IN THE SUPREME COURT OF THE STATE OF NEVADA

ALEJANDRO MORALES, A/K/A ALEJANDRO TAMAYO,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 35322

FILED

JAN 22 2002

JANETTE M BLOOM
CLERK OF SUPREME COURT
BY J. Richards
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus.

On December 2, 1997, the district court convicted appellant, pursuant to a jury trial, of two counts of trafficking in a controlled substance in violation of NRS 453.3385(3) (Counts II and IV), and one count of conspiracy to sell a controlled substance (Count III). The district court sentenced appellant to serve in the Nevada State Prison two concurrent terms of ten (10) to twenty-five (25) years for Counts II and IV, and a concurrent term of twenty-four (24) to sixty (60) months for Count

III.[1] This court dismissed appellant's direct appeal.[2] Remittitur issued on April 6, 1999.

On August 23, 1999, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Appellant filed a reply. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On December 3, 1999, the district court denied appellant's petition. This appeal followed.

In his petition, appellant first contended that he received ineffective assistance of counsel. Specifically, appellant argued that his attorney (1) failed to file pretrial motions challenging (a) the actual weight of the seized cocaine and (b) the chain of custody respecting this contraband, and (2) failed to object to the State's oral motion to amend the information to conform to the evidence.[3]

To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a defendant must demonstrate that counsel's performance fell below an objective standard of reasonableness,

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[1]On April 4, 1998, appellant filed a motion to modify sentence by correcting for time served. On May 13, 1998, the district court entered an amended judgment of conviction, reflecting additional credit for time served.

[2]Tamayo v. State, Docket No. 32544 (Order Dismissing Appeal, March 11, 1999).

[3]Appellant appeared to argue that the State's evidence was impermissibly inconsistent: the original information charged appellant with actual or constructive possession of 28.2 grams with respect to trafficking Count II and 117.9 grams with respect to trafficking Count IV. At appellant's preliminary hearing, it was determined that the actual weight of the seized cocaine was 28.01 grams and 95.32 grams respectively.

and that counsel's errors were so severe that they rendered the jury's verdict unreliable.[4]

Appellant's claims are without merit. Appellant did not contest that the quantities of contraband seized exceeded 28 grams. The State's evidence consistently demonstrated that appellant possessed, either actually or constructively, amounts of cocaine in excess of 28 grams. Under NRS 453.3385(3), the precise quantity above 28 grams is irrelevant.[5] Moreover, reductions in the amounts of cocaine in appellant's case do not raise any concern regarding chain of custody.[6] Finally, a court "may permit an indictment or information to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced."[7] As discussed above, the amended information did not charge appellant with an

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[4]See Strickland v. Washington, 466 U.S. 668 (1984).

[5]See NRS 453.3385(3) (providing, in pertinent part, that trafficking in a controlled substance of 28 grams or more constitutes a category A felony).

[6]First, field and lab tests were substantially consistent. Second, the 117.9 grams incorrectly charged in Count IV of appellant's original information is explained by the fact that appellant's co-conspirators were charged with a third sale of 20.14 grams of cocaine with which appellant was not charged. Thus, the amended information reflected the deduction of this third quantity of cocaine from the charges against appellant.

[7]NRS 173.095(1); see also United States v. LeMaux, 994 F.2d 684, 690 (9th Cir. 1993) (providing, in pertinent part, that variances between the amounts of cocaine charged in the indictment and the amounts proved at trial did not prejudice the defendant's substantive rights).

"additional or different offense."[8] Also, the amendment was effected after the jurors were sworn but before they had heard any evidence in the case. Jurors were therefore unaware of the larger amounts of cocaine charged in the original information. Thus, appellant's concern that jurors perceived him as a "major drug dealer" based on the amounts of cocaine cited in the original information are belied and repelled by the record.[9] We conclude that the district court did not err in determining appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced by counsel's performance.

Appellant next appeared to contend that he received ineffective assistance of appellate counsel. Specifically, appellant claimed that his appellate counsel failed to raise the following issues on direct appeal: (1) that the district court abused its discretion in granting the State's motion to amend the information to conform to the evidence, and (2) that "the evidence was insufficient to sustain his conviction for trafficking because there was no attempt to weigh the [cocaine] outside [of] its container."[10]

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[8]Among other things, the amended information corrected Count IV to read that appellant actually or constructively possessed "approximately 95.32 grams of [c]ocaine."

[9]See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

[10]Appellant also raised these issues as constitutional violations independent of his ineffective assistance of appellate counsel claims. To the extent that these issues could have been raised on direct appeal, they are waived. Franklin v. State, 110 Nev. 750, 877 P.2d 1058 (1994) overruled in part on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999). We nevertheless address appellant's claims in connection with his contention that appellate counsel should have raised them on direct appeal.

The Strickland test applies to claims of ineffective assistance of appellate counsel.[11] To establish prejudice based on the deficient assistance of appellate counsel, a defendant must show that the omitted issue would have a reasonable probability of success on appeal.[12] Again, appellant's claims are without merit. As discussed above, appellant suffered no prejudice as a result of the amended information. As to his second claim, appellant provided no evidence for his contention that the cocaine was weighed with its container. Thus, appellant failed to support this allegation with specific facts that, if true, would entitle him to relief.[13] We conclude that appellant failed to demonstrate that appellate counsel's performance fell below an objective standard of reasonableness, or that the omitted issues would have a reasonable probability of success on appeal.

Finally, appellant contended that the evidence was insufficient to support his convictions because the evidence showed that he was merely present at the scene of the crimes. On direct appeal, appellant argued that the district court impermissibly instructed the jury that it could consider appellant's presence at the scene of the crime as evidence of aiding and abetting, without also instructing the jury that mere presence alone is insufficient to support a conviction. In dismissing appellant's direct appeal, this court concluded that "instructions . . . adequately informed the jury that appellant must be a knowing and active participant in order to be criminally liable for aiding and abetting." The doctrine of

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[11]Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1113-14 (1996).

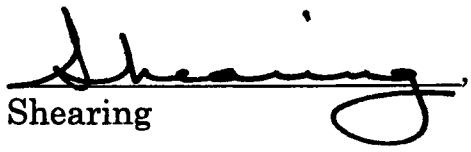
[12]Id.

[13]Hargrove, 100 Nev. at 502, 686 P.2d at 225.

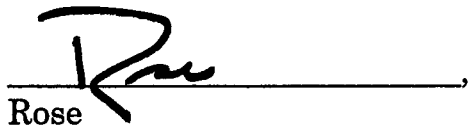
the law of the case prevents further litigation of this issue.[14] In an apparent attempt to circumvent the doctrine, appellant argued that the doctrine should not apply to this claim because "the argument of 'mere presence' . . . brought . . . on appeal, was presented in the form of an objection to the 'Jury Instruction' (sic) of mere presence, and [not] the actual argument of insufficient evidence." Appellant, however, cannot avoid this doctrine "by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings."[15]

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted.[16] Accordingly, we

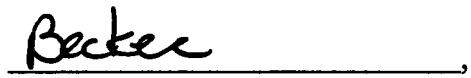
ORDER the judgment of the district court AFFIRMED.



_____, J.
Shearing



_____, J.
Rose



_____, J.
Becker

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[14]See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975) (stating that the law of a first appeal is the law of the case on all subsequent appeals in which the facts are substantially the same).

[15]Id. at 316, 535 P.2d at 799.

[16]See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

cc: Hon. Sally L. Loehrer, District Judge
Attorney General/Carson City
Clark County District Attorney
Alejandro Morales
Clark County Clerk