

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

FERRILL JOSEPH VOLPICELLI,

Case No. 51622

Appellant,

Vs.

LENARD VARE, WARDEN,

Respondent.

FILED

NOV 10 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *R. Malone*
DEPUTY CLERK

APPELLANT'S OPENING BRIEF

Appeal from Order Denying Petition for
Writ of Habeas Corpus (Post-Conviction)
Second Judicial District Court, County of Washoe
The Honorable Steven P. Elliott

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STATEMENT OF THE ISSUES

I. The trial court erroneously dismissed all but four of petitioner's grounds for relief without a hearing.

II. Counsel was ineffective for allowing the sentencing judge to rely on a "prior" felony conviction for habitual criminal enhancement, because the criminal activity supporting the conviction occurred after the criminal activity at issue in this appeal.

III. Counsel was ineffective for failing to argue possession of counterfeit labels merged with the burglary for sentencing purposes.

IV. Counsel was ineffective for failing to contest the restitution amount.

V. Trial counsel was ineffective for failing to impeach the state's primary witness, Mr. Volpicelli's co-defendant, with his many prior inconsistent statements.

STATEMENT OF THE CASE

This is an appeal from a district court decision denying Mr. Volpicelli's post-conviction petition for writ of habeas corpus. (Appellant's Appendix at 409-413, hereinafter cited as App. at 409-413.)

Mr. Volpicelli filed his proper person petition on November 9, 2005, and his supplement to the petition on March 22, 2006. App. 286-299. At petitioner's request counsel, Kay Ellen Armstrong, was appointed on August 10, 2006. App. 300-302. Counsel filed a supplement on November 21, 2006. App. 303-308. The state filed its motion for partial dismissal of petition and answer on February 5, 2007. App. 373-381. Petitioner filed his

1 opposition to motion on February 20, 2007. App. 396-400. The
2 trial court's order of August 2, 2007, granted the state's
3 motion, limiting the petition and argument to the following four
4 (4) issues: 1) counsel's failure to contest restitution amount;
5 2) counsel's failure to impeach prosecution witness with prior
6 inconsistent statements; 3) counsel's failure to retrieve
7 exculpatory evidence; and 4) same as issue 3. App. 401-408.

8 The remaining grounds for relief in the petition were
9 dismissed and the trial court heard no evidence on those issues.

10 The trial court conducted an evidentiary hearing on
11 September 20, 2007, and February 14, 2008. App. 309-372; 385-
12 395. At the conclusion of the hearings, the petition was denied
13 and this appeal follows. App. 409-413.

14 **STATEMENT OF THE FACTS**

15 Mr. Volpicelli was charged by way of grand jury indictment
16 with multiple felonies arising from purchases made from various
17 businesses in Washoe County. App. 4-13. Mr. Volpicelli was
18 convicted following a jury trial at which he was represented by
19 appointed counsel Bradley O. Van Ry. App. 80-82. Counsel was
20 presented with voluminous discovery upon being assigned to
21 represent Mr. Volpicelli, and only had a few days before trial
22 to review the materials. App. 309-372. At trial, counsel
23 failed to request a lesser included jury instruction, and failed
24 to argue against the multiplicitious counts.

25 At sentencing, counsel failed to argue that one of the
26 convictions was improperly used to enhance Mr. Volpicelli's
27 sentence as an habitual criminal. App. 59. Counsel testified
28 at evidentiary hearing that he did not personally review each

1 prior conviction, but instead, only reviewed the presentence
2 investigation regarding the prior conviction. App. 338-339.

3 At sentencing trial counsel failed to object to the
4 imposition of the sentence on count 10 consecutive to the
5 concurrent sentences in counts 2 through 9, as count 10 was
6 merged with counts 2 through 9 for sentencing purposes. App.
7 17-79.

8 Also at sentencing counsel failed to contest the incorrect
9 restitution amount. App. 52.

10 Finally, appellate counsel failed to adequately argue the
11 above.

12 **LEGAL ARGUMENT**

13 **I. The Trial Court Erroneously Dismissed all but Four of**
14 **Petitioner's Grounds for Relief without a Hearing**

15 An evidentiary hearing is required in regard to any claims
16 that are supported by specific factual allegations unrepelled by
17 the record and that would warrant relief if true. *Evans v.*
18 *State*, 117 Nev. 609, 621, 28 P.3d 498, 507 (2001).

19 This court recently held that the argument that counsel
20 made reasonable strategic choices is in many instances a
21 difficult assessment to make without the benefit of counsel's
22 testimony at an evidentiary hearing. *Byford v. State*, 123 Nev.
23 Adv. Op. No. 9 (2007) at p.3.

24 Certainly the attorney's decision to stipulate to the
25 admission of the "prior convictions" was not a reasonable
26 strategic choice, and the district court should have heard
27 evidence on this issue.

28 ///

1 **II. Counsel was Ineffective for Allowing the Sentencing**
2 **Judge to Rely on a "Prior" Felony Conviction for Habitual**
3 **Criminal Enhancement**

4 Mr. Volpicelli's post-conviction evidentiary hearing was
5 limited to only 4 of the 23 grounds he alleged in his original
6 petition. The trial court refused to hear evidence and
7 arguments regarding the legality of the prior conviction used as
8 an enhancement pursuant to the habitual criminal statute. The
9 order disallowing evidence regarding the habitual criminal issue
10 states:

11 Ground Six

12 In Ground Six, petitioner argues issues that
13 were either argued and decided on appeal or
14 should have been argued and decided on appeal.
15 These grounds must therefore be dismissed
16 pursuant to NRS 34.810(b).

17 Ground Eighteen

18 Here, couched in terms of ineffective assistance
19 of counsel, petitioner argues that his status as
20 an habitual criminal was improper. This is one
21 of the issues argued and decided on direct appeal
22 to the Nevada Supreme Court. This Court has no
23 authority to overrule the Supreme Court. Ground
24 Eighteen is dismissed.

25 Ground Nineteen

26 Ground Nineteen, again couched in terms of
27 Ineffective assistance of counsel, is an
28 argument that petitioner has received cruel
and unusual punishment due to his
status as an habitual criminal. This has been
argued and decided on direct appeal to the Nevada
Supreme Court. Ground Nineteen is dismissed.
App. 401-408.

1 Contrary to the trial court's assertions, the imposition of
2 the habitual criminal enhancement pursuant to NRS 207.010 was
3 only reviewed by the Nevada Supreme Court for an abuse of
4 discretion. App. 83-91. Mr. Volpicelli's arguments in his
5 post-conviction petition concern ineffectiveness of trial and
6 appellate counsel in failing to argue that the felony conviction
7 in CR 02-0148 was the first felony proffered by the state for
8 enhancement purposes and was not in fact a prior offense.
9

10 Claims of ineffective assistance of trial or appellate
11 counsel are properly raised for the first time in a timely post-
12 conviction petition. NRS 34.720; *Pelligrini v. State*, 117 Nev.
13 860, 34 P.3d 519 (2001).
14

15 In his petition, Mr. Volpicelli argues both trial and
16 appellate counsel were ineffective for failing to contest the
17 use of the 2004 conviction for enhancement purposes. The state
18 filed its notice of intent on October 9, 2003, but there were no
19 particular convictions referenced nor attached. App. 14-15.
20 Clearly, a conviction which did not exist could not have been
21 referred to in the notice. However, at sentencing Mr. Van Ry
22 did not object to the admission of Exhibit 1, the 2004
23 conviction. App. 59.
24

25 The criminal activity for which Mr. Volpicelli was
26 sentenced as an habitual offender occurred between June 21, 2001
27 and October 17, 2001. App. 4-13. The criminal activity
28

1 underlying the 2004 "prior" conviction, for which the
2 information was filed on February 6, 2002 in case number CR02-
3 0148, occurred on October 22, 23, 2001, after the conduct being
4 punished. App. 1-3.

5
6 The purpose of NRS 207.010, which defines habitual
7 criminals and prescribes their punishment, is not that a person
8 proceeded against thereunder shall be tried again for crimes
9 which he has been adjudged guilty, but that he should be
10 informed of the fact that his former convictions will be invoked
11 in order that his punishment may be increased, provided that he
12 has in fact been thus convicted by a court having jurisdiction.
13 *State v. Bardmess*, 54 Nev. 84, 7 P.2d 817 (1932).
14

15 A sentence based upon a material mistake of fact about a
16 defendant's criminal record that worked to his extreme detriment
17 is an error of constitutional dimension--a violation of due
18 process. *Passanisi v. State*, 108 Nev. 318, 323, 831 P.2d 1371,
19 1373-74 (1992). Because this sentencing court relied on
20 mistaken information, which was not objected to by trial
21 counsel, the matter should be remanded.
22

23 As this court recently reiterated, an illegal sentence may
24 be corrected at any time. *Davidson v. State*, 124 Nev. Adv. Op.
25 No. 76 at p.4, (2008), citing *Grey v. State*, 124 Nev. Adv. Op.
26 No. 11, 178 P.3d 154, 163 (2008).
27

28 ///

1 In *Hudson v. Warden*, 117 Nev. 387 at 400, 22 P.3d 1154,
2 (2001), this court held appellate counsel was ineffective in not
3 raising issues relating to the district court's rulings
4 involving defendant's prior convictions (for third offense
5 possession of controlled substance). In Hudson's case, the
6 sentencing Judge relied on information in the presentence
7 investigation for proof of prior convictions.
8

9 **III. Counsel was Ineffective for Failing to Argue**
10 **Possession of Counterfeit Labels Merged with the Offense of**
11 **Burglary for Sentencing Purposes.**
12

13 The trial court improperly dismissed grounds 8 and 9 of the
14 petition without a hearing. Ground 8 alleged ineffective
15 assistance of trial counsel for failing to seek dismissal of
16 multiplicitous charges. Ground 9 alleged ineffective assistance
17 of trial counsel for failure to submit proposed jury
18 instructions for lesser included offenses.
19

20 The order dismissing Ground 8 states:

21 Here, Petitioner claims that the indictment was
22 duplicitous (that he was charged with either X or Y,
23 and a jury was allowed to choose between crimes) and
24 multiplicitous (that he was charged more than once
25 for the same crime). The indictment contains no
26 duplicitous counts, and each count represents a separate
27 crime. Thus, Ground Eight is dismissed."
28 App. 401-408.

26 The order dismissing Ground 9 states "Petitioner argues, in
27 Ground Nine, that the conspiracy conviction is a lesser included
28

1 offense of his burglary convictions. A charge of conspiracy
2 does not merge into the completed crime. *Gordon v. District*
3 *Court*, 112 Nev. 216, 230, 913 P.2d 240, 249 (1996). Ground Nine
4 is dismissed." App. 401-408.

5
6 However, without possession of the inventory pricing labels
7 prohibited by NRS 205.965, there is no evidence of the intent
8 element of burglary. Likewise, unless the intent element of
9 burglary was supplied by possession of labels, anyone who is
10 merely in possession of clipped UPC codes from retail items for
11 proof of purchase has committed a crime. See *State v. Porter*
12 *1997 Wash. Lexis 570 (1997)*, 942 P2d 974, where the Supreme
13 Court of Washington discussed whether counts 1 and 2 should have
14 been treated as the same or separate criminal conduct. In order
15 for the offenses to encompass the same criminal conduct, the
16 elements which must be present are: (1) same criminal intent,
17 (2) same time and place, (3) same victim. The Washington court
18 reversed the sentencing court for erroneously increasing the
19 sentence length. *Id.* at 976. In the case at bar a review of
20 the transcripts will demonstrate that there is nothing in the
21 court record where the state claims that the 15 UPC labels found
22 at the time of Mr. Volpicelli's arrest and alleged in Count 10
23 were not the same 15 UPC labels used to purchase the same 15
24 items contained within the indictment specifically cited in
25 Counts 2 through 9.

1 **IV. Counsel was Ineffective for Failing to Contest the**
2 **Restitution Amount**

3 The trial court erroneously found Mr. Van Ry provided
4 effective assistance of counsel at sentencing. Because Mr. Van
5 Ry stipulated to the restitution figure at sentencing, Mr.
6 Volpicelli was ordered to pay over \$10,000 in restitution.
7 App. 75.

8 The trial court's denial of the restitution claim notes:

9 One of the claims involved restitution. The
10 claim of ineffective assistance of counsel,
11 however, was based on a chart showing the
12 disposition of stolen property. That chart
13 was prepared well after this litigation, by
14 an Assistant City Attorney who was not involved
15 in the instant litigation. In argument, counsel
16 for petitioner conceded that trial counsel could
17 not be ineffective in failing to utilize that
18 which did not exist at the time. Accordingly,
19 the claim that counsel was ineffective in failing
20 to challenge the amount of restitution is denied.
21 App. 409-413.

22 However, other factors were adduced at hearing regarding
23 Van Ry's failure to contest the amount. Mr. Van Ry testified
24 that he believed any argument by the defendant for lesser
25 restitution was ridiculous. App. 19. Although failure to argue
26 against excessive restitution could be considered a trial
27 tactic, counsel testified he could not remember why he decided
28 not to contest the restitution. App. 343. Finally, restitution
29 should accurately reflect the loss to the victims. In this

30 ///

1 case, the evidence demonstrated the items were returned to the
2 retailers.

3 In *Martinez v. State*, 115 Nev. 9, 974 P.2d 133 (1999), the
4 Nevada Supreme Court upheld the trial court's order requiring
5 payment of restitution based on amounts recited in the
6 presentence report of the Division of Parole and Probation.
7 Because Martinez' attorney did not object to the amount, the
8 issue was deemed waived on appeal. *Id.* at 12. However, the
9 Court noted "sentencing courts are cautioned to rely on reliable
10 and accurate evidence in setting restitution. A defendant is
11 not entitled to a full evidentiary hearing at sentencing
12 regarding restitution, but he is entitled to challenge
13 restitution sought by the state and may obtain and present
14 evidence to support that challenge." *Id.* at 13.

15 Counsel in the present case made absolutely no attempt to
16 verify the figure in the presentence investigation.

17
18
19
20 **V. Trial Counsel was Ineffective for Failing to Impeach**
21 **the State's Primary Witness, Mr. Volpicelli's Original Co-**
22 **Defendant, with his Many Prior Inconsistent Statements**

23 The jury was instructed as follows:

24
25 To the jury alone belongs the duty of
26 weighing the evidence and determining the
27 credibility of the witnesses. The degree
28 of credit due a witness should be determined
by his or her character, conduct, manner
upon the stand, fears, bias, impartiality,

reasonableness or unreasonableness of the statements he or she makes, and the strength or weakness of his or her recollections, viewed in the light of all the other facts in evidence.

If the jury believes that any witness has willfully sworn falsely, they may disregard the whole of the evidence of any such witness. App. 16.

If trial counsel had more effectively cross-examined Mr. Bowman, the jury would have wholly disregarded that testimony, leaving the state without a case.

CONCLUSION

For the above reasons, this Court should remand this matter for an evidentiary hearing on the issues of habitual criminal enhancement and merger of counts for sentencing purposes.

Dated this 10th day of November 2008.

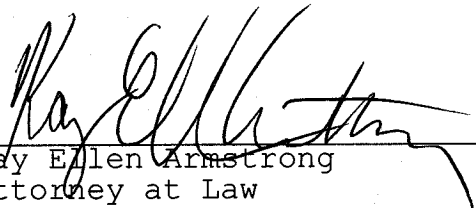
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CERTIFICATE OF COMPLIANCE

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 a reference to the page of the transcript or appendix where the matter relied on is to be found. 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 10th day of November, 2008.


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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of Kay Ellen Armstrong, Attorney at Law, and on this date I deposited for delivery with the Reno/Carson Messenger Service a true copy of the attached APPELLANT'S OPENING BRIEF to:

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And I also deposited for mailing with the United States Postal Service a true copy of the attached APPELLANT'S OPENING BRIEF to:

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November, 10 2008.

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