

IN THE SUPREME COURT OF THE STATE OF NEVADA

EDMOND WADE GREEN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 46469

FILED

JAN 09 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Peter I. Breen, Judge.

Appellant Edmond Green was convicted in 1997, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon for killing Renee Bendus, who was pregnant with his child. The district court sentenced Green to serve two consecutive terms of life in prison with the possibility of parole. This court affirmed Green's conviction and sentence on direct appeal.¹

Green filed in the district court a timely post-conviction petition for a writ of habeas corpus in proper person. He was later appointed counsel, and a supplement was filed. The district court held an evidentiary hearing on his petition on October 21, 2005, where Green, along with one of his former trial counsel, John Arrascada, and his appellate counsel, Cheryl Bond, testified. The district court later denied Green post-conviction relief. This appeal followed.

¹Green v. State, Docket No. 31909 (Order Dismissing Appeal, August 12, 1999).

Green appeals the district court's denial of his claim that his trial counsel were ineffective for failing to challenge jury instruction 29 given during his trial.² Green contends that instruction 29 was an "acquittal first" instruction that this court held was improper in the 2003 decision Green v. State.³ He maintains that Green should have retroactive application and that his trial counsel was ineffective for not objecting to the erroneous instruction. We disagree.

To establish a valid claim of ineffective assistance of trial counsel, a two-part test must be satisfied.⁴ First, the petitioner must show that the performance of his trial counsel was deficient, falling below an objective standard of reasonableness.⁵ Second, the petitioner must show prejudice.⁶ Prejudice is demonstrated by showing that, but for the errors of counsel, there is a reasonable probability that the result of the proceedings would have been different.⁷

²To the extent Green frames his claim on appeal outside the context of ineffective assistance of counsel, we conclude that it is procedurally defaulted and, for the reasons discussed in this order, even if he could show good cause, he cannot demonstrate the prejudice necessary to overcome the default. See 34.810(1), (3).

³119 Nev. 542, 80 P.3d 93 (2003).

⁴See Strickland v. Washington, 466 U.S. 668, 687 (1984); Kirksey v. State, 112 Nev. 980, 987-88, 923 P.2d 1102, 1107 (1996).

⁵See Strickland, 466 U.S. at 687.

⁶Id.

⁷Id. at 694.

Nothing in Green suggests that this court's rejection of the "acquittal first" instruction and adoption of the "unable to agree" instruction was constitutionally required.⁸ Because Green did not set forth a constitutional rule, this court's retroactivity analysis in Colwell v. State⁹ is not implicated.

Moreover, this court generally recognizes that "[t]he failure of counsel to anticipate a change in the law does not constitute ineffective assistance."¹⁰ That Green's trial counsel did not challenge the "acquittal first" instruction and anticipate this court's subsequent decision in Green, which was published several years after Green's conviction was final, does not mean that their performance was per se ineffective.

Even assuming Green has retroactive application and Green's trial counsel acted unreasonably in failing to challenge the "acquittal first" instruction, we conclude that Green cannot demonstrate prejudice. This court concluded on direct appeal that the evidence supporting Green's murder conviction was "substantial."¹¹ Had the "acquittal first" instruction not been given in Green's case, we conclude that there is still no reasonable likelihood that the result of his trial would have been different. For these reasons, we conclude that Green has failed to demonstrate that his trial counsel were ineffective on this matter.

⁸See Green, 119 Nev. 542, 80 P.3d 93.


⁹118 Nev. 807, 818-19, 59 P.3d 463, 471-72 (2002).

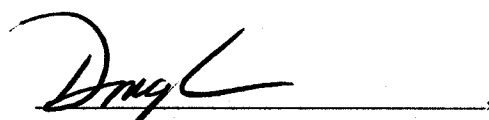
¹⁰Doyle v. State, 116 Nev. 148, 156, 995 P.2d 465, 470 (2000).

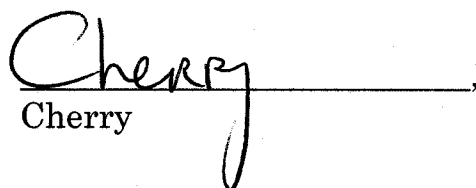
¹¹Green, Docket No. 31909, at 4.

We similarly conclude that Green has failed to demonstrate that his appellate counsel was ineffective for not challenging the "acquittal first" instruction on direct appeal.¹² Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Gibbons


_____, J.
Douglas


_____, J.
Cherry

cc: Second Judicial District Court Dept. 7, District Judge
Scott W. Edwards
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

¹²See Kirksey, 112 Nev. at 998, 923 P.2d at 1113-14.