

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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THE STATE OF ARIZONA,  
*Respondent,*

*v.*

RAY HURST,  
*Petitioner.*

No. 2 CA-CR 2015-0440-PR  
Filed March 31, 2016

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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NOT FOR PUBLICATION  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.*

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Petition for Review from the Superior Court in Pinal County  
No. S1100CR201401966  
The Honorable Dwight P. Callahan, Judge Pro Tempore

**REVIEW GRANTED; RELIEF DENIED**

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COUNSEL

M. Lando Voyles, Pinal County Attorney  
By Adena J. Astrowsky, Deputy County Attorney, Florence  
*Counsel for Respondent*

Rosemary Gordon Pánuco, Tucson  
*Counsel for Petitioner*

STATE v. HURST  
Decision of the Court

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**MEMORANDUM DECISION**

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

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ECKERSTROM, Chief Judge:

¶1 Petitioner Ray Hurst seeks review of the trial court’s order denying his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. “We will not disturb a trial court’s ruling on a petition for post-conviction relief absent a clear abuse of discretion.” *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Hurst has not sustained his burden of establishing such abuse here.

¶2 Pursuant to a plea agreement, Hurst was convicted of attempted possession of a narcotic drug for sale as part of a global plea agreement that included agreements in two other causes. The trial court imposed, as stipulated in Hurst’s plea agreement, an aggravated, four-year term of imprisonment for his attempted possession conviction. He thereafter initiated a proceeding for post-conviction relief, arguing in his petition that newly discovered evidence relating to his health would have changed his sentence and that his Eighth Amendment rights had been violated based on his treatment by the Arizona Department of Corrections (ADOC). The trial court summarily denied relief.

¶3 On review, Hurst first contends the trial court “missed” his Eighth Amendment claim and again asserts his rights were violated. But the court stated Hurst’s “claim that the prohibition against cruel and unusual punishments is appropriate grounds for relief under Rule 32 is denied.” The court’s evaluation of the claim is correct because, other than for an exception not applicable here, Rule 32 is limited to claims concerning the propriety of a defendant’s conviction or sentence and does not encompass claims of constitutional violations occurring during a defendant’s incarceration. *See* Ariz. R. Crim. P. 32.1; *cf. State v. Davis*, 148 Ariz.

STATE v. HURST  
Decision of the Court

62, 64, 712 P.2d 975, 977 (App. 1985) (challenges to calculation credit “are not cognizable under Rule 32 unless they result in the defendant remaining in custody when he should otherwise be free”).

¶4 Hurst next repeats his claim of newly discovered evidence and argues the trial court erred in denying him an evidentiary hearing at which “to present the new medical evidence.” He contends his heart condition, which was known at the time of sentencing, “had deteriorated more than anticipated at the time of the plea and sentence.” In support of his claim, as he did below, he relies on *State v. Bilke*, in which our supreme court determined that a defendant’s post-traumatic stress disorder, which existed at the time of trial, but was not diagnosed until later, constituted newly discovered evidence under Rule 32.1(e). 162 Ariz. 51, 781 P.2d 28 (1989).

¶5 Unlike the situation in *Bilke*, however, in this case Hurst, as well as the court, was aware of his heart condition at the time of sentencing. That the condition worsened, the court here stated, was expected and taken into account in mitigation. Hurst therefore has not established that the evidence relating to the worsening of his condition, even accepting *arguendo* that it meets the remainder of Rule 32.1(e)’s requirements, “probably would have changed the . . . sentence.” This is particularly so in view of the fact that the sentence imposed was stipulated to in the plea agreement as part of a global deal encompassing multiple causes.

¶6 For these reasons, although we grant the petition for review, we deny relief.