IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID WAYNE STANLEY,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 36007

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 March 13, 1996, the district court convicted appellant, pursuant to a jury verdict, of two counts of assault with the use of a deadly weapon upon a police officer.[1] The district court adjudicated appellant an habitual offender and sentenced him to serve two consecutive terms of a minimum of 60 months to a maximum of 150 months in the Nevada State Prison. This court dismissed appellant's appeal from his judgment of conviction and sentence.[2] The remittitur issued on March 2, 1999.

On February 7, 2000, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. 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 March 27, 2000, the district court denied appellant's petition. This appeal followed.

In his petition, appellant made several claims that his trial counsel was ineffective. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that counsel's errors were so severe that they

[1]The district court entered an Amended Judgment of Conviction on March 14, 1996, to correct appellant's social security number.

[2]Stanley v. State, Docket No. 28774 (Order Dismissing Appeal, February 5, 1999).

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rendered the jury's verdict unreliable.[3] Our review of the record on appeal reveals that petitioner has not demonstrated that trial counsel's performance fell below an objective standard of reasonableness.

First, appellant argued that his trial counsel was ineffective for failing to move to dismiss the charges against appellant because the charges were based on "inaccurate and misleading" information. We conclude that this allegation is belied by the record.[4] The charges against appellant were based on the police officer's account of events, which differed markedly from appellant's account. Appellant testified on his own behalf and the jury had the opportunity to hear his account and weigh the credibility of the two different accounts. Thus, we conclude that appellant failed to demonstrate that his counsel's performance was deficient in this regard.[5]

Second, appellant argued that his trial counsel was ineffective because counsel asked for a continuance of trial over appellant's objection. Judicial review of a lawyer's representation is highly deferential, and a defendant must overcome the presumption that a challenged action might be considered sound trial strategy.[6] In this case, the district court offered appellant the continuance because the amendment of the information changed appellant's viable defenses. The record reveals that counsel was not ineffective in accepting the extra time to revise his defense plan. In fact, counsel's revised plan allowed appellant to defeat three of the five counts charged at his subsequent trial. Thus we conclude that appellant failed to demonstrate that his counsel's performance was deficient in this regard.[7]

Third, appellant argued that his trial counsel was ineffective because counsel objected to the repeated amendment of the information, but did not do so in writing. We conclude that this argument lacks merit. Counsel is not required to submit written objections to the trial court. In

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[3]See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984), cert. denied, 471 U.S. 1004 (1985).

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

[5]See Strickland, 466 U.S. 668.

[6]State v. LaPena, 114 Nev. 1159, 1166, 968 P.2d 750, 754 (1998) (quoting Strickland, 466 U.S. at 689).

[7]See Strickland, 466 U.S. 668.

this case, counsel's verbal objection to the amended information was sufficient to preserve the issue for direct appeal. This court subsequently concluded upon direct appeal that the amendments were not improper. Thus we conclude that appellant failed to demonstrate that his counsel's performance was deficient in this regard.[8]

In his petition, appellant also contended that his appellate counsel was ineffective for failing to raise several issues on direct appeal.[9] "A claim of ineffective assistance of appellate counsel is reviewed under the 'reasonably effective assistance' test set forth in Strickland."[10] Appellate counsel is not required to raise every non-frivolous issue on appeal.[11] To the contrary, this court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.[12] To establish prejudice based on the deficient assistance of appellate counsel, the defendant must show that omitted issues would have a reasonable probability of success on appeal.[13] In making this determination of prejudice, a court must review the merits of the omitted claims.[14] Thus, we address each of these omitted claims in turn.

First, appellant contended that appellate counsel failed to argue on appeal that the district court abused its discretion in allowing the prosecutor to repeatedly amend the information. As noted above, this court concluded on direct appeal that the amendments were not improper.

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[8]See Strickland, 466 U.S. 668.

[9]Stanley also raises each of these issues as legal errors independent of his ineffective assistance claims. To the extent that these issues could have been raised on direct appeal, they are waived. See 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 nonetheless address Stanley's claims in connection with his contention that appellate counsel should have raised them on direct appeal.

[10]Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1113 (1996) (citing Strickland, 466 U.S. 668).

[11]Jones v. Barnes, 463 U.S. 745, 751 (1983).

[12]Ford v. State, 105 Nev. 850, 784 P.2d 951 (1989).

[13]Kirksey, 112 Nev. at 998, 923 P.2d at 1114 (quoting Duhamel v. Collins, 955 F.2d 962, 967 (5th Cir. 1992); Heath v. Jones, 941 F.2d 1126, 1132 (11th Cir. 1991)).

[14]Id. (quoting Heath, 941 F.2d at 1132).

Thus, appellant failed to show that he was prejudiced by appellate counsel's performance in this regard.[15]

Appellant also contended that appellate counsel was ineffective for failing to file a reply brief. Appellant claimed that counsel conceded his case to the State by failing to reply to the State's brief. We conclude that this claim is patently without merit. Appellant alleged no specific arguments which he believes should have been included in a reply brief. [16] Thus, appellant failed to show that he was prejudiced by appellate counsel's performance in this regard.[17]

Appellant also contended that (1) the prosecutor committed misconduct because the charging information was based on inaccurate and misleading information; (2) the district court abused its discretion in allowing the information to be repeatedly amended; (3) the district court disqualified jurors in violation of appellant's constitutional rights; (4) his two convictions for the same offense were improperly imposed and improperly enhanced under the habitual criminal statute because they arose out of the same transaction; (5) it was cruel and unusual punishment for him to receive consecutive sentences; (6) his right to a speedy trial was violated because of delay created by the amendments to the information.

We conclude that appellant waived these arguments because they were not raised on direct appeal.[18] Moreover, these issues lack merit. As discussed above, appellant's contention that the information was based on inaccurate and misleading information is belied by the record. Second, as noted above, appellant's contention that the information was improperly amended is without merit. Third, a slight variation of appellant's contention that the district court improperly disqualified jurors was addressed on direct appeal and is consequently barred by the law of

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[15]See Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

[16]See Hargrove, 100 Nev. 498, 686 P.2d 222 (holding that bare and naked claims unsupported by any specific factual allegations will not entitle defendant to relief).

[17]See Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

[18]Franklin, 110 Nev. 750, 877 P.2d 1058.

the case.[19] Fourth, it is permissible for multiple convictions to be imposed and separately enhanced if separate criminal acts are committed.[20] Fifth, it is not cruel and unusual punishment for a district court to exercise its statutory discretion to impose consecutive sentences for two or more offenses.[21] Sixth and last, appellant has not contended or demonstrated that he was oppressed or prejudiced by any alleged deprivation of his right to a trial within the 60-day statutory period.[22]

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.[23] Accordingly, we

ORDER the judgment of the district court AFFIRMED.[24]

Young, J.
Young

Agosti, J.
Agosti

Leavitt, J.
Leavitt

cc: Hon. John P. Davis, District Judge
Attorney General
Esmeralda County District Attorney
David Wayne Stanley
Esmeralda County Clerk

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[19]See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975) (holding that doctrine of law of case cannot be avoided by more detailed and precisely focused argument subsequently made after reflection upon previous proceedings).

[20]See Peck v. State, 116 Nev. 840, 7 P.3d 470 (2000); State v. Lomas, 114 Nev. 313, 955 P.2d 678 (1998); see also NRS 200.471(2)(b), 207.010(1)(a).

[21]See NRS 176.035(1); Warden v. Peters, 83 Nev. 298, 303, 429 P.2d 549, 552 (1967).

[22]See NRS 178.556; Graves v. State, 112 Nev. 118, 128, 912 P.2d 234, 240 (1996); Rodriguez v. State, 91 Nev. 782, 784, 542 P.2d 1065, 1065 (1975).

[23]See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975), cert. denied, 423 U.S. 1077 (1976).