

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

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THE STATE OF ARIZONA,  
*Respondent,*

*v.*

JAMES RAY HACKETT SR.,  
*Petitioner.*

No. 2 CA-CR 2015-0094-PR  
Filed June 4, 2015

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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NOT FOR PUBLICATION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 Pima County

No. CR20010089

The Honorable Richard E. Gordon, Judge

**REVIEW GRANTED; RELIEF DENIED**

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COUNSEL

Mark Brnovich, Arizona Attorney General  
By Paul E. Carter, Assistant Attorney General and  
Daniel P. Schaack, Assistant Attorney General, Tucson  
*Counsel for Respondent*

Isabel G. Garcia, Pima County Legal Defender  
By Joy Athena, Deputy Legal Defender, Tucson  
*Counsel for Petitioner*

STATE v. HACKETT  
Decision of the Court

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**MEMORANDUM DECISION**

Judge Vásquez authored the decision of the Court, in which Judge Howard and Judge Brammer<sup>1</sup> concurred.

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V Á S Q U E Z, Judge:

¶1 James Hackett 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 that ruling unless the court clearly abused its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Hackett has not met his burden of demonstrating such abuse here.

¶2 After a jury trial, Hackett was convicted of two counts each of aggravated assault with a deadly weapon and assault, and one count of first-degree burglary. The trial court sentenced him to time served for the assault convictions and imposed fifteen-year prison terms for each conviction of aggravated assault and first-degree burglary. The court ordered that Hackett serve consecutive prison terms for the aggravated assault convictions, but that he serve the term imposed for burglary concurrent to both aggravated assault terms. We affirmed Hackett’s convictions and sentences on appeal. *State v. Hackett*, No. 2 CA-CR 2002-0199 (memorandum decision filed Oct. 28, 2003).

¶3 In 2014, Hackett filed a notice of and petition for post-conviction relief claiming pursuant to Rule 32.1(d) that he was being held past the expiration of his sentence. He argued that, because the trial court had made the burglary sentence concurrent to both sentences imposed for his aggravated assault convictions, all three

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<sup>1</sup>The Hon. J. William Brammer, Jr., a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and the supreme court.

STATE v. HACKETT  
Decision of the Court

sentences effectively were to be served concurrently and he thus was entitled to release.

¶4 The trial court summarily denied relief. It concluded “there is no sensible way” the burglary sentence would be served concurrent with both aggravated assault sentences. Thus, the court concluded, the sentence was ambiguous and it should ascertain the sentencing judge’s intent based on “the entire record.” The court noted that the sentence tracked the state’s recommendation of consecutive terms, and the signed sentencing minute entry expressly stated that the sentence for the second aggravated assault conviction “is to date from the completion of the sentence imposed” for the first conviction. This petition for review followed.

¶5 On review, Hackett repeats his claim that his sentences “must be served concurrently” because both aggravated assault sentences were ordered to be served concurrently to his sentence for burglary. Hackett does not argue we must disregard the sentencing court’s order that his prison terms for aggravated assault be served consecutively in favor of concurrent sentences. Instead, as he did below, he contends the aggregate structure of his sentences must be viewed “as a ‘poison-pill’ sentence, which is not unlawful.” He suggests the sentencing judge adopted this structure to discourage an appeal, explaining that had he successfully sought relief from his burglary conviction, he would then have to serve a thirty-year aggregate sentence on the remaining aggravated assault convictions.

¶6 Hackett’s view of his sentences is implausible at best. A “poison-pill” sentencing structure like the one Hackett describes is unlawful. Even if our sentencing statutes theoretically would allow such a sentence, due process prohibits the punishment of a defendant for asserting his or her right to an appeal. *State v. Macumber*, 119 Ariz. 516, 522, 582 P.2d 162, 168 (1978). A sentencing scheme that would, by design, increase a defendant’s incarceration if he or she succeeded on appeal plainly would run afoul of that rule. Hackett has identified no authority describing such a sentencing structure, much less approving of it. We must presume the sentencing judge knew and followed the law. *See State v. Ramirez*, 178 Ariz. 116, 128, 871 P.2d 237, 249 (1994). And nothing in the

STATE v. HACKETT  
Decision of the Court

record even tangentially suggests the judge intended to impose an illegal sentence designed to discourage Hackett from appealing.

¶7 Instead, the proper interpretation of Hackett’s sentences is the one described by the state—that the burglary sentence was made concurrent to both aggravated assault sentences to ensure that Hackett would not serve a thirty-year aggregate sentence if one of his aggravated assault convictions were vacated on review. As the state correctly notes, a sentence is presumed to be consecutive unless the sentencing court expressly states otherwise. A.R.S. § 13-711(A).<sup>2</sup> And, as they discussed at sentencing, the judge and state believed the sentences for aggravated assault might have to be served concurrently to the sentence for burglary to comply with A.R.S. § 13-116.<sup>3</sup> But Hackett cites no authority, and we find none, suggesting the terms imposed for aggravated assault would have to be concurrent with each other even if § 13-116 compelled that the burglary term be concurrent with the terms for aggravated assault. *Cf. State v. White*, 160 Ariz. 377, 379-81, 773 P.2d 482, 484-86 (App. 1989) (consecutive sentences upheld when single criminal act harmed multiple victims).

¶8 The sentencing minute entry further supports our determination the sentencing judge intended for Hackett’s prison terms for aggravated assault to be served consecutively. That minute entry states Hackett’s prison term for the second aggravated assault count “is to date from completion of sentence imposed in” the first aggravated assault count. We disagree with Hackett that this portion of the sentencing minute entry conflicts with the oral pronouncement of sentence. The judge’s oral pronouncement expressly makes the prison terms for aggravated assault consecutive. To adopt Hackett’s argument, we would either have to

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<sup>2</sup>We refer to the current version of this statute, formerly numbered as § 13-708. 2008 Ariz. Sess. Laws, ch. 301, § 27; 2007 Ariz. Sess. Laws, ch. 20, § 1.

<sup>3</sup>Section 13-116 prohibits consecutive sentences for a single act or omission, even if it is otherwise “made punishable in different ways by different sections of the laws.”

STATE v. HACKETT  
Decision of the Court

ignore that portion of the judge's order or assume the judge sought to impose an illegal sentence. We are provided no basis to do so.<sup>4</sup>

¶9 Finally, because Hackett's sentences were imposed properly, the state had no reason to challenge them. We therefore need not address Hackett's arguments that he is entitled to relief because it failed to do so. Nor need we address his claim that the Arizona Department of Corrections lacked authority to "alter" his sentence.

¶10 Although we grant review, we deny relief.

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<sup>4</sup>We recognize the judge's inclusion of credit for time served for each prison term is inconsistent with the imposition of consecutive terms. This apparent oversight, standing alone, is an insufficient reason to disregard the judge's otherwise unambiguous imposition of consecutive sentences. *See Ramirez*, 178 Ariz. at 128, 871 P.2d at 249 (we presume trial court knows and follows law).