

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

MAY 30 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2012-0029-PR
)	DEPARTMENT B
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
LYNDALL DWAIN THOMPSON,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20072584

Honorable Howard Fell, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
Attorneys for Respondent

Lyndall Thompson

Florence
In Propria Persona

ESPINOSA, Judge.

¶1 A jury found petitioner Lyndall Thompson guilty of second-degree murder for killing his brother. He appealed the conviction and the presumptive, sixteen-year prison term. This court affirmed after considering the brief filed by appointed counsel

pursuant to *Anders v. California*, 386 U.S. 738 (1967), and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999), and Thompson's two pro se supplemental briefs. *State v. Thompson*, No. 2 CA-CR 2008-0236 (memorandum decision filed Sept. 24, 2009). Thompson then sought post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., raising various claims, including claims of ineffective assistance of counsel, which the trial court rejected without an evidentiary hearing. This court denied relief on review. *State v. Thompson*, No. 2 CA-CR 2010-0274-PR (memorandum decision filed Feb. 8, 2011). Thompson filed a combined second notice and petition for post-conviction relief, and again the trial court denied relief. This petition for review followed.

¶2 Couched as newly discovered evidence pursuant to Rule 32.1(e), Thompson's primary claim in this proceeding was that the jury had received an incorrect or inaccurate version of the transcription of his statement to law enforcement officers, based on a transcript he asserted the state had possessed but had failed to disclose to him before trial, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and his due process rights. He maintained that portions of those transcripts had been redacted from the transcript given to the jury and that the state had, in bad faith and with deception, deprived him of evidence he could have used to impeach the state's witnesses. The state explained in its response to the notice/petition, and the court found in its minute entry denying the request for post-conviction relief, there was only one recording of Thompson's statements to law enforcement officers; there were, however, two transcriptions, one prepared by the Pima County Sheriff's office, which seems to have become the transcript used by the Pima County Attorney's office (the "state's

transcript”), and the other by the Pima County Public Defender’s office, which differed in nonmaterial ways. Thompson also complained the state had deprived him of portions of what he refers to as the “original statement,” or Exhibit A to his notice/petition, by redacting it. The state submitted with its response to the petition exhibits establishing that portions of the transcript had been redacted at Thompson’s insistence, deleting information provided by Thompson that he apparently had held undocumented immigrants on his property at gunpoint.

¶3 As the trial court noted in denying relief, only the audio recording of the statements was played for the jury; the redacted version of the state’s transcript was used during testimony but was not admitted into evidence. And, as the court also pointed out, the transcript Thompson claimed the state had failed to disclose to him was actually the transcript prepared by the Public Defender’s office, exhibit A to Thompson’s petition. Additionally, with respect to the redaction of portions of Thompson’s recorded statements, the prosecutor explained to the court during a bench conference on the second day of trial that Thompson did not want the jury to hear anything about his having held individuals suspected of being undocumented immigrants at gunpoint on his property. Clearly, then, Thompson knew portions of the recorded statement had been redacted because he had insisted on their redaction.

¶4 Detective Theresa Hess testified at trial that she had interviewed Thompson, explaining there had been a period of about five minutes during which the recorder had been stopped, apparently at Thompson’s request, but the discussion had nothing to do with the case. Detective Joseph Copeland also participated in the interview

of Thompson and testified at trial about the interview process, including the transcription of the recorded interview from a compact disc. He testified he had reviewed the state's transcript and concluded the transcription was accurate, noting portions of the recording had been inaudible to the transcriber but understandable to him. The discussion between the trial court and the attorneys establishes the state's transcript was marked as an exhibit but was not admitted into evidence. The version of the transcript prepared by the Public Defender's office, also was marked as an exhibit but not admitted.

¶5 It is for the trial court to determine in the exercise of its discretion whether post-conviction relief is warranted, and, unless it abuses that discretion, we will not disturb its ruling. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). Thompson has failed to establish the court abused its discretion when it summarily dismissed his notice/petition. Thompson contends, for example, the court erred and violated his constitutional rights when it permitted the state to file an untimely response to the notice/petition. The court addressed this very issue, Thompson having raised it in his reply to the state's response to the petition. The court found the petition, although prepared in July 2011, had been filed on October 27, 2011, rendering the state's response, filed on November 28, 2011, thirty-two days later, timely pursuant to Rule 32.6(a), which permits the state to file its response within forty-five days of the filing of the petition. We see no error and no abuse of discretion.

¶6 In all other respects, in its well-reasoned minute entry the trial court clearly identified and correctly resolved the claims Thompson had raised. Because Thompson

has not persuaded us the court abused its discretion in any manner, we adopt that ruling.

See State v. Whipple, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993).

¶7 The petition for review is granted, but the request for relief is denied.

/s/ Philip G. Espinosa

PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Garye L. Vásquez

GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly

VIRGINIA C. KELLY, Judge