

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BENNETT GRIMES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 74419-COA

FILED

DEC 19 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Bennett Grimes appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on February 20, 2015, and supplemental petition filed on May 16, 2017. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Grimes contends the district court erred by denying his claims that trial and appellate counsel were ineffective. To demonstrate ineffective assistance of counsel, a petitioner must show counsel's performance was deficient in that it fell below an objective standard of reasonableness and prejudice resulted in that there was a reasonable probability of a different outcome absent counsel's errors. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Warden v. Lyons*, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in *Strickland*); see also *Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996) (applying *Strickland* to claims of ineffective assistance of appellate counsel). Both components of the inquiry must be shown. *Strickland*, 466 U.S. at 697. Counsel cannot be ineffective for failing to raise futile claims. See *Ennis v. State*, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006).

First, Grimes claimed trial counsel should have argued the steak knife was not a deadly weapon. Grimes failed to demonstrate deficiency or prejudice. Grimes' jury was instructed in accordance with NRS 193.165(6)(b) that a deadly weapon is any instrument that, "under the circumstances in which it is used . . . is readily capable of causing substantial bodily harm or death." Grimes used the knife to stab his victim 21 times and at least twice nearly hit major arteries in the chest and neck areas, the victim was hospitalized as a result of Grimes' attack and subsequently had to undergo physical therapy and a surgery, and the jury was shown the extensive scarring caused by the attack. From this, it is clear Grimes used the knife in a manner readily capable of causing substantial bodily harm, and any argument from counsel that the knife was not a deadly weapon would have been futile. We therefore conclude the district court did not err by denying this claim.

Second, Grimes claimed trial counsel should have moved to dismiss count 3 prior to Grimes' sentencing hearing on the ground that it was redundant to count 1.¹ Grimes failed to demonstrate deficiency. Grimes did not demonstrate counsel was objectively unreasonable in planning to wait until sentencing to move to dismiss count 3. Grimes concedes *Jackson's* change in law was unforeseeable, and counsel cannot be ineffective for failing to predict an unforeseeable change in law. See *Nika*

¹At the time Grimes' jury returned its guilty verdicts in October 2012, Nevada caselaw prohibited multiple convictions that arose from the same illegal act or course of conduct. See *Salazar v. State*, 119 Nev. 224, 228, 70 P.3d 749, 751 (2003), *disapproved of by Jackson v. State*, 128 Nev. 598, 611, 291 P.3d 1274, 1282 (2012). *Jackson* was decided in December 2012, and Grimes was sentenced in February 2013.

v. State, 124 Nev. 1272, 1293-94, 198 P.3d 839, 854 (2008). We therefore conclude the district court did not err by denying this claim.

Third, Grimes claimed trial counsel should have argued at his sentencing hearing that count 3 should be dismissed because Grimes had detrimentally relied on the State's assertions during trial that count 3 would merge into count 1 should the jury return guilty verdicts as to both counts. Grimes' bare claim failed to demonstrate deficiency or prejudice. Grimes did not allege that counsel, who Grimes admits did not foresee the change in law, would have acted differently had the State not agreed during trial that the counts would merge. He thus failed to demonstrate that he relied on the State's agreement to his detriment. We therefore conclude the district court did not err by denying this claim. *See Hargrove v. State*, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).²

Fourth, Grimes claimed trial counsel should have argued at his sentencing hearing that the application of *Jackson* to his case violated the Ex Post Facto Clause. Grimes failed to demonstrate deficiency or prejudice. The Ex Post Facto Clause prohibits legislatures from enacting statutes that apply retroactively to the disadvantage of an offender. *Stevens v. Warden*, 114 Nev. 1217, 1221, 969 P.2d 945, 948 (1998) (citing *Lynce v. Mathis*, 519 U.S. 433, 441 (1997)). Through the Due Process Clause, courts apply the same principles to judicial decisions, prohibiting the retroactive application of new and unexpected interpretations of statutes that would disadvantage an offender. *See id.* The holding in *Jackson* overturning Nevada's

²To the extent Grimes raised detrimental reliance as an independent ground for relief, the claim was procedurally barred. *See* NRS 34.810(1)(b)(2). And for the reasons just discussed, Grimes failed to demonstrate good cause or actual prejudice. *See* NRS 34.810(1).

redundancy doctrine was not the result of statutory interpretation. See generally *Jackson*, 128 Nev. at 608-12, 291 P.3d at 1280-83 (adopting the test announced in *Blockburger v. United States*, 284 U.S. 299 (1932), as the sole test for a double jeopardy violation); see also *Sweat v. Eighth Judicial Dist. Court*, 133 Nev. ___, ___ n.3, 403 P.3d 353, 355 n.3 (2017) (noting *Jackson* overruled this portion of *Salazar*). Accordingly, any claim that applying *Jackson* violated ex post facto principles would have been futile. We therefore conclude the district court did not err by denying this claim.

Fifth, Grimes claimed appellate counsel should have raised the Ex Post Facto Clause claim on appeal instead of in a motion to correct an illegal sentence. For the reasons discussed above, we conclude counsel was not deficient for failing to raise this futile claim on direct appeal and Grimes was not prejudiced by counsel's ill-fated attempt to raise the claim in a motion to correct an illegal sentence. We therefore conclude the district court did not err by denying this claim.

Sixth, Grimes claimed appellate counsel should have challenged the district court's denial of Grimes' pretrial motion to dismiss for failure to gather evidence. Grimes failed to demonstrate deficiency or prejudice. The State gathered the evidence: the bloody steak knife. The gravamen of Grimes' complaint was that the State did not test the steak knife for fingerprints or DNA evidence. Grimes failed to demonstrate the State had an obligation to test the evidence. Further, Grimes failed to demonstrate the test results would have had a reasonable probability of changing the results of the proceeding. See *Daniels v. State*, 114 Nev. 261, 267-68, 956 P.2d 111, 115 (1998) (holding dismissal of charges for failure to gather evidence is only a possibility where the failure was in bad faith and there is a reasonable probability of a different result had the evidence been

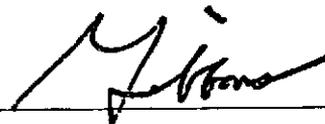
collected). We therefore conclude the district court did not err by denying this claim.

Finally, Grimes claimed the cumulative errors of trial and appellate counsel warrant relief. Even assuming any such errors could be cumulated, *see McConnell v. State*, 125 Nev. 243, 259, 212 P.3d 307, 318 (2009) (noting the Nevada Supreme Court has never adopted a standard to evaluate such claims in postconviction proceedings), Grimes failed to demonstrate any error such that there was nothing to cumulate. We therefore conclude the district court did not err by denying this claim, and we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Michelle Leavitt, District Judge
Resch Law, PLLC d/b/a Conviction Solutions
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk