IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN FREDERICK LUONGO, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 35779
JOHN FREDERICK LUONGO, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 36603

FILED

DEC 14 2001

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

ORDER OF AFFIRMANCE

Docket Nos. 35779 and 36603 are proper person appeals from orders of the district court denying appellant John Fredrick Luongo's motion for jail time credits and post-conviction petition for a writ of habeas corpus. We elect to consolidate these appeals for disposition.[1]

On April 8, 1999, the district court convicted Luongo, pursuant to a jury verdict, of three counts of burglary and four counts of robbery. For the burglary counts, the district court sentenced Luongo to serve three concurrent terms of twenty-two to ninety-six months. For each of the robbery counts, the district court sentenced Luongo to serve a term of thirty-five to one hundred fifty-six months with three terms running consecutive to the others and one term running concurrently. This court dismissed Luongo's direct appeal from his judgment of conviction and sentence.[2] The remittitur issued on December 15, 1999.

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[1]See NRAP 3(b).

[2]Luongo v. State, Docket No. 34158 (Order Dismissing Appeal, November 19, 1999).

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Docket No. 35779

On February 4, 2000, Luongo filed a proper person motion for jail time credits. On February 22, 2000, the district court denied the motion. This appeal followed.

In his motion, Luongo argued that the district court erred by not awarding him approximately ten months credit for time served while awaiting trial and sentencing.

Our review of the record reveals that Luongo's argument lacks merit. Luongo's judgment of conviction states that he received the credit he seeks in the case in which his probation was actually revoked. The district court properly denied his motion.

Docket No. 36603

On April 24, 2000, Luongo filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition, and Luongo filed a response. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent Luongo or to conduct an evidentiary hearing. On August 22, 2000, the district court denied Luongo's petition. This appeal followed.

At the outset, we note that Luongo based several of his claims for relief on alleged errors that could have been challenged in the trial court or on direct appeal. Absent good cause for not presenting these claims before and actual prejudice, these types of claims are inappropriately raised in a habeas petition.[3] Luongo did not attempt to demonstrate good cause or prejudice. Therefore, the district court properly denied relief on these grounds.

Luongo also argued that the information in his case was fatally defective. Specifically, Luongo contended that the district court never acquired jurisdiction over his case because the individual robbery counts did not specify where the robberies occurred. Luongo further contended that the burglary allegations counts were defective because they did not allege sufficient facts.

Luongo's challenge to the information lacks merit. Nevada courts have jurisdiction over crimes that are punishable under Nevada

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[3]NRS 34.810(1)(b).

law and committed within the state of Nevada.[4] In this case, the opening paragraph of the information clearly alleged that all of the charged crimes were committed in Clark County, Nevada. This allegation is sufficient to confer jurisdiction upon the district court. The burglary charges' factual allegations were also sufficient. Under NRS 173.075, the information must include a written statement of the essential facts that constitute the charged offense. Here, each burglary count clearly informed Luongo that the State was accusing him of entering a specific building with the intent to commit a robbery therein. Thus, the burglary allegations complied with NRS 173.075. We conclude that the district court properly denied relief on this ground.

Luongo next argued that his trial counsel was ineffective. To establish a claim of ineffective assistance of counsel, a petitioner must demonstrate that: 1) trial counsel's representation fell below an objective standard of reasonableness; and (2) trial counsel's deficient performance prejudiced the defense to such a degree that, but for counsel's ineffectiveness, there is a reasonable probability that the results of the trial would have been different.[5] In essence, a petitioner must show that "counsel's error's were so severe that they rendered the jury's verdict unreliable."[6]

Luongo argued that trial counsel was ineffective for failing to file a motion to suppress testimony regarding items observed in his vehicle when he was arrested on an unrelated charge. This argument lacks merit. Luongo does not argue that the unrelated arrest was illegal; instead he contends that information discovered when investigating one crime cannot be used in another crime. This argument is patently without merit. We conclude that trial counsel properly declined to file the motion to suppress.

Next, Luongo argued that a police detective arrested him in his home without a warrant and that trial counsel was ineffective for

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[4]NRS 171.010.

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

[6]Pertgen v. State, 110 Nev. 554, 558, 875 P.2d 361, 363 (1994) overruled on other grounds by Pellegrini v. State, 117 Nev. ___, ___ P.3d ___ (2001).

failing to challenge the arrest. This argument is belied by the record.[7] At trial, the detective testified that after he learned that Luongo possessed restraints similar to those used in the robberies and after five victims positively identified Luongo as the perpetrator, the detective obtained a warrant for Luongo's arrest. The district court properly denied this claim of ineffective assistance.

Next, Luongo argued that trial counsel should have filed a motion to suppress testimony regarding the victims' prior identification because the police officer used an unduly suggestive identification procedure. We conclude that the district court did not err in determining that counsel was not ineffective in this regard.

In determining whether a pretrial identification preceding formal charges is admissible, a court must consider, under the totality of the circumstances, whether the confrontation was so unnecessarily suggestive and conducive to irreparable mistaken identification that the appellant was denied due process of law.[8] Our review of the record on appeal reveals that the police detective assembled a photographic lineup that included Luongo and five other similar-looking men. When presented with the lineup, five of the victims separately identified Luongo as the perpetrator. Nothing in the record indicates that the police detective suggested or encouraged the victims to select Luongo's picture. We conclude that the pretrial identification was proper.[9] Thus, trial counsel reasonably declined to challenge it.

Next, Luongo argued that trial counsel was ineffective for failing to investigate whether another person committed the crimes that Luongo allegedly committed. Specifically, Luongo claimed that before trial he told counsel that a fellow inmate at the Clark County Detention Center told him that someone else had confessed to committing the crimes that Luongo was accused of committing. Luongo argued that counsel should have presented evidence to this effect.

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

[8]Jones v. State, 95 Nev. 613, 617, 600 P.2d 247, 250 (1979) (citing Stovall v. Denno, 388 U.S. 293, 301-02 (1967), and Manson v. Braithwaite, 432 U.S. 98 (1977)).

[9]See Odoms v. State, 102 Nev. 27, 714 P.2d 568 (1986).

We conclude that Luongo has not established that trial counsel provided constitutionally ineffective assistance in this regard. First, the credibility of Luongo's fellow inmate is questionable. The decision to not call an incredible witness is a strategic one and, therefore, largely unchallengeable.[10] Even assuming that trial counsel erred by not investigating the alleged statement, we conclude that Luongo is unable to demonstrate prejudice.[11] The State adduced compelling evidence of Luongo's guilt. As noted above, five of the victims readily identified Luongo out of a photographic lineup as the perpetrator. Those victims also identified Luongo at trial. Moreover, Luongo possessed restraints similar to the ones used in the crimes. In light of this evidence against Luongo, we conclude that he is unable to demonstrate a reasonable probability that the result of the trial would have been different had trial counsel investigated Luongo's fellow inmate's alleged statement.

Luongo also argued that trial counsel provided ineffective assistance by failing to file a demurrer to the information due to its alleged defects. As we conclude above, the information complied with Nevada law. Therefore, any challenge would have been fruitless. Trial counsel was not ineffective in this regard.

Next, Luongo argued that trial counsel was ineffective for failing to file a motion to dismiss the information, challenge alleged police and prosecutorial misconduct, and seek a change of venue. Luongo failed to support these claims with specific factual allegations that would, if true, entitle him to relief; therefore, he has not demonstrated that counsel was ineffective on these grounds.[12] The district court properly denied relief on these grounds without an evidentiary hearing.[13]

Luongo also argued that appellate counsel provided constitutionally ineffective assistance by raising only one issue on direct appeal. Luongo further argued that appellate counsel should have

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[10]See State v. LaPena, 114 Nev. 1159, 968 P.2d 750 (1998).

[11]Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996) (recognizing that if a petitioner is unable to make a showing on one prong, the court need not consider the other one).

[12]See id. at 987-88, 923 P.2d at 1107; Hargrove, 100 Nev. 498, 686 P.2d 222.

[13]See Hargrove, 100 Nev. 498, 686 P.2d 222.

challenged his conviction on all of the above-mentioned grounds. We disagree. First, we note that appellate counsel is not required to raise every colorable issue on appeal.[14] After reviewing a case, a reasonable and competent appellate attorney will winnow out weak arguments and concentrate on claims that are more likely to yield results.[15] Second, as we concluded above, Luongo's claims lacked merit. Therefore, we conclude that Luongo failed to demonstrate that appellate counsel provided constitutionally ineffective assistance.

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

ORDER the judgments of the district court AFFIRMED.[17]

_____, J.
Young

_____, J.
Agosti

_____, J.
Leavitt

cc: Hon. Kathy A. Hardcastle, District Judge
Attorney General/Carson City
Clark County District Attorney
John Frederick Luongo
Clark County Clerk

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[14]Hernandez v. State, 117 Nev. ___, 24 P.3d 767 (2001).

[15]Id.

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

[17]We have considered all proper person documents filed or received in these matters, and we conclude that the relief requested is not warranted.