

IN THE SUPREME COURT OF THE STATE OF NEVADA

FERRILL JOSEPH VOLPICELLI,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51622

FILED

DEC 03 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Steven P. Elliott, Judge.

On April 1, 2004, the district court convicted appellant, pursuant to a jury verdict, of one count of conspiracy to commit crimes against property, eight counts of burglary, and one count of unlawful possession, making, forging or counterfeiting of inventory pricing labels. The district court adjudicated appellant a habitual criminal and sentenced appellant to terms totaling life in the Nevada State Prison with the possibility of parole after 20 years. Appellant was also ordered to pay \$10,339.16 in restitution. On appeal, this court confirmed the judgment of conviction and sentence. Volpicelli v. State, Docket No. 43203 (Order of Affirmance, June 29, 2005). The remittitur issued on July 26, 2005.

On November 9, 2005, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Counsel was appointed and filed a supplement. On April 2, 2007, the district court entered an order dismissing the majority of appellant's claims and set an evidentiary

hearing concerning the remaining claims. Following an evidentiary hearing, the district court denied the remaining claims on April 14, 2008. This appeal follows.

Appellant argues that the district court erred in denying four of his ineffective assistance of trial counsel claims. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and prejudice such that counsel's errors were so severe that they rendered the jury's verdict unreliable. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); Warden v. Lyons, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in Strickland). The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one. Strickland, 466 U.S. at 697. To warrant an evidentiary hearing, a petitioner must raise claims that are supported by specific factual allegations that are not belied by the record and, if true, would entitle him to relief. Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). A petitioner must demonstrate the facts underlying a claim of ineffective assistance of counsel by a preponderance of the evidence, and the district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal. Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004); Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

First, appellant argues that his trial counsel was ineffective for failing to object to the use of a 2004 Nevada conviction for aiding and abetting in the commission of attempting to obtain money by false

pretenses for adjudication as a habitual criminal. Appellant fails to demonstrate that he was prejudiced.

The criminal activity for the 2004 conviction for attempting to obtain money by false pretenses occurred after appellant had been charged and was awaiting trial for this case. However, appellant was convicted of attempting to obtain money by false pretenses prior to his conviction in this case. After the trial for this case, the State sought adjudication of appellant as a habitual criminal and filed the 2004 judgment of conviction for obtaining money by false pretenses along with two other judgments of conviction. The other judgments of conviction were a 1998 federal court conviction of four counts of felony tax perjury and a 1998 Nevada conviction for two counts of burglary. As the conviction for the attempt to obtain money by false pretenses was not entered before the unlawful actions leading to the instant offense occurred, the conviction for the attempt to obtain money by false pretenses was not properly used as a past conviction for purposes of adjudication as a habitual criminal in the instant matter. Brown v. State, 97 Nev. 101, 102, 624 P.2d 1005, 1006 (1981). However, we conclude that any error was harmless because a sufficient number of convictions was presented. See NRS 178.598 (stating that “[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded”).

The two additional judgments of conviction list six additional felonies which were properly considered when determining appellant’s adjudication as a habitual felon. Appellant makes no argument that any of the six other felonies were improperly considered. A review of the record reveals that, at the sentencing hearing, the State presented evidence that the felony tax perjury convictions stemmed from a plan

running over at least four years, with numerous transactions, through which appellant fraudulently gained at least \$800,000. Accordingly, the previous tax perjury convictions were not the result of the same act, transaction, or occurrence and may be used as four separate convictions for purposes of habitual criminal adjudication. Rezin v. State, 95 Nev. 461, 462, 596 P.2d 226, 227 (1979). Thus, even excluding the conviction for the attempt to obtain money by false pretenses, there were sufficient past felony convictions for the district court to adjudicate appellant a habitual criminal. NRS 207.010. Considering the district court's statement at the sentencing hearing to appellant that he was the "poster child for habitual criminality in that every time you're released from custody it seems like you're out making a full-time living stealing," appellant fails to demonstrate a reasonable probability that the outcome of the sentencing hearing would have been different had his trial counsel objected to the use of the 2004 Nevada conviction for attempt to obtain money by false pretenses when adjudicating him as a habitual criminal. Therefore, the district court did not err in denying this claim.

Second, appellant argues that his trial counsel was ineffective for failing to argue that the burglary offenses and the unlawful possession, making, forging or counterfeiting of inventory pricing labels offense merged, and that conviction and sentence for both constitute a violation of double jeopardy. Appellant fails to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. To determine whether multiple offenses violate double jeopardy principles "[t]he test is whether the individual acts are prohibited, or the course of action which they constitute. If the former, then each act is punishable separately. If the latter, there can be but one penalty." Blockburger v. United States,

284 U.S. 299, 302 (1932) (quoting Wharton's Criminal Law § 35 (11th ed.)); see also United States v. Dixon, 509 U.S. 688, 696 (1993). Burglary occurs when a person enters a building with the intent to commit any felony, or to obtain money or property by false pretenses. NRS 205.060(1). The unlawful possession, making, forging or counterfeiting of inventory pricing labels occurs when a person possesses, makes, alters, forges, or counterfeits any sales receipt or inventory pricing label with the intent to cheat or defraud a retailer. NRS 205.965(1). Therefore, the acts of burglary and the unlawful possession, making, forging or counterfeiting of inventory pricing labels offense are distinct individual acts with different elements. Thus, conviction and sentencing for the offenses do not violate double jeopardy principles. Appellant fails to demonstrate a reasonable probability that the outcome of the proceedings would have been different had his trial counsel argued the conviction and sentence for both crimes violated double jeopardy. Therefore, the district court did not err in denying this claim.

Third, appellant argues that his trial counsel was ineffective for failing to argue for a lesser restitution amount. Appellant argues that the items taken from the various businesses were returned after they were recovered by the police, and therefore, the businesses did not lose the total amount of the restitution that was imposed. Appellant fails to demonstrate that he was prejudiced. Appellant fails to identify any way in which to reasonably calculate the value lost by the businesses due to appellant's crimes. Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984); see also NRS 205.0831 (stating that the standard by which to calculate the value of property obtained through theft is the fair market value of the property at the time of the theft). The district court concluded

that trial counsel was not ineffective for failing to argue for a lower restitution amount and substantial evidence supports that conclusion. Therefore, the district court did not err in denying this claim.


Fourth, appellant argues that his trial counsel was ineffective for failing to cross-examine Brett Bowman concerning his inconsistent statements. Appellant fails to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant compares statements Bowman made prior to trial with those that Bowman made during trial and argues they were inconsistent. The district court determined that the statements appellant compares covered different topics and that the questions were posed differently in each situation. The district court also determined that the questions posed to Bowman necessarily elicited different answers. Those statements were, therefore, consistent statements that could not have been used for impeachment purposes. See NRS 51.035(2)(a); Leonard v. State, 114 Nev. 639, 652-53, 958 P.2d 1220, 1230 (1998). The district court also determined that appellant failed to demonstrate a reasonable probability that the outcome of the trial would have been different had counsel questioned Bowman about these statements. Appellant fails to demonstrate that the district court's determination was erroneous and we conclude that substantial evidence supports the district court's determination. Therefore, the district court did not err in denying this claim.

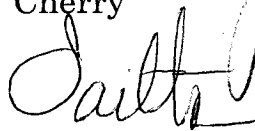
Next, appellant argues that the district court erred by conducting an evidentiary hearing over only four of his claims and dismissing the remainder. Other than the claim concerning the use of past convictions for adjudicating appellant as a habitual criminal, appellant makes no specific argument for why an evidentiary hearing

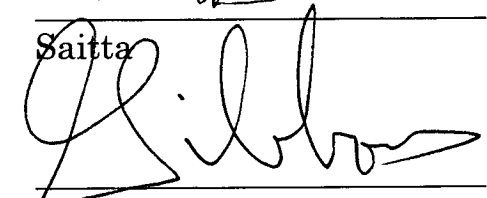
should have been conducted concerning any other claims or why the district court erred in dismissing any other claims. Hargrove, 100 Nev. at 502-03, 686 P.2d at 225. Because appellant's claim was not supported by specific argument, we conclude appellant failed to demonstrate the district court erred. See Mazzan v. Warden, 116 Nev. 48, 75, 993 P.2d 25, 42 (2000).

Accordingly, having considered appellant's contentions and concluding that they are without merit, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

cc: Hon. Steven P. Elliott, District Judge
Kay Ellen Armstrong
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk