

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

FEB -7 2013

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2012-0454-PR
)	DEPARTMENT B
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
ODIS AMOS SCHLOSSER,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR063443

Honorable Michael O. Miller, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
Attorneys for Respondent

Odis Schlosser

Florence
In Propria Persona

K E L L Y, Judge.

¶1 Petitioner Odis Schlosser 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). Schlosser has not sustained his burden of establishing such abuse here.

¶2 After a jury trial in 1999, Schlosser was convicted of first-degree murder. The trial court sentenced him to life in prison without the possibility of parole. This court affirmed his conviction and sentence on appeal. *State v. Schlosser*, No. 2 CA-CR 99-0322 (memorandum decision filed Nov. 8, 2000). In February 2012, Schlosser initiated a proceeding for post-conviction relief, arguing in his petition (1) there had been a significant change in the law regarding premeditation which entitled him to relief, (2) counsel had rendered ineffective assistance, and (3) the trial court had erred in denying his motion for mistrial based on a juror having seen him in shackles.¹ The trial court summarily dismissed Schlosser’s petition.

¶3 On review, Schlosser essentially repeats the arguments made below and argues the trial court abused its discretion in dismissing his petition. We disagree. Because Schlosser did not timely file a notice of post-conviction relief, he could “only raise claims pursuant to Rule 32.1(d), (e), (f), (g) or (h).” Ariz. R. Crim. P. 32.4. In his petition, Schlosser asserted that his claims of ineffective assistance of counsel and error in the denial of his mistrial motion, although based on Rule 32.1(a) and not cognizable in an untimely petition, could still be raised under Rule 32.1(f) because he was unaware he could seek post-conviction relief. But the court pointed out in its ruling that Schlosser had received and signed a notice after his conviction that stated he had a right to seek post-conviction relief and provided information on when and how to file a notice for such

¹Schlosser initially filed a pro se “petition for writ of state habeas corpus.” His petition, however, relied on Rule 32, and the trial court properly treated the petition as one for post-conviction relief under that rule and appointed counsel who ultimately filed the petition at issue here. *See* Ariz. R. Crim. P. 32.3.

relief. We therefore cannot say the trial court abused its discretion in denying Schlosser relief on these two claims. *See State v. Oakley*, 180 Ariz. 34, 36, 881 P.2d 366, 368 (App. 1994) (appellate court “will affirm the trial court when it reaches the correct result even though it does so for the wrong reasons”).

¶4 Schlosser’s claim of a significant change in the law of premeditation arises under Rule 32.1(g), and therefore could be raised in an untimely petition. *See Ariz. R. Crim. P. 32.4*. But we agree with the trial court’s conclusion that even if *State v. Thompson*, 204 Ariz. 471, 65 P.3d 420 (2003), were deemed a significant change in the law that was retroactively applicable,² Schlosser has not established that the premeditation jury instruction mandated by *Thompson* “would probably overturn [his] conviction.” Ariz. R. Crim. P. 32.1(g). The court thoroughly and correctly resolved Schlosser’s claim on this point. We see no reason to repeat that portion of its ruling here and therefore adopt it. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993). Therefore, although we grant the petition for review, relief is denied.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

²Notably, in *Thompson* the court expressly stated that the jury instruction announced therein should be given by trial judges in “future cases.” 204 Ariz. 471, ¶ 32, 65 P. 3d at 428. It also concluded, as the trial court did here, that the flawed instruction in that case did not affect the jury’s verdict. *Id.* ¶ 34.