FERRILL JOSEPH VOLPICELLI,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

_____/

No. 51622

RESPONDENT'S ANSWERING BRIEF

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08-31584

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IN THE SUPREME COURT OF THE STATE OF NEVADA

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RESPONDENT'S ANSWERING BRIEF

I. STATEMENT OF THE CASE

Volpicelli was represented by counsel when he stood trial for several charges stemming from a scheme involving changing UPC price codes in retail stores. He was found guilty of several felonies and at sentencing the court sentenced him as a habitual criminal. He appealed, but the judgment was affirmed. *Volpicelli v. State*, Docket No. 43203, Order of Affirmance (June 29, 2005). Appellant's Appendix, Volume I (AA1) at 83-91. He then filed a petition for writ of habeas corpus, asserting claims of ineffective assistance of counsel. AA1 92-285.[1] The district court appointed counsel who filed a supplement to the petition. Appellant's Appendix, Volume II (AA2) at 303. The supplement summarized the original claims but added nothing new.

The district court dismissed many of the claims in the petition and set the surviving claims for a hearing. AA2 401-408. After that hearing, the court made findings of fact and conclusions of law and denied the petition. AA2 409-413. The court found that Volpicelli had failed to meet his burden of persuading the court that counsel's performance was defective or that he was prejudiced as a result. Accordingly, the court denied the petition. This appeal followed.

[1]There is no petition in the appendix. The citation is to the "memorandum" supporting the petition.

II. STATEMENT OF THE FACTS

The underlying facts involve a scheme by which Volpicelli and a confederate entered area stores and used a device to change the UPC price code on merchandise. They would then purchase the goods at the greatly reduced price. A search of a storage facility revealed scores of such stolen items.

III. ARGUMENT

1. The District Court Did Not Err in Dismissing a Claim Relating to the Dates of the Offense in a Prior Conviction Because There Was No Such Claim in the Petition and the Court Did Not Dismiss Any Such Claim.

On August 2, 2007, the district court entered an order dismissing many of the claims for relief. In his first two captioned arguments, Volpicelli now claims error in that order, but identifies only one claim for this argument. He argues that the court erred in dismissing his assertion that trial counsel was ineffective in failing to object to the use of one of his felony convictions to adjudicate him as a habitual criminal because, he asserts, the date of that offense actually came after the date of the instant offenses, although the conviction preceded the instant conviction. There are several flaws in that position. Most notably, the 193-page memorandum in support of the petition includes no such claim. *See* AA1 92-285. There was, therefore, no order dismissing any such claim. *See* AA2 401-408. The Court may also note that the evidence admitted at sentencing is not included in the appendix and so this Court has no ruling and no evidence to review.

Finally, the State would also point out that if the claim had been pleaded, and if it had been supported with specific facts, and if it were not barred by the ruling on appeal that approved of the finding that petitioner was a habitual criminal, and if it had been dismissed, it would still not be error because NRS 207.010, unlike the statutes relating to driving while under the influence, makes no reference to the date of the offense. Instead, it requires only that the convicted person have been previously "convicted."

Certainly a sentencing judge can consider the relative dates of the offenses when

determining whether to impose sentence as a habitual criminal. The threshold, however, is met upon demonstrating that the defendant has previously been thrice "convicted." *See O'Neil v. State*, 123 Nev. ____, 153 P.3d 38 (2007). Therefore, because the instant claim did not appear in the petition, was not the subject of any ruling by the district court, is not supported by the appendix and is legally incorrect, this Court should find no error.

2. The District Court Did Not Err Is Dismissing the Assertion That Trial Counsel Was Ineffective in Failing to Argue That Two Crimes Merged Because They Were Supported by the Same Evidence.

The district court dismissed grounds 8 and 9 of the petition. Those were based on the proposition that the defendant could not be convicted of Burglary and possession of counterfeit pricing labels (in violation of NRS 205.965) because the counterfeit labels were used as evidence of his larcenous intent as part of the burglary prosecution. The Opening Brief is clearly propounding that same notion at page 8.

There was a brief period in which the double jeopardy clause prohibited prosecution for multiple crimes where they were based on the "same evidence." *Grady v. Corbin*, 495 U.S. 508, 110 S.Ct. 2084 (1990). After three years, that decision was soundly overruled in *United States v. Dixon*, 509 U.S. 688, 113 S.Ct. 2849 (1993)(reviving the "*Blockburger*" or "same elements" test). Under the appropriate analysis, the crimes of Burglary and Possessing Counterfeit Pricing Labels are not duplicitous, multiplicitous, merged, redundant or otherwise barred by the double jeopardy clause or any other clause. Instead, Volpicelli committed both crimes. He unlawfully possessed the counterfeit pricing labels and then when he entered the stores with larcenous intent, he committed a second crime. Accordingly, the claim that counsel failed to advance a meritless argument was properly dismissed.

3. The District Court Did Not Err in Failing to Be Persuaded That Counsel Was Ineffective in Failing to Rebut the Claimed Amount of Restitution.

One of the claims in the petition was that the amount of restitution ordered by the court was incorrect because some of the stolen goods had been returned to the owners. The petition claimed

that counsel was ineffective in failing to rebut the amount of restitution. That claim was set for a hearing. At that hearing, trial counsel testified that he devoted his attentions to trying to seek a lenient prison sentence, and that devoting attention to the precise amount of restitution would be counter-productive to one claiming that he wished to take responsibility for his actions. AA2 328; 341.

The claim that property had been returned was based entirely on a document that was prepared by an Assistant City Attorney, well after sentencing. AA2 388. That document was never admitted to prove the truth of the assertion that any property was returned to the owners. AA2 320. Counsel conceded that trial counsel should not be found ineffective in failing to utilize that which did not exist. AA2 389. Thus, the district court found that the basic premise of the claim of ineffective assistance of counsel relating to restitution was unfounded and unproved. AA2 410.

A petitioner advancing a claim of ineffective assistance of counsel bears the burden of pleading and the burden of actually proving his claims by a preponderance of the evidence. *Means v. State*, 120 Nev. 1001, 103 P.3d 25 (2004). As the ruling concerning restitution appears to be supported by the fact that the linear nature of time precludes counsel from exploiting that which does not yet exist, and because counsel testified to a sentencing strategy that would not include disputing restitution, this Court should find no error in the district court failing to be persuaded that counsel was ineffective.

4. The District Court Did Not Err in Failing to Be Persuaded That Counsel Was Ineffective in Failing to More Thoroughly Impeach the Defendant's Accomplice.

Brett Bowman testified at trial. He was an accomplice of Volpicelli. In the habeas corpus petition the petitioner contended that statements he made to police were inconsistent with his trial testimony and that counsel rendered ineffective assistance in failing to ask the witness about those prior inconsistent statements.

One claiming ineffective assistance of counsel bears the burden of showing that the specific decisions of counsel fell below some objective standard of reasonableness and that but for the

failings of counsel a different result was probable. *Means v. State, supra.*

At the habeas corpus hearing, the parties provided the district court with the transcripts of the interviews and the trial transcripts. AA2 371. The district court found that they included no significant means of impeachment. AA2 410. The court also noted that Bowman did not testify at the habeas corpus hearing and so Volpicelli failed to prove how he would have responded to questions about his prior statements. AA2 410-411.

Initially, this Court should discount the argument because Volpicelli does not identify a single one of the alleged prior inconsistent statements. This Court has held that the appellant must support his position with appropriate references to the record and cogent argument supported by relevant authority. *Browning v. State,* 120 Nev. 347, 354, 91 P.3d 39, 45 (2004). Pages 10 and 11 of the Opening Brief do not come close to meeting that standard. Therefore, unless this Court is prepared to assume the burden of pleading for the appellant, the argument should be disregarded.

The district court mentioned a few of the alleged inconsistent statements and determined that they were not inconsistent at all. AA2 at 411. Appellant has not attempted to demonstrate any error in the conclusions of the district court and has not even attempted to demonstrate that the trial would probably have had a different outcome if only trial counsel has asked additional questions of the witness Bowman. Therefore, this Court should find no error in the failure of the district court to be persuaded that counsel's performance fell below an objective standard of reasonableness and that the outcome would probably have been different.

IV. CONCLUSION

The pleaded habeas corpus claims were properly dismissed. Those that were the subject of

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a hearing were unproven. Accordingly, the judgment of the Second Judicial District Court should be affirmed.

DATED: December 9, 2008.

RICHARD A. GAMMICK
District Attorney

By 
TERRENCE P. McCARTHY
Appellate Deputy

CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 9 day of December, 2008.

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CERTIFICATE OF MAILING

Pursuant to NRAP Rule 25, I hereby certify that I am an employee of the Washoe County District Attorney's Office and that on this date, I deposited for mailing at Reno, Washoe County, Nevada, postage prepaid, a true copy of the foregoing document, addressed to:

Kay Ellen Armstrong, Esq.
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DATED: December 10, 2008.

Sally Ludwick