

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

APR 10 2013

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2012-0512-PR
)	DEPARTMENT A
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
CARY D. RININGER,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR200900728

Honorable Wallace R. Hoggatt, Judge

REVIEW GRANTED; RELIEF DENIED

Edward G. Rheinheimer, Cochise County Attorney
By Roger H. Contreras

Bisbee
Attorneys for Respondent

Cary D. Rininger

Tucson
In Propria Persona

MILLER, Judge.

¶1 Cary Rininger petitions this court for review of the trial court’s order summarily dismissing his of-right petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that ruling unless the court clearly has abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Rininger has not met his burden of establishing such abuse here.

¶2 Rininger pled guilty to theft of a means of transportation and was sentenced to a 3.5-year prison term, to be served consecutively to a prison term imposed in a case originating in Pima County. Rininger filed a notice and petition for post-conviction relief, arguing the trial court erred in not ordering his sentence to be concurrent with the sentence imposed in Pima County because Rininger suffered from serious health problems and was not receiving adequate treatment while in the custody of the Arizona Department of Corrections (ADOC). Pursuant to Rule 32.1(e), he argued ADOC’s failure to “provide the *necessary* medical treatment” for those conditions, the discovery of a mass in his right testicle, and the fact that his existing medical conditions were “getting worse” constituted newly discovered material facts relevant to his sentence.¹ The trial court summarily denied relief. It concluded that the “fact that [Rininger]’s condition [had] worsened . . . is not a newly discovered fact” and that the sentence it had imposed was reasonable in light of the circumstances.

¹Rininger obtained post-conviction relief in Pima County based on similar arguments. The superior court’s ruling there is not relevant to our evaluation of the trial court’s ruling here.

¶3 On review, Rininger repeats his claim that ADOC’s purported failure to treat his health conditions properly, causing his conditions to worsen, constitutes a newly discovered material fact relevant to his sentence. A defendant presents a colorable claim of newly discovered evidence pursuant to Rule 32.1(e) if:

(1) the evidence must appear on its face to have existed at the time of trial but be discovered after trial; (2) the motion must allege facts from which the court could conclude the defendant was diligent in discovering the facts and bringing them to the court’s attention; (3) the evidence must not simply be cumulative or impeaching; (4) the evidence must be relevant to the case; (5) the evidence must be such that it would likely have altered the verdict, finding, or sentence if known at the time of trial.

State v. Bilke, 162 Ariz. 51, 52-53, 781 P.2d 28, 29-30 (1989). Newly diagnosed medical conditions that existed at the time of trial can constitute newly discovered evidence. *See id.* at 53, 781 P.2d at 30.

¶4 Rininger has not established that the alleged facts constitute newly discovered evidence. The trial court clearly stated in its ruling that, in imposing Rininger’s sentence, it had considered the level of care ADOC would likely provide for his serious conditions. Thus, the fact that his health care purportedly has been lacking cannot be considered “newly discovered” pursuant to Rule 32.1(e) because it was not discovered after sentencing. *See Bilke*, 162 Ariz. at 52-53, 781 P.2d at 29-30. Nor can the fact that Rininger’s health problems have continued to worsen be considered a newly discovered material fact because that fact plainly did not exist at the time of sentencing. *See id.* Finally, Rininger has identified no evidence in the record that what he describes

as a “testicular illness” existed at the time of sentencing, much less that it would have changed his sentence had the court been aware of it. *See id.*

¶5 For the reasons stated, the trial court did not abuse its discretion in summarily dismissing Rininger’s petition for post-conviction relief. *See Ariz. R. Crim. P. 32.6(c)*. Review is granted, but relief is denied.

/s/ Michael Miller

MICHAEL MILLER, Judge

CONCURRING:

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

/s/ Peter J. Eckerstrom

PETER J. ECKERSTROM, Presiding Judge