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REFERENCE TITLE: **aggravating factors; trier of fact**

State of Arizona
House of Representatives
Forty-seventh Legislature
First Regular Session
2005

HB 2522

Introduced by
Representative Farnsworth

AN ACT

AMENDING SECTIONS 13-702 AND 13-702.01, ARIZONA REVISED STATUTES; RELATING TO SENTENCING.

(TEXT OF BILL BEGINS ON NEXT PAGE)

1 Be it enacted by the Legislature of the State of Arizona:

2 Section 1. Section 13-702, Arizona Revised Statutes, is amended to
3 read:

4 13-702. Sentencing; definition

5 A. Sentences provided in section 13-701 for a first conviction of a
6 felony, except those felonies involving the discharge, use or threatening
7 exhibition of a deadly weapon or dangerous instrument or the intentional or
8 knowing infliction of serious physical injury upon another or if a specific
9 sentence is otherwise provided, may be increased or reduced by the court
10 within the ranges set by this subsection. Any reduction or increase shall be
11 based on the aggravating and mitigating circumstances contained in
12 subsections C and D of this section and shall be within the following ranges:

	<u>Minimum</u>	<u>Maximum</u>
14 1. For a class 2 felony	4 years	10 years
15 2. For a class 3 felony	2.5 years	7 years
16 3. For a class 4 felony	1.5 years	3 years
17 4. For a class 5 felony	9 months	2 years
18 5. For a class 6 felony	6 months	1.5 years

19 B. The upper or lower term imposed pursuant to section 13-604,
20 13-604.01, 13-604.02, 13-702.01 or 13-710 or subsection A of this section may
21 be imposed only if the circumstances alleged to be in aggravation ~~or~~
22 ~~mitigation~~ of the crime are found to be true by the TRIER OF FACT, OR IN
23 MITIGATION OF THE CRIME ARE FOUND TO BE TRUE BY THE trial judge, on any
24 evidence or information introduced or submitted to the court before
25 sentencing or any evidence previously heard by the judge at the trial, and
26 factual findings and reasons in support of such findings are set forth on the
27 record at the time of sentencing.

28 C. For the purpose of determining the sentence pursuant to section
29 13-710 and subsection A of this section, the ~~court~~ TRIER OF FACT shall
30 ~~consider~~ DETERMINE the following aggravating circumstances:

31 1. Infliction or threatened infliction of serious physical injury,
32 except if this circumstance is an essential element of the offense of
33 conviction or has been utilized to enhance the range of punishment under
34 section 13-604.

35 2. Use, threatened use or possession of a deadly weapon or dangerous
36 instrument during the commission of the crime, except if this circumstance is
37 an essential element of the offense of conviction or has been utilized to
38 enhance the range of punishment under section 13-604.

39 3. If the offense involves the taking of or damage to property, the
40 value of the property so taken or damaged.

41 4. Presence of an accomplice.

42 5. Especially heinous, cruel or depraved manner in which the offense
43 was committed.

44 6. The defendant committed the offense as consideration for the
45 receipt, or in the expectation of the receipt, of anything of pecuniary
46 value.

1 7. The defendant procured the commission of the offense by payment, or
2 promise of payment, of anything of pecuniary value.

3 8. At the time of the commission of the offense, the defendant was a
4 public servant and the offense involved conduct directly related to the
5 defendant's office or employment.

6 9. The VICTIM OR, IF THE VICTIM HAS DIED AS A RESULT OF THE CONDUCT OF
7 THE DEFENDANT, THE VICTIM'S IMMEDIATE FAMILY SUFFERED physical, emotional ~~and~~
8 OR financial harm ~~caused to the victim or, if the victim has died as a result~~
9 ~~of the conduct of the defendant, the emotional and financial harm caused to~~
10 ~~the victim's immediate family.~~

11 10. During the course of the commission of the offense, the death of an
12 unborn child at any stage of its development occurred.

13 11. The defendant was previously convicted of a felony within the ten
14 years immediately preceding the date of the offense. A conviction outside
15 the jurisdiction of this state for an offense that if committed in this state
16 would be punishable as a felony is a felony conviction for the purposes of
17 this paragraph.

18 12. The defendant was wearing body armor as defined in section 13-3116.

19 13. The victim of the offense is AT LEAST sixty-five ~~or more~~ years of
20 age or is a disabled person as defined by section 38-492.

21 14. The defendant was appointed pursuant to title 14 as a fiduciary and
22 the offense involved conduct directly related to the defendant's duties to
23 the victim as fiduciary.

24 15. Evidence that the defendant committed the crime out of malice
25 toward a victim because of the victim's identity in a group listed in section
26 41-1750, subsection A, paragraph 3 or because of the defendant's perception
27 of the victim's identity in a group listed in section 41-1750, subsection A,
28 paragraph 3.

29 16. The defendant was convicted of a violation of section 13-1102,
30 section 13-1103, section 13-1104, subsection A, paragraph 3 or section
31 13-1204, subsection A, paragraph 1 or 2 arising from an act that was
32 committed while driving a motor vehicle and the defendant's alcohol
33 concentration at the time of committing the offense was 0.15 or more. For
34 the purposes of this paragraph, "alcohol concentration" has the same meaning
35 prescribed in section 28-101.

36 17. Lying in wait for the victim or ambushing the victim during the
37 commission of any felony.

38 18. The offense was committed in the presence of a child and any of the
39 circumstances exist that are set forth in section 13-3601, subsection A.

40 19. The offense was committed in retaliation for a victim's either
41 reporting criminal activity or being involved in an organization, other than
42 a law enforcement agency, that is established for the purpose of reporting or
43 preventing criminal activity.

44 20. The defendant was impersonating a peace officer as defined in
45 section 1-215.

1 21. Any other factor that the ~~court deems~~ STATE ALLEGES AS AN
2 AGGRAVATING CIRCUMSTANCE AND THAT THE TRIER OF FACT FINDS appropriate to the
3 ends of justice TO BE AGGRAVATING.

4 D. For the purpose of determining the sentence pursuant to section
5 13-710 and subsection A of this section, the court shall consider the
6 following mitigating circumstances:

7 1. The age of the defendant.

8 2. The defendant's capacity to appreciate the wrongfulness of the
9 defendant's conduct or to conform the defendant's conduct to the requirements
10 of law was significantly impaired, but not so impaired as to constitute a
11 defense to prosecution.

12 3. The defendant was under unusual or substantial duress, although not
13 such as to constitute a defense to prosecution.

14 4. The degree of the defendant's participation in the crime was minor,
15 although not so minor as to constitute a defense to prosecution.

16 5. Any other factor that the court deems appropriate to the ends of
17 justice.

18 In determining what sentence to impose, the court shall take into account the
19 amount of aggravating circumstances and whether the amount of mitigating
20 circumstances is sufficiently substantial to call for the lesser term. If
21 the ~~court~~ TRIER OF FACT finds aggravating circumstances and THE COURT does
22 not find any mitigating circumstances, the court shall impose an aggravated
23 sentence.

24 E. The court in imposing a sentence shall consider the evidence and
25 opinions presented by the victim or the victim's immediate family at any
26 aggravation or mitigation proceeding or in the presentence report.

27 F. Nothing in this section affects any provision of law that imposes
28 the death penalty, that expressly provides for imprisonment for life or that
29 authorizes or restricts the granting of probation and suspending the
30 execution of sentence.

31 G. Notwithstanding any other provision of this title, if a person is
32 convicted of any class 6 felony not involving the intentional or knowing
33 infliction of serious physical injury or the discharge, use or threatening
34 exhibition of a deadly weapon or dangerous instrument and if the court,
35 having regard to the nature and circumstances of the crime and to the history
36 and character of the defendant, is of the opinion that it would be unduly
37 harsh to sentence the defendant for a felony, the court may enter judgment of
38 conviction for a class 1 misdemeanor and make disposition accordingly or may
39 place the defendant on probation in accordance with chapter 9 of this title
40 and refrain from designating the offense as a felony or misdemeanor until the
41 probation is terminated. The offense shall be treated as a felony for all
42 purposes until such time as the court may actually enter an order designating
43 the offense a misdemeanor. This subsection does not apply to any person who
44 stands convicted of a class 6 felony and who has previously been convicted of
45 two or more felonies. If a crime or public offense is punishable in the
46 discretion of the court by a sentence as a class 6 felony or a class 1

1 misdemeanor, the offense shall be deemed a misdemeanor if the prosecuting
2 attorney:

3 1. Files an information in superior court designating the offense as a
4 misdemeanor.

5 2. Files a complaint in justice court or municipal court designating
6 the offense as a misdemeanor within the jurisdiction of the respective court.

7 3. Files a complaint, with the consent of the defendant, before or
8 during the preliminary hearing amending the complaint to charge a
9 misdemeanor.

10 H. FOR THE PURPOSES OF THIS SECTION, "TRIER OF FACT" MEANS A JURY,
11 UNLESS THE DEFENDANT AND THE STATE WAIVE A JURY IN WHICH CASE THE TRIER OF
12 FACT MEANS THE COURT.

13 Sec. 2. Section 13-702.01, Arizona Revised Statutes, is amended to
14 read:

15 13-702.01. Exceptional circumstances; aggravation; mitigation;
16 definition

17 A. Notwithstanding section 13-702, subsection A, if a person is
18 convicted of a felony without having previously been convicted of any felony
19 and if the ~~court~~ TRIER OF FACT finds that at least two substantial
20 aggravating factors listed in section 13-702, subsection C apply, the court
21 may increase the maximum term of imprisonment otherwise authorized for that
22 offense up to the following maximum terms:

- 23 1. For a class 2 felony 12.5 years
- 24 2. For a class 3 felony 8.75 years
- 25 3. For a class 4 felony 3.75 years
- 26 4. For a class 5 felony 2.5 years
- 27 5. For a class 6 felony 2 years

28 B. Notwithstanding section 13-702, subsection A, if a person is
29 convicted of a felony without having previously been convicted of any felony
30 and if the court finds that at least two substantial mitigating factors
31 listed in section 13-702, subsection D apply, the court may decrease the
32 minimum term of imprisonment otherwise authorized for that offense down to
33 the following minimum terms:

- 34 1. For a class 2 felony 3 years
- 35 2. For a class 3 felony 2 years
- 36 3. For a class 4 felony 1 year
- 37 4. For a class 5 felony 6 months
- 38 5. For a class 6 felony 4 months

39 C. Notwithstanding section 13-604, subsection A or B, if a person is
40 convicted of a felony offense and has one historical prior felony conviction
41 and if the ~~court~~ TRIER OF FACT finds that at least two substantial
42 aggravating factors listed in section 13-702, subsection C apply, the court
43 may increase the maximum term of imprisonment otherwise authorized for that
44 offense up to the following maximum terms:

- 45 1. Class 2 felony 23.25 years
- 46 2. Class 3 felony 16.25 years

1 H. The court in imposing sentence shall consider the evidence and
2 opinions presented by the victim or the victim's immediate family at any
3 aggravation or mitigation proceeding or in the presentence report.

4 I. The court shall inform all of the parties before sentencing occurs
5 of its intent to increase or decrease a sentence pursuant to this
6 section. If the court fails to inform the parties, a party waives its right
7 to be informed unless the party timely objects at the time of sentencing.

8 J. FOR THE PURPOSES OF THIS SECTION, "TRIER OF FACT" MEANS A JURY,
9 UNLESS THE DEFENDANT AND THE STATE WAIVE A JURY IN WHICH CASE THE TRIER OF
10 FACT MEANS THE COURT.