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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. ALBERT KARL HEITZMANN, Petitioner.	2 CA-CR 2012-0147-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF MARICOPA COUNTY

Cause No. CR2007127543001DT

Honorable Rosa Mroz, Judge

REVIEW GRANTED; RELIEF DENIED

William G. Montgomery, Maricopa County Attorney
By Linda Van Brakel — Phoenix
Attorneys for Respondent

Stephen M. Johnson — Phoenix
Attorney for Petitioner

E S P I N O S A, Judge.

¶1 Petitioner Albert Heitzmann seeks review of the trial court's summary dismissal of his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We grant review, but deny relief.

¶2 After a jury trial, Heitzmann was convicted of perjury, attempted tampering with a witness, and two counts of misconduct involving weapons. The trial court sentenced him to concurrent, presumptive, one-year terms of imprisonment on the two counts of weapons misconduct and a consecutive, presumptive, 2.5-year term on the perjury count. The court suspended the sentence for attempted witness tampering and imposed a two-year term of probation, to begin upon Heitzmann's release.

¶3 On appeal, counsel filed a brief in accordance with *Anders v. California*, 386 U.S. 738 (1967), asking us to search the record for fundamental error. *See State v. Heitzmann*, No. 1 CA-CR 08-0228, ¶ 1 (memorandum decision filed Oct. 27, 2009). After requesting supplemental briefing, another department of this court found the evidence insufficient to support Heitzmann's convictions for weapons misconduct and reversed those convictions, but affirmed his convictions and sentences for perjury and witness tampering. *Id.* ¶¶ 1, 18.

¶4 In May 2010, Heitzmann filed a timely, pro se notice of post-conviction relief. Appointed counsel filed a petition for post-conviction relief alleging (1) the trial court erred in ruling, preliminarily, that Heitzmann's allegedly perjurious statements were made "in regard to a material issue" in the case, A.R.S. § 13-2702(A)(1); (2) the trial court erred in "fail[ing] to submit the question of materiality to the jury in violation of his

constitutional rights"; (3) the state engaged in vindictive prosecution; and (4) trial and appellate counsel rendered ineffective assistance. In response, the state argued Heitzmann's claims of trial error and prosecutorial misconduct were precluded and his claims of ineffective assistance of counsel were not colorable. The trial court agreed, adopted the state's arguments, and specifically found Heitzmann had failed to state a colorable claim that trial or appellate counsel had performed deficiently or that he had been prejudiced by their performance. *See State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006) (colorable claim of ineffective assistance of counsel requires showing "both that counsel's performance fell below objectively reasonable standards and that this deficiency prejudiced the defendant"), *citing Strickland v. Washington*, 466 U.S. 668, 687 (1984). This petition for review followed.

¶5 We review a trial court's summary denial of post-conviction relief for an abuse of discretion. *Id.* ¶ 17. We find none here.

¶6 On review, Heitzmann fails to address the trial court's implicit and correct finding that his claims of trial error and prosecutorial misconduct are precluded. *See* Ariz. R. Crim. P. 32.2(a)(3). Derivative of those claims, he asserts, as he did below, that trial counsel was ineffective based on her

> 1. Failure to file a motion to remand the matter to the Grand Jury;
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> 2. Failure to file a motion regarding a materiality finding by the Judge;
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> 3. Failure to request a verdict form ordering the jury to find whether the statements made were material; [and]

> 4. Fail[ure] to file [a motion to dismiss] the matter based upon vindictive prosecution.

He also contends appellate counsel was ineffective because she "should have raised both the issue of [the finding of] materiality by the Judge, as well as the [lack] of a verdict form on the materiality issue."

¶7 The perjury charge against Heitzmann was related to his testimony in a capital murder trial against Paul Speer, in which he provided an alibi for Speer's co-defendant, Brian Womble. *Heitzmann*, No. 1 CA-CR 08-0228, ¶¶ 6-7; *see also State v. Womble*, 225 Ariz. 91, 235 P.3d 244 (2010); *State v. Speer*, 221 Ariz. 449, 212 P.3d 787 (2009). In its decision on appeal, the court explained, "In order to establish that Heitzmann lacked a motive to lie about the alibi he provided, Speer[']s attorney asked Heitzmann about his relationship with Speer." *Heitzmann*, No. 1 CA-CR 08-0228, ¶ 7. When asked whether he "even consider[ed] Paul Speer a friend," he had responded, "Not anymore," and he agreed with counsel that he and Speer "had a falling out that's gone on for several years." *Id.* The state later charged Heitzmann with perjury, "for lying about whether he remained friends with Speer," and this court found the state had produced "an abundance of evidence sufficient for the jury to find Heitzmann knowingly made a false sworn statement . . . when he testified he and Speer were no longer friends." *Id.* ¶¶ 8, 21.

¶8 Although Heitzmann maintains trial and appellate counsel should have argued his statements about his relationship with Speer were "not material to a capital murder case," he is mistaken about the law regarding the materiality of an allegedly

perjurious statement. Section 13-2701(1), A.R.S., defines the term "[m]aterial" as "that which could have affected the course or outcome of any proceeding or transaction." As our supreme court has explained, a witness's sworn, false statement may be "material" for the purpose of a perjury charge if it "bear[s] upon his credibility or the weight to be accorded his testimony." *Fletcher v. State*, 40 Ariz. 388, 389, 12 P.2d 284, 285 (1932). As found on direct appeal, counsel had elicited this testimony "[i]n order to establish that Heitzmann lacked a motive to lie about the alibi he provided," *Heitzmann*, No. 1 CA-CR 08-0228, ¶ 7; thus, the testimony was directly related to his credibility as a witness. Heitzmann provides no basis for concluding that the motions or arguments he proposes on the question of materiality might have been successful, and no argument or evidence that competent counsel would have raised them. *See Strickland*, 466 U.S. at 687.

¶9 Similarly lacking in merit is Heitzmann's assertion that counsel "fell below prevailing professional norms" by failing to insist that the jury be given a separate verdict form for the finding of materiality or by failing to argue on appeal that the omission of a separate form was error. Pursuant to *Franzi v. Superior Court*, 139 Ariz. 556, 562, 679 P.2d 1043, 1049 (1984), the trial court is required to make an initial determination of materiality, and if it "finds that the statement is material, the case may be submitted to the jury, which can make an independent determination on materiality." That is what occurred here. The court made a preliminary finding of materiality, and the issue was then submitted to the jury in the context of instructions on the elements of a perjury offense. We are aware of no authority suggesting this procedure is insufficient.

¶10 Finally, Heitzmann fails to support his claim that trial counsel was ineffective in failing to file a motion to dismiss the case based on vindictive prosecution. Again, he provides no evidence or basis to conclude that any attorney exercising "reasonable professional judgment," *Strickland*, 466 U.S. at 690, would have filed such a motion, or that, had such a motion been filed, it might have been successful. Indeed, Heitzmann's limited allegations about the conduct of the prosecutor, taken as true, would not have constituted even "a prima facie showing that the charging decision [was] 'more likely than not attributable to . . . vindictiveness' by the prosecutor." *State v. Mieg*, 225 Ariz. 445, ¶ 12, 239 P.3d 1258, 1261 (App. 2010), *quoting Alabama v. Smith*, 490 U.S. 794, 801 (1989) (alteration in *Mieg*).[1] He thus failed to state a colorable claim of ineffective assistance of counsel on this basis. *See Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d at 68.

¶11 The trial court did not abuse its discretion in dismissing Heitzmann's petition for post-conviction relief on the basis that his claims of trial error and vindictive

[1]Without citing any supporting evidence, Heitzmann asserts, "In this matter, a prosecutor who specialized in capital murder trials . . . did not personally like the petitioner. . . . [and it wa]s this dislike that led to the perjury charge . . . ." Thus he contends, the prosecutor's submission of a sentencing memorandum arguing for aggravated and consecutive sentences was a means of "[c]ontinuing her personal attack" on him. Apart from such conclusory characterizations, however, Heitzmann cites no evidence suggesting the prosecutor's conduct was "motivated by a desire to punish him for doing something that the law plainly allowed him to do." *United States v. Goodwin*, 457 U.S. 368, 384 (1982); *see also Mieg*, 225 Ariz. 445, ¶ 15, 239 P.3d at 1261 (courts "consider all relevant circumstances when evaluating whether" defendant has made showing required for presumption of vindictiveness).

prosecution were precluded and his claims of ineffective assistance of counsel were not colorable. Accordingly, we grant review, but 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