COURT OF APPEALS, DIVISION ONE

BRIEFS

SECTION 2

1 CA-CR 7432

STATE OF ARIZONA

Appellee,

vs

WILFRED KENNETH McMANUS,

Appellant.

MOHAVE COUNTY
SUPERIOR COURT
No. CR-5778

TRANSMITTAL DATE:

ORIGINAL

IN THE

COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

STATE OF ARIZONA Appellee	)	
	)	1 CA-CR 7432
Vs.	)	
	)	DEPARTMENT A
WILFRED KENNETH McMANUS Appellant	)	MOHAVE COUNTY SUPERIOR COURT NO. CR-5778

OPENING BRIEF

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DIVISION 1
COURT OF APPEALS
STATE OF ARIZONA

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ISSUES PRESENTED

The issues presented to this Court are as follows:

I. Did the sentencing Judge exercise sound discretion in pronouncing sentence, or did said sentence indicate sufficient abuse of discretion to warrant a remand to Superior Court for re-sentencing?

II. Did the sentencing Judge comply with applicable case law, statutes, and Rules of Criminal Procedure in pronouncing sentence; specifically, in giving consecutive sentences to the appellant?

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STATEMENT OF FACTS

On April 6, 1983, the Appellant plead guilty to two counts of Kidnapping, two counts of Armed Robbery, and two counts of Attempted Murder. A lengthy aggravation-mitigation hearing was held on May 16, 17, and 18, 1983, at the conclusion of which the Court ordered a ninety-day psychiatric evaluation of Mr. McManus pursuant to Arizona Rules of Criminal Procedure 26.5. This was subsequently performed at Arizona State Hospital, and the Appellant was returned to Mohave County for sentencing. Judgment and Sentence proceeding was held on September 2, 1983, and the Court imposed sentences of 10-1/2 years on each Count, all sentences to run consecutive to each other; a total of 63 years.

ISSUE I

DID THE SENTENCING JUDGE EXERCISE SOUND DISCRETION IN PRONOUNCING SENTENCE, OR DID SAID SENTENCE INDICATE SUFFICIENT ABUSE OF DISCRETION TO WARRANT A REMAND TO SUPERIOR COURT FOR RE-SENTENCING?

It is established law "that the trial Court has wide discretion in the setting of a sentence. If it is within the statutory limits, it will not be modified or reduced on appeal unless a clear abuse of discretion is shown."

> State v. Horton - 18 Az. App. 217 and cases cited.

"Such an abuse occurs only where the Judge's decision is characterized as capricious or arbitrary or by a failure to adequately investigate all facts and circumstances necessary for an intelligent exercise of sound discretion."

> State v. Horton, Supra - and cases cited.

1. The trial Judge did in fact fail to adequately investigate all facts and circumstances necessary for an intelligent exercise of sound discretion.

   a) A major factor in this whole case is the frequency with which the issue of a change in behavior and/or personality of the defendant was brought out. There are, on record, opinions of professionals and

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others that allude to this change suggesting everything up to mental illness as a factor. In addition to testimony of the defendant, the defendant's wife and the defendant's daughter, there are appropriate documents from the following persons:

J. W. Braithwaite	-	Deputy Commissioner, Canadian Correctional Service and past President, American Corrections Association.
J. E. Laverock	-	Director of Staff Development and former Senior Probation Officer.
S. Smith	-	Corrections Chaplain and former Probation Officer.
E. J. Hulford	-	Senior Protestant Chaplain.
Dr. M. J. Cleary	-	Psychiatrist.
Dr. E. Almer	-	Psychiatrist.
J. Mullin	-	Probation Officer, Mohave County, Arizona.

The issue was obviously a factor in the trial Judge's discretion to postpone sentence for a period of observation and evaluation of up to 90 days.

Referring to pages 32-40 inclusive of the transcript of proceedings from the aggravation-mitigation hearing, Tuesday, May 17, 1983, the trial Judge, in conversational language, discusses the need for a further evaluation of the defendant, saying in part:

"It's apparent to me that maybe that might be appropriate in Mr. McManus's case because unless I am misinformed as to the law, the minimum sentence I could impose would be seven years in the custody of the Department of Corrections on all six counts and make the seven year sentence on each of the six counts run concurrently with other charges, so that in effect Mr. McManus would be sentenced to the Department of Corrections for a seven year period.

On the other extreme, I guess I could theoretically impose a sentence of six times 21 years by imposing a maximum sentence and making the sentences consecutive, one after another." (Page 33)

"I think it certainly appears to me that the actions and activities of Mr. McManus in Arizona were very atypical of Mr. McManus's behavior prior to 1979." (Page 34)

"Here we have Mr. McManus engaging in conduct that is certainly different from the conduct that anybody knows about Mr. McManus before the fall of 1982." (Page 36)

"I certainly feel in view of the seriousness of the situation and the vast ranges that the Court has in front of it, anywhere from a minimum of up to six times 21, whatever that is, I haven't bothered to try and calculate it out,

the Court certainly has a wide range." (Page 37)

"but I just feel that I need more information on Mr. McManus." (Page 37)

Now, refering to page 2 of the transcript of proceedings from Judgment and Sentencing, September 2, 1983, the trial Judge's only comment about that report which he solicited, after about 80 days of observation and evaluation, it is as follows:

"And the Court received the report of Dr. Baker, had it sent to both counsel, but the Court hasn't read it other than just to see that it was a short report that pertained to Mr. McManus."

The defendant feels that such a response to this evaluation, after expressing such a strong need for it, clearly indicates an abuse of discretion.

b) A second issue in the area of trial judge's discretion deals with challenged error in the presentence report; the officer preparing the report stating that "the defendant recollected the incident of the Oregon robbery sufficiently to supply the investigating detective with the date, location and approximate amount of cash stolen."

The transcript of proceedings during the Grand Jury Indictment show the same investigating detective being questioned by the prosecutor:

Q. "Okay. Has Mr. McManus made any statement about this?"

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A. "No. He says he's going to - not going to talk to anybody until he sees a lawyer." (Page 20)

During the mitigation hearing the defendant challenged the above stated section of the presentence report stating that the only thing he discussed with detectives was the blackout experienced during the period of the offence and one experience a year earlier. This matter was taken up by the trial Judge with the probation officer who said the statement in his report was correct.

It seems possible that this now proven incorrect statement was of sufficient concern to the trial Judge that he raised it at a later time with the probation officer. In absence of the now proven falseness of that statement, the defendant holds that the trial Judge may have been influenced by the incorrect evidence thereby abusing discretion.

2. The imposition of consecutive sentences cannot be used as a reason for balancing aggravating and mitigating circumstances.

Quoting from page 23 of the transcript of proceedings, Judgment and Sentencing, September 2, 1983:

> "The only reason that I allowed the mitigating circumstances to balance out and equal the aggravating circumstances that I found, was the fact that I am imposing each of the sentences consecutive to one another."

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"If I do not impose the sentences consecutive to one another, I would find that the aggravating circumstances far outweighed the mitigating circumstances and would justify a much greater sentence than the presumptive."

The defendant argues that the intent of examining aggravating and mitigating circumstances is to determine the validity of imposing a sentence other than the presumptive - not to be used in the way that has been done by the trial Judge.

Further the defendant argues that the intent of the trial judge as expressed in the above quoted paragraphs, was to be lenient towards the defendant by imposing the sentence given instead of finding the aggravating circumstances to dominate requiring a "much greater sentence than the presumptive".

However, if by finding the aggravating circumstances dominated to the extreme and imposing the maximum sentence of 21 years (ARS 13-701 and ARS 13-604 G) because he did "not impose the sentences consecutive to one another", the trial Judge had so ruled, the sentence received would have been one-third the sentence imposed, there appears to be a very real contradiction with the expressed intent.

The defendant challenges that this decision was an abuse of discretion because the decision can be characterized as both capricious and arbitrary.

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3. The trial Judge acted incorrectly in imposing two consecutive sentences for armed robbery.

The items identified as being taken during the robbery were the wallet of Donald Salmen and the Motorhome registered to Donald Salmen. The two counts of Armed Robbery for which two consecutive sentences were imposed were for the stealing of the above noted items from two different people - Donald and Marilyn Salmen.

In State v. Boag (1969) 104 Ariz. 362, the defendant robbed a husband and wife, managers of a motel, and subsequently committed other offences. The defendant was found guilty of only one charge of armed robbery.

The defendant argues that this act was only one armed robbery and certainly could not be subject to two consecutive sentences.

4. It is a violation of law to offer, at the time of sentencing, a form of relief from sentencing to the defendant, which such suggested relief is contrary to the same law relied upon in sentencing.

At page 22 of the transcript of proceedings, Judgment and Sentencing, September 2, 1983, the following statement made by the trial Judge after sentencing can be found:

> "The sentence now, Mr. McManus, may be that the Department of Corrections will, through the treatment and help of Dr. Baker, come to the

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conclusion that you are cured and no longer a danger or threat to society, and at that time you can contact the appropriate state governmental agency, whether it be the Governor or the Department of Parole Division of the Department of Corrections and request a commutation of sentence."

The obvious implication is that the trial Judge was offering the defendant relief from an excessive sentence through the process of commutation of sentence - an apparent indication that the trial Judge believed the defendant need not be any longer detained once his status as a danger or threat to society was removed.

However, ARS 13-604 (G) states, in part, that when an accused is found guilty of a dangerous Class 2 felony he cannot be released in any way including parole, pardon, commutation of sentence, work release, etc. until two-thirds of the sentence imposed has been served.

Since that statement is part of the statute, the defendant believes that it must be held that the trial Judge was offering specific relief rather than just stating the law.

The defendant holds that this factor, of itself, requires that the total sentence be overturned.

ISSUE II

DID THE SENTENCING JUDGE COMPLY WITH APPLICABLE CASE LAW, STATUTES, AND RULES OF CRIMINAL PROCEDURE IN PRONOUNCING SENTENCE; SPECIFICALLY, IN GIVING CONSECUTIVE SENTENCES TO THE APPELLANT?

The Appellant maintains that the Court did not give adequate reasons for consecutive sentencing.

a) ARS 13-708 states that "the sentence or sentences imposed by the Court shall run concurrently unless the Court expressly directs otherwise, in which case the Court shall set forth on the record the reason for its sentence."

This was referred to in State v. McGuire, 131 Az. 93, (1982), wherein the Court stated:

> "At the presentence hearing, the trial Judge expressly stated that she had reviewed the file in the case, the presentence report and recommendations, the plea agreement, numerous letters from interested parties and the photographs of the victims. The Court went on to state that the murders were committed in an especially heinous, cruel and depraved manner, that she considered the defendant to be a dangerous and violent person and that the defendant is a grave danger to society and the sentence imposed must protect society." Sentence affirmed.

In State v. Sanchez (1981) 130 Ariz. 295, 635 P2d 1217,

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the sentence was overturned because of lack of reasons given by the Court for consecutive sentences.

In State v. Woratzeck (1981) 130 Ariz. 499, 637 P2d 301, the sentence was overturned because of lack of reasons given by the Court for consecutive sentences.

The Court stated as its reasons:

> "and Mr. McManus, if you are, and I see no reason to believe that you would have changed, if you are still the individual that for whatever reasons was able to commit the offences that took place on October 9, I cannot see any way to release you to society, the State of Arizona, the County of Mohave, or Canada, so that's why I've imposed the sentence." (Page 23, transcript of proceedings, Judgment and Sentencing.)

The Appellant maintains that this statement completely fails to meet the test of 13-708, McGuire, Sanchez, and Woratzeck (supra).

It may be argued that the Court's adoption of the aggravating circumstances as argued by the prosecutor provide sufficient enumeration to meet the test. Page 21 of the Judgment and Sentencing transcript reads:

> "The Court finds the aggravating circumstances that Miss Cromer spoke of, and I'm not going to enumerate them here, but as I was listening as she discussed them, I found that each of those aggravating circumstances did in fact exist with regard to the crime ...."

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This does not meet the requirement stated in State v. Rodriquez, 126 Az. 104:

"trial Judge stating that reasons for the sentence were set forth in the presentence report, did not substantially comply with statute requiring setting forth on the record at the time of sentencing factual findings and reasons in support of such findings before imposing sentence on defendant."

In State v. Poling, 125 Az. 9, the Court stated:

"To avoid similar appeals, it would be better practice for trial Judge to state in the more precise terms of the statute that he has found specific circumstances in aggravation or mitigation to be true and to thereafter make factual findings and reasons in support of such findings."

In State v. Mahler, 128 Az. 429:

"We must add our voice to that of the Court of Appeals in urging that the trial Judge make specific findings of the aggravating or mitigating factors which form the basis for a sentence greater or lesser than the presumptive sentence. It must also be added that the prosecutor has an obligation to see to it that the record shows compliance with ARS 13-702 (c)."

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CONCLUSION

The Appellant strongly urges this Court to review the entire record in this matter for any errors not brought to the attention of the Court by the undersigned counsel.

For all the reasons submitted herein the Appellant contends that the judgment of the trial Court should be reversed, and the case remanded to Superior Court for disposition not inconsistent with the Court's judgment.

RESPECTFULLY SUBMITTED,

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Appellant

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CERTIFICATE OF SERVICE

I certify that I caused two (2) copies of the foregoing Appellant's Opening Brief to be mailed to the Mr. William J. Schafer, III, Chief Counsel, Criminal Division, Assistant Attorney General, 1275 West Washington Street, Phoenix, Arizona 85007, and Wilfred Kenneth McManus, P. O. Box B-48371, Florence, Arizona 85232, Appellant.

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Attorney for the Appellant

SUBSCRIBED and SWORN to before me this 3rd day of January, 1984, by GORDON J. O'BRIEN.

NOTARY PUBLIC

My Commission Expires:

1/21/88

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ORIGINAL

IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

STATE OF ARIZONA, Appellee, -vs- WILFRED KENNETH McMANUS, Appellant.	)	NO. 1 CA-CR 7432 DEPARTMENT A MOHAVE COUNTY SUPERIOR COURT NO. CR-5778

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DIVISION 1
COURT OF APPEALS
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QUESTIONS PRESENTED FOR REVIEW

1. Are appellant's sentences excessive?

2. Did the trial court comply with Ariz.Rev.Stat.Ann. § 13-708 in imposing the consecutive sentences?

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STATEMENT OF THE CASE

Appellant was indicted for two counts of dangerous kidnapping (class 2), two counts of dangerous armed robbery (class 2), one count of dangerous aggravated assault (class 3), two counts of dangerous attempted first-degree murder (class 2), one count of dangerous first-degree burglary (class 2), one count of theft (class 3), and one count of theft of a credit card (class 5). (Indictment, filed Oct. 21, 1982.) Appellant pled guilty to the kidnapping, armed robbery, and attempted murder counts in return for which the state dismissed the remaining counts, agreed not to allege priors, and agreed not to present evidence in aggravation. (Stipulated Guilty Plea, filed Apr. 5, 1983.) The trial court sentenced appellant to the presumptive term of 10.5 years in prison on each count, all counts to run consecutively. (R.T. of Sept. 2, 1983, at 22.) Notice of appeal was filed September 12, 1983. This Court has jurisdiction pursuant to Ariz.Rev.Stat.Ann. §§ 12-120.21(A)(1), 13-4031, and -4033. The following factual basis appears in the record.

The whole incident began on September 13, 1982, in British Columbia when McManus presented a check which he had forged on his son's account as payment for a Chinook motor home. He drove the motor home into the United States. He stopped on September 20, 1982, at the Boldrock

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Rest Area on Interstate 5 in Oregon where he robbed Mr. and Mrs. D.J. Martinez by entering their motor home, tying them up, gagging them, and taking their money, wallets and credit cards. He used the credit cards to make various purchases in California. He then proceeded south. He arrived on October 4, 1982, at the Virgin River Recreational Area in the Arizona Strip Country.

On the very same date, Donald and Marilyn Salmen, age 62 and 56, arrived in their motor home and stopped at that rest area. On October 5, 1982, McManus met Donald and Marilyn Salmen and also another couple who were staying in the area, Ervin and Mary Light. McManus told these couples that he was a widower and he explained that his wife had died 3 weeks earlier of cancer. The couples became sympathetic because McManus seemed rather depressed about the death of his wife. (McManus's wife is actually still living.) McManus was invited to join them at their campfires and on daily hikes. They included him in all of their activities because they felt sorry for him.

On October 9, 1982, the Salmens were leaving the campground area. McManus stated he needed a fuel pump for his motor home and that he could pick the part up in Mesquite, Nevada. The Salmens agreed to give him a ride there and give him a ride back with the part. As they were

driving on Interstate 15, McManus was sitting in the passenger seat of the motor home; Mr. Salmen was driving; and Mrs. Salmen was back in the breakfast nook area of the motor home. McManus claimed he had a "charley horse" in his leg and got up and went to the rear of the motor home as if he was going to massage his leg. At this point, he grabbed Mrs. Salmen, placed a knife to her throat -- this is a knife with a 5 1/2 inch blade -- and yelled at Don Salmen to pull over and stop, which Mr. Salmen did because he feared that his wife was going to be injured. Then McManus requested the Salmens to lie face down on the floor of the motor home. He pulled pre-cut cord from his pants' pocket -- it had already been prepared for this purpose -- and he tied both of their hands and feet. He also used some tape to secure them, and he gagged them with some towels. McManus then took Mr. Salmen's wallet from Mr. Salmen's person. He went through Mrs. Salmen's purse. He also took the keys to the motor home. Then he took over driving the motor home, and he turned the vehicle completely around.

The Salmens are not exactly sure where they were going. They knew at first they were still on the interstate because of the sound of traffic and the kind of surface they were going over, but later they turned off onto a dirt or gravel road and drove for quite awhile. The

speed of the motor home was reduced because it appeared they were heading away from the main highway into a secluded area.

After they had driven for awhile, McManus stopped the vehicle. He started rummaging through the cupboards of the motor home. Mrs. Salmen asked if there was anything she could help him find because she could tell from the sounds what was going on. At this point, appellant covered the victims' heads with their sleeping bags. He struck Mrs. Salmen a severe blow to the head, and then another one. Then he started to hit Mr. Salmen and he struck him at least five times with extremely severe blows. During this time, Mrs. Salmen was begging him not to kill them, and then he struck her again. At this point, both of them did not make any further sounds or motions. After this was done, McManus started driving the vehicle again.

Mr. Salmen managed to work his hands loose and he had hidden a .22 caliber pistol away in the motor home. He had actually hollowed a part in a wooden drawer where the gun could be concealed and could not be found by anyone else. He managed to get his hands loose and untie himself and get the gun. Then he pulled it on McManus and yelled, "Pull it over to the side of the road." McManus complied. Mr. Salmen yelled, "Get out of the car," which McManus did. During this entire period of time, Mr. Salmen related

that he was fighting to obtain consciousness because he knew he would be dead if he did not. After McManus left, the Salmens locked the motor home and then drove back to the interstate and eventually drove up to a residence. They were taken to the hospital in Las Vegas where they were hospitalized for several days with severe injuries to their heads.

McManus was later found in the area by the Nevada Highway Patrol. He had in his possession Mr. Salmen's wallet and credit cards. McManus' fingerprints were found in the motor home and on various articles in the motor home, and he was identified by both victims. Also in the motor home police found the lid to a dutch oven with human blood on it. It had been dented in the area where the human blood was, so it appeared that this large, cast-iron dutch oven lid had been the instrument that was used to strike the Salmens on the head. (R.T. of Apr. 6, 1983, at 23-28; Presentence Report, filed Sept. 2, 1983, at 2-4.)

ARGUMENTS

I

APPELLANT'S SENTENCE IS NOT EXCESSIVE.

Appellant claims his sentences are excessive. The imposition of a sentence within statutory limits is entirely within the discretion of the trial court. State v. Williams, 134 Ariz. 411, 656 P.2d 1272 (Ct.App. 1982).

Any challenge thereto must be carefully scrutinized because the trial judge is in the best position to evaluate a defendant. State v. Ferreira, 128 Ariz. 530, 627 P.2d 681 (1981). Appellant's sentences cannot be disturbed unless they are clearly excessive and reveal an abuse of discretion. State v. Limpus, 128 Ariz. 371, 625 P.2d 960 (Ct.App. 1981). An abuse of discretion is characterized by arbitrariness or capriciousness, and a failure to conduct an adequate investigation into the facts relevant to sentencing. State v. Williams, supra; State v. Limpus, supra. Appellant has shown no such abuse in this case.

The trial court noted that appellant was an atypical defendant, a fact that complicated the sentencing process. (R.T. of May 18, 1983, at 11.) Appellant had led a law-abiding life when, after nearly 20 years service as a Canadian corrections official, he started writing bad checks and eventually lost his job for fraudulent use of a government credit card. (Presentence Report, supra, at 8; R.T. of May 17, 1983, at 19-24.) Thereafter, he left his wife and four children in Canada on numerous occasions, and traveled around Canada and the United States, never bothering to keep in touch with them. (R.T. of May 17, 1983, at 19.) The family fell on hard times, losing both their home and vehicle. (R.T. of May 16, 1983, at 65.) Appellant claimed to experience blackouts during these

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periods. (Id. at 13-18.) One possible explanation came from the Rule 11 doctors who noted signs of alcohol abuse. (Letter from Dr. Almer, filed Feb. 25, 1983, at 2; letter from Dr. Cleary, filed Feb. 25, 1983, at 2-3.) Dr. Cleary further opined that appellant was lying about his alleged blackouts, preferring not to remember. (Letter from Dr. Cleary, supra, at 6.) Appellant, his wife and daughter denied he is an alcoholic. (R.T. of May 16, 1983, at 32; R.T. of May 17, 1983, at 14, 26.) Appellant's behavior continued to deteriorate until it culminated in the attempted murders and other charges to which he pled guilty. Much of the state's cross-examination centered on the idea that appellant, as a former corrections official, knew just how to manipulate the system, and his claimed amnesia was one step in that process. (R.T. of May 16, 1983, at 31; R.T. of May 17, 1983, at 30.)

Believing that additional information on appellant was necessary, the trial court ordered additional medical examination pursuant to Rule 26.5, Arizona Rules of Criminal Procedure. (R.T. of May 17, 1983, at 33-39; R.T. of May 18, 1983, at 2.) In his opening brief, appellant attempts to show an abuse of discretion by saying that the trial court was unfamiliar with this additional medical evaluation prepared by Dr. Baker. His argument ignores the fact that both sides discussed the report with the trial

judge at sentencing. (R.T. of Sept. 2, 1983, at 3-6.) The report was not very favorable to appellant. It showed there was nothing organically wrong with him and Dr. Baker apparently agreed with Dr. Cleary that appellant's memory loss was selective on his part. (Id. at 6.) It is obvious from this discussion that the trial court was aware of the additional report it had ordered. No abuse of discretion has been shown.

The second argument under this heading attempting to show an abuse of discretion refers to a claimed inaccuracy in the presentence report. (Opening Brief, at 5.) The presentence report stated that appellant had never told the investigating detective that he could not remember events due to a blackout. (Presentence Report, supra, at 5, 7.) During his testimony at the presentencing hearing, appellant claimed the detective was a liar. (R.T. of May 16, 1983, at 39.) In keeping with its agreement not to present evidence, the state did not call the detective at the hearing. However, the trial court questioned the probation officer who prepared the report and he assured the trial court that he had correctly reported the detective's information. (R.T. of May 18, 1983, at 5-6.) What we have here is a dispute in the evidence for the trier of fact to resolve. Appellant was an accomplished liar. He lied to the victims, he gave a phony address to

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arresting officers, and he had, over a number of years, repeatedly lied to his wife and other people in Canada. (R.T. of May 17, 1983, at 9, 12, 20-21.) There could be no abuse of discretion in the trial court's discounting appellant's testimony.

Appellant next decries the trial court's reference to other sentencing options and possible aggravation and mitigation. (R.T. of Sept. 2, 1983, at 23.) The remarks were gratuitous; the sentencing court does not have to discuss possible aggravating/migitating circumstances in imposing the presumptive sentence. State v. Limpus, supra; State v. Winans, 124 Ariz. 502, 505, 605 P.2d 902, 905 (Ct.App. 1979). These remarks are just a restatement of the trial court's earlier statement that appellant, being an atypical defendant, presented a difficult sentencing decision. (R.T. of May 18, 1983, at 11.) Appellant argues that he would have been better off with concurrent, maximum sentences. (Opening Brief, at 7.) Nothing in the record suggests that the trial court was considering such. The probation department had recommended a mixture of maximum and consecutive sentences totaling 63 years. (Presentence Report, supra, at 17.) At any rate, the trial court settled on presumptive, consecutive sentences. These sentences are adequately supported by the record, and no remark by the trial judge about other options shows an abuse of discretion.

Next appellant claims he could not receive consecutive sentences for the two armed robberies because it was the same act perpetrated against two people. (Opening Brief, at 8.) He was charged with taking the property of both Marilyn and Donald Salmen. (Indictment, filed Dec. 21, 1982.) Appellant held a knife to Mrs. Salmen's throat, then struck each victim individually over the head several times. (R.T. of Apr. 6, 1983, at 23-28.) He took more than one item of property. (Id.) It appears that the evidence passes the identical elements test set forth in State v. Rumsey, 130 Ariz. 427, 430, 636 P.2d 1209, 1212 (1981), and other cases. Even if appellant is correct in stating that he only committed one act, since there were two victims in this case the consecutive sentences are proper. State v. Gunter, 132 Ariz. 64, 643 P.2d 1034 (Ct.App. 1982).

Lastly, appellant contends that the trial court was offering him relief from an unjust sentence by intimating that he may some day be able to convince a parole board or a governor that he has ceased to be a threat to society. (R.T. of Sept. 2, 1983, at 22.) This reference to appellant's future rights under our system is not an admission that the sentence imposed is excessive. Taken in context, the statement is more an admonition to appellant to use his time in prison to get help from Dr. Baker and

try to straighten himself out. (Id. at 22.) It was followed by the statement that appellant stood before the court as an extremely dangerous person with an undefined problem, from whom society could only be protected by a long period of confinement. (Id. at 23.) Appellee submits that none of the claims raised in appellant's first argument shows an abuse of the trial court's sentencing discretion.

II

THE TRIAL JUDGE DID NOT VIOLATE THE REQUIREMENTS OF ARIZ.REV.STAT.ANN. § 13-708 WHEN HE IMPOSED APPELLANT'S CONSECUTIVE SENTENCES.

Appellant claims the trial court did not state on the record the reasons why the sentences are to run consecutively as required by Ariz.Rev.Stat.Ann. § 13-708. The trial judge stated that the aggravating circumstances argued by the prosecutor did, indeed, exist in this case. (R.T. of Sept. 2, 1983, at 21.) That is, there was serious physical injury, use of a deadly weapon or dangerous instrument, expectation of pecuniary gain, and the crimes were done in a heinous, cruel, or depraved manner. (Id. at 8-10.) In imposing sentence the trial judge called appellant "a danger or a threat to society." (Id. at 22.) The trial judge further elaborated:

> But Mr. McManus, the way you are now, even though you're a nice guy right now, there's something either consciously or

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> unconsciously wrong with you that causes you to commit these completely senseless acts of violence that are very untypical of your prior life; and Mr. McManus, if you are, and I see no reason to believe that you would have changed, if you are still the individual that for whatever reason was able to commit the offenses that took place on October 9, I cannot see any way to release you to society, the State of Arizona, the County of Mohave or Canada, so that's why I've imposed the sentence.

(Id. at 22-23.) (Emphasis added.)

Appellee submits that the foregoing complies with Ariz.Rev.Stat.Ann. § 13-708. Appellant is confusing the requirements of Ariz.Rev.Stat.Ann. § 13-702 with those of Ariz.Rev.Stat.Ann. § 13-708. It is only when the sentence deviates from the presumptive sentence that specific findings of aggravating (or mitigating) circumstances must be made. State v. Limpus, 128 Ariz. 371, 625 P.2d 960 (Ct.App. 1981); State v. Winans, 124 Ariz. 502, 605 P.2d 904 (Ct.App. 1979). The sentences imposed here are presumptive sentences, thus it is incorrect to take the case law interpreting Ariz.Rev.Stat.Ann. § 13-702 and apply it to this case.

Under cases construing Ariz.Rev.Stat.Ann. § 13-708 statements such as that by Judge Langford in the instant case, that the defendant's senseless acts of violence make him a dangerous threat to society, have been found to be in

compliance with the statute. State v. Girdler, No. 5621 (Ariz.Sup.Ct., Dec. 21, 1983), slip op. at 12-15; State v. McGuire, 131 Ariz. 93, 95, 638 P.2d 1339, 1341 (1981); State v. Gordon, 125 Ariz. 425, 428, 610 P.2d 59, 62 (1980); State v. Williams, 134 Ariz. 411, 413, 656 P.2d 1272, 1274 (Ct.App. 1982); State v. Frederick, 129 Ariz. 269, 272, 630 P.2d 565, 568 (Ct.App. 1981). As in the foregoing cases, the trial judge had read the presentence report and other documents. (R.T. of Mar. 16, 1983, at 3; R.T. of Sept. 2, 1983, at 2.) He heard appellant's evidence offered in mitigation. (R.T. of May 16, 1983; R.T. of May 17, 1983.) He even ordered additional medical evaluation of appellant. (R.T. of May 18, 1983.) Yet he remained convinced that the facts of this case, in which the lives of two elderly people were changed forever (R.T. of May 18, 1983, at 6-7), after they were tricked, bound and gagged, driven around in their motor home for hours, then nearly slaughtered by a man they had befriended -- these facts were so seriously aggravated that nothing other than a very lengthy term of incarceration was appropriate. (R.T. of Sept. 2, 1983, at 23.) Under the cases previously cited the statement of reasons for the consecutive sentences fully complied with Ariz.Rev.Stat.Ann. § 13-708.

CONCLUSION

Appellant has failed to show an abuse of discretion by any selective reading of the trial court's comments. The record as a whole supports the sentences imposed. His double punishment claim must also fail. Likewise, the record shows compliance with Ariz.Rev.Stat.Ann. § 13-708. Appellant has requested a reversal of the judgment. (Opening Brief, at 13.) His issues go only to the sentencing. Should he prevail, he would only be entitled to a remand for resentencing. However, appellee submits that such is not necessary because the sentences are not excessive or illegally imposed. Appellant therefore requests that the judgments of guilt and sentences be affirmed.

Respectfully submitted,

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A F F I D A V I T

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

DIANE M. RAMSEY, being first duly sworn upon oath, deposes and says:

That she served the attorney for the appellant in the foregoing case by forwarding two (2) copies of APPELLEE'S ANSWERING BRIEF, in a sealed envelope, first class postage prepaid, and deposited same in the United States mail, addressed to:

GORDON J. O'BRIEN
2164 McCulloch Blvd.
Lake Havasu City, Arizona 86403
Attorney for APPELLANT

this 17th day of January 1984.

Diane M. Ramsey
DIANE M. RAMSEY

SUBSCRIBED AND SWORN to before me this 17th day of January 1984.

Chris L. Piske
CHRIS PISKE
NOTARY PUBLIC

My Commission Expires:
October 28, 1985

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