address Bertling's assertion that the trial court committed fundamental error in imposing an aggravated sentence despite the state's failure to allege aggravating factors.

¶9 We also find no abuse of discretion in the trial court's denial of post-conviction relief on Bertling's claims of ineffective assistance of counsel, although we agree with Bertling that the court apparently misunderstood the nature of those claims. Bertling did not assert that trial counsel had been ineffective in failing to anticipate the decision in *Blakely*. Instead, he complained that trial counsel had failed to object to the trial court's considering evidence at sentencing that it had heard in Bertling's codefendants' trials and that his previous Rule 32 counsel had failed to raise the issue in his first post-conviction proceeding. In addition, Bertling asserted trial counsel had been ineffective in expressly requesting that the case be reassigned from the judge who accepted Bertling's guilty plea to the judge who ultimately sentenced him.

¶10 To state a colorable claim of ineffective assistance of counsel, a defendant must show that counsel's performance was objectively unreasonable under prevailing professional standards and that counsel's deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). A court need not address both requirements

if it finds one requirement has not been met. *State v. Salazar*, 173 Ariz. 399, 414, 844 P.2d 566, 581 (1992).

¶11 The prejudice Bertling asserted from trial and Rule 32 counsel's alleged deficiencies was the imposition of an aggravated sentence. But, because we have concluded no reasonable jury could have found differently on the presence-of-accomplices aggravating factor, Bertling cannot show that the outcome of sentencing would have been different absent counsel's alleged deficient performance. Therefore, the trial court did not abuse its discretion in denying relief on his claims about counsel's effectiveness. *See Salazar*, 173 Ariz. at 414, 844 P.2d at 581.

¶12 We grant the petition for review but deny relief.

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J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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PHILIP G. ESPINOSA, Judge