FILED BY CLERK
FEB 26 2009
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. JAMES LYLE HOISINGTON, Petitioner.	2 CA-CR 2008-0351-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20051398

Honorable Hector E. Campoy, Judge

REVIEW GRANTED; RELIEF DENIED

James Lyle Hoisington
Douglas
In Propria Persona

B R A M M E R, Judge.

¶1 After petitioner James Hoisington was convicted by a jury of second-degree trafficking in stolen property and theft by controlling stolen property, he was sentenced to enhanced, mitigated, concurrent prison terms, the longer of which was ten years. The

property in question was a pump and hoses worth approximately $1,400 that had been stolen from a construction site. Hoisington pawned the pump for $100 before the theft had been discovered. He testified at trial that he had purchased the equipment for $100 at a yard sale the day before he pawned it.

¶2 On appeal, we affirmed his convictions but remanded for resentencing to determine whether his sentences could properly be enhanced on the basis of three out-of-state felony convictions. *State v. Hoisington*, 2 CA-CR 2005-0319 (memorandum decision filed Mar. 13, 2007). After remand, the trial court determined that only one of the out-of-state convictions could be used for enhancement and, accordingly, resentenced Hoisington to concurrent, mitigated terms, the longer for 5.5 years.

¶3 Through counsel, Hoisington then filed a petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., arguing his trial counsel had been ineffective in not moving to suppress statements he had made to police and in failing to produce at trial the original, instead of a copy, of a receipt showing he had purchased the equipment at a yard sale. Hoisington also filed a pro se supplement to his petition below, asserting the trial court had failed to rule on his motion for new counsel, had "[im]properly maintain[ed] admitted evidence" because the photocopied receipt was not given to the jury until after it had begun deliberating, had not "compl[ied] with Arizona Rules of Evidence" because the court allowed the state to use an undisclosed transcript during trial, and had improperly allowed defense counsel to waive Hoisington's presence during a portion of the trial. He additionally asserted

the state had "engaged in prejudicial misconduct" by relying on the undisclosed transcript and his trial counsel had been ineffective for failing to interview witnesses, disclose the receipt to the state, preserve the original receipt, and subpoena defense witnesses.

¶4 The trial court summarily dismissed Hoisington's petition, finding all his claims except those for ineffective assistance of counsel precluded because they could have been raised on direct appeal. In addressing his ineffective assistance claims, the court determined Hoisington had failed to demonstrate any deficiency in performance or prejudice resulting from his attorney's alleged failure to interview or subpoena witnesses or to move to suppress his statements. Regarding the claim based on counsel's failure to preserve and produce the original receipt, the court found Hoisington's counsel's admission that she had "lost or misplaced" the original "raise[d] a substantial question regarding the deficiency of [her] performance." The court concluded, however, that the deficiency did not prejudice Hoisington because a photocopy of the receipt was admitted into evidence. Therefore, the court reasoned, because "photocopies are admissible to the same extent as an original" pursuant to Rule 1003, Ariz. R. Evid., "[a]ny question of [the receipt's] authenticity would not have been overcome or mitigated by production of the original." The court denied Hoisington's subsequent motion for rehearing, and this petition for review followed. We will not disturb a trial court's ruling on a petition for post-conviction relief absent an abuse of its discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). We find none here.

¶5 On review, Hoisington raises seven claims, six of which are precluded by Rule 32.2(a). Hoisington raised on appeal—and we rejected—claims that the trial court had failed to rule on his request for new counsel and that the state had committed misconduct by "shift[ing] the burden of proof" during its closing argument.[1] *Hoisington*, 2 CA-CR 2005-0319, ¶¶ 3, 14. He is therefore precluded from raising these claims now. *See* Ariz. R. Crim. P. 32.2(a)(2). Although Hoisington argues we erred in rejecting those claims on appeal, a Rule 32 proceeding is not the proper vehicle for raising alleged appellate error. *See* Ariz. R. Crim. P. 31.18, 31.19, 32.2(a)(2). For the same reason, we do not address Hoisington's contention that our memorandum decision on appeal contains factual errors. His claims that the trial court improperly allowed defense counsel to waive his presence during jury deliberations and failed "to properly maintain admitted evidence" were raisable, although not actually raised, on direct appeal. Therefore, like the claims listed above, they are precluded in this post-conviction relief proceeding. *See* Ariz. R. Crim. P. 32.2(a)(1), (3).

¶6 The only nonprecluded issue Hoisington raises is his contention that trial counsel was ineffective in failing to preserve the original receipt for admission into evidence.[2] "To state a colorable claim of ineffective assistance of counsel, a defendant must

---

[1]Additionally, Hoisington did not raise this argument below, instead asserting the state had committed misconduct by using an undisclosed transcript during trial. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (petitioner may not present new issues on review).

[2]Although Hoisington briefly mentions in his petition for review claims he raised below that his trial counsel was ineffective in failing to interview and subpoena witnesses, he does not develop these arguments in any meaningful way. *See* Ariz. R. Crim. P.

show both that counsel's performance fell below objectively reasonable standards and that this deficiency prejudiced the defendant." *State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006). Failure to satisfy either part of this test is fatal to an ineffective assistance claim. *Id.*

¶7 Hoisington testified he had purchased the stolen equipment at a yard sale and had obtained a receipt for the equipment because he "had been in trouble before." At trial, counsel offered a photocopy of the receipt in evidence. After the state objected, defense counsel explained that she had seen the original receipt in the file but was now unable to locate it. The trial court permitted the photocopy to be admitted into evidence but allowed the state "wide open cross-examination on the receipt."

¶8 As we noted above, the trial court found defense counsel's failure to "disclose and safeguard" the receipt fell below prevailing professional norms but the error did not prejudice Hoisington. We agree. "A defendant establishes prejudice if []he can show a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Bennett*, 213 Ariz. 562, ¶ 25, 146 P.3d at 69, *quoting Strickland v. Washington*, 466 U.S. 668, 694 (1984).

32.9(c)(1)(iv); *State v. Burdick*, 211 Ariz. 583, n.4, 125 P.3d 1039, 1042 n.4 (App. 2005) (defendant waives improperly developed argument). Nor do we find in the record any basis to conclude the trial court abused its discretion in rejecting these claims. For the same reasons, we reject any suggestion Hoisington makes in his petition for review that his appellate counsel was ineffective.

¶9 The copy of the receipt was offered as proof that Hoisington had purchased the stolen equipment at a yard sale for $100. Hoisington testified at trial that he had given the original receipt to his previous attorney. There was no evidence contradicting his testimony nor any evidence suggesting the receipt was not authentic. Thus, producing the original receipt would not have meaningfully bolstered Hoisington's defense. *See* Ariz. R. Evid. 1003 (duplicate admissible "to the same extent as an original" unless genuine question of original's authenticity raised or admission of duplicate would be unfair). Although the state suggested in closing argument that Hoisington's story might have been stronger had the state had the opportunity to "test[]" the receipt, there is no evidence in the record suggesting what tests the state might have employed to determine the receipt's authenticity, much less that those tests would have required the original receipt instead of a photocopy. Moreover, the jury was instructed that comments by counsel during closing argument were not evidence.[3] Therefore, it would have been improper for the jury to assume the original receipt would have strengthened Hoisington's defense or that its absence supported a finding of guilt. We presume the jury understood and followed the court's instructions in reaching its verdicts. *See State v. Nordstrom*, 200 Ariz. 229, 254, ¶ 84, 25 P.3d 717, 742 (2001).

[3]Although the state questioned Hoisington about tests it might have been able to perform to determine the receipt's authenticity, Hoisington's objection to those questions was sustained, and the jury was instructed to disregard any question to which an objection had been sustained and not to speculate what the answer might have been.

¶10 To the extent the state's comments about the receipt called into question Hoisington's credibility, any resulting prejudice was not sufficient to undermine confidence in the outcome of the trial. *See Bennett*, 213 Ariz. 562, ¶ 25, 146 P.3d at 69. As we explained in our decision affirming Hoisington's convictions on appeal, even if the jury believed Hoisington had purchased the equipment at a yard sale for the amount he claimed, the evidence would still support a finding of guilt because the jury could properly conclude that, by purchasing the equipment for an amount he knew to be far below its value, Hoisington had "recklessly disregarded the risk he might be trafficking in stolen property." *Hoisington*, 2 CA-CR 2005-0319, ¶ 8; *see also* A.R.S. § 13-2307(A). Indeed, we observed that his obtaining the receipt demonstrated Hoisington had "his own . . . suspicions" whether the equipment had been stolen. *Hoisington*, 2 CA-CR 2005-0319, ¶ 9.

¶11 Moreover, there was ample other evidence in the record calling into question Hoisington's credibility. A Tucson Police Department detective testified Hoisington had been unable to provide precise information about where and from whom he had purchased the pump. He gave the detective only the seller's first name—despite the fact the receipt listed the seller's full name—and a description of the house and neighborhood where he claimed to have purchased the property. The detective stated he had been unable to locate either the house or the seller. Nor did Hoisington mention the receipt to the police. He also admitted at trial that he had not told the detective everything he knew about the seller or the

transaction. Additionally, he gave several conflicting stories about why he had pawned the equipment only one day after allegedly purchasing it for an amount far less than its value.

¶12 We cannot say the trial court abused its discretion in concluding that any deficiency in trial counsel's performance had not affected the outcome of Hoisington's trial. Accordingly, although we grant the petition for review, for the reasons stated, we deny relief.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge