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JUN -1 2012
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

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| THE STATE OF ARIZONA,<br><br>Respondent,<br><br>v.<br><br>PHILLIP WAYNE JORDAN,<br><br>Petitioner. | 2 CA-CR 2012-0134-PR<br>DEPARTMENT A<br><br>MEMORANDUM DECISION<br>Not for Publication<br>Rule 111, Rules of<br>the Supreme Court |

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF MARICOPA COUNTY

Cause No. CR2007006437001DT

Honorable Robert L. Gottsfield, Judge

REVIEW GRANTED; RELIEF DENIED

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William G. Montgomery, Maricopa County Attorney
By Diane Meloche — Phoenix
Attorneys for Respondent

Phillip W. Jordan — Winslow
In Propria Persona

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H O W A R D, Chief Judge.

**¶1** Petitioner Phillip Jordan seeks review of the trial court's order summarily dismissing 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 has abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

**¶2** Jordan was found guilty after a jury trial of possession or use of methamphetamine, a dangerous drug, and was sentenced to a mitigated six-year prison term. His conviction and sentence were affirmed on appeal. *State v. Jordan*, No. 1 CA-CR 08-0058 (memorandum decision filed Mar. 11, 2010). Jordan filed a notice of post-conviction relief, and appointed counsel filed a notice stating he was "unable to raise any viable issues under Rule 32."

**¶3** Jordan filed a pro se petition for post-conviction relief arguing that his conviction was a result of perjured testimony; that evidence had been tampered with and the prosecutor had committed misconduct; and that his trial counsel had been ineffective because he did not communicate with him adequately prior to trial, file a motion to suppress as Jordan had requested, conduct an adequate investigation, raise certain objections or motions during trial, or accept the trial court's offer to grant a mistrial when a police officer mentioned excluded evidence. The trial court permitted Jordan to file a supplemental petition, in which he additionally argued his appellate counsel had been ineffective in failing to raise claims based on purported perjury, evidence tampering, and prosecutorial misconduct, and in informing Jordan such claims had to be raised in a post-conviction relief proceeding. The court summarily dismissed Jordan's petition, concluding his claims of ineffective assistance of trial and appellate counsel were not colorable and his remaining claims were precluded because they were not raised properly on appeal.

**¶4** On review, Jordan reurges his claims but does not identify any error in the trial court's summary dismissal of his petition. Regarding Jordan's claims of perjury, evidence tampering, and prosecutorial misconduct, we agree with the court that these claims are precluded pursuant to Rule 32.2(a)(3) because they could have been raised on appeal but were not.[1] And the court thoroughly reviewed and correctly rejected Jordan's claim of ineffective assistance of trial counsel in a manner that will allow any future court to understand its resolution. We therefore approve and adopt its ruling as to that claim and see no reason to restate it here. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993).

**¶5** Regarding Jordan's claim that his appellate counsel had been ineffective, the trial court noted the state had addressed that claim thoroughly in its response and determined, "[f]or reasons stated by the state, . . . [Jordan] has failed to demonstrate a reasonable probability that but for appellate counsel's alleged deficient performance the outcome of the appeal would have been different" and, in any event, the failure to raise those claims was "by no means an inadequate performance by counsel." To state a

[1]Jordan attempted to raise these claims in a pro se appellate brief, despite having been represented by counsel on appeal, but his request to file that brief was denied. *See Martinez v. Court of Appeal of Cal.*, 528 U.S. 152, 163 (2000) (no federal constitutional right to proceed without counsel on direct appeal); *State v. Cornell*, 179 Ariz. 314, 325, 878 P.2d 1352, 1363 (1994) (no constitutional right to hybrid representation). To the extent Jordan asserts these claims therefore are not precluded because he had attempted to raise them, he does not adequately develop an argument that they are of sufficient constitutional magnitude that he is not bound by his counsel's decision. *See Swoopes*, 216 Ariz. 390, ¶¶ 26-39, 166 P.3d at 953-57 (claims of sufficient constitutional magnitude cannot be waived absent knowing, voluntary, and intelligent personal waiver). In any event, as we explain below, the claims are meritless.

colorable claim of ineffective assistance of appellate counsel, Jordan must demonstrate that his counsel's representation fell below prevailing professional norms and "must offer evidence of a reasonable probability that but for counsel's unprofessional errors, the outcome of the appeal would have been different." *State v. Herrera*, 183 Ariz. 642, 647, 905 P.2d 1377, 1382 (App. 1995). We agree with the court that Jordan has not met that burden here.

**¶6** Jordan's claim of perjured testimony rests entirely on discrepancies between a police officer's testimony and information contained in various police reports. To establish a due process violation based on perjured testimony, a defendant must prove that the prosecution knew or should have known that the testimony actually was false. *Hayes v. Ayers*, 632 F.3d 500, 520 (9th Cir. 2011); *see also United States v. Agurs*, 427 U.S. 97, 103 (1976) (conviction obtained by knowing use of perjured testimony requires reversal). But inconsistencies in testimony by government witnesses do not establish knowing use of false testimony. *United States v. Sherlock*, 962 F.2d 1349, 1364 (9th Cir. 1989); *see also United States v. Payne*, 940 F.2d 286, 291 (8th Cir. 1991) (perjury not established by fact witness's "testimony is challenged by another witness or is inconsistent with prior statements"). Jordan has identified nothing in the record to support a claim that the state knowingly induced or encouraged any witness to testify to anything but the truth, and "we do not presume that the prosecutor used false testimony." *Sherlock*, 962 F.2d at 1364. Thus, because this claim is without merit, Jordan cannot establish his appellate counsel was ineffective in failing to raise it.

**¶7** We also find no reasoned basis for appellate counsel to have raised a claim based on purported tampering with the evidence. A police officer testified based on his report that the methamphetamine taken from Jordan, including its packaging, weighed an estimated one milligram. In contrast, a forensic scientist testified the methamphetamine weighed 820 milligrams absent its packaging. Jordan asserts this shows the evidence had been "altered."[2] Jordan's argument is essentially that there was inadequate foundation for the evidence—that there was insufficient evidence for the jury to conclude the methamphetamine tested by the forensic scientist and presented at trial was the same methamphetamine removed from his person. *See* Ariz. R. Evid. 901(a) ("The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.").[3] But, although Jordan complained below that the chain of custody was inadequate, he identified nothing in the record supporting that claim and did not adequately develop that argument either below or in his petition for review. And the weight discrepancy would not render the evidence inadmissible; based on the chain of custody, a jury readily could conclude that the weight discrepancy was the result of error and that the methamphetamine removed from Jordan's pocket was the same

[2]Jordan asserts in his petition for review that the state conceded the evidence had been tampered with. Although the state acknowledged that there was an apparent discrepancy between the weight obtained by the officer and that obtained by the forensic scientist, it did not concede the evidence actually had changed.

[3]Although the current versions of the Rules of Evidence have undergone stylistic changes, we quote the version of the rule in effect at the time of Jordan's trial. *See* Ariz. R. Evid. 901 2012 cmt.

methamphetamine tested by the forensic scientist and presented at trial. *See* Ariz. R. Evid. 901(a); *State v. Lavers*, 168 Ariz. 376, 386, 814 P.3d 333, 343 (1991) ("The judge does not determine whether the evidence is authentic, but only whether evidence exists from which the jury could reasonably conclude that it is authentic.").

**¶8** Jordan's final claim of ineffective assistance of appellate counsel rests on his contention that appellate counsel should have raised a claim of prosecutorial misconduct. Jordan's claims of misconduct are premised on arguments we already have rejected, and Jordan therefore has identified no meritorious claim that should have been raised on appeal.

**¶9** For the reasons stated, although review is granted, relief is denied.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge