

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

LONNIE LEE BANARK,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 69332

**FILED**

JUL 26 2016

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *J. Hendrich*  
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

This is an appeal from an order of the district court denying a postconviction petition for a writ of habeas corpus.<sup>1</sup> Eighth Judicial District Court, Clark County; Michael Villani, Judge.

On appeal, appellant Lonnie Banark claims the district court erred by denying his ineffective-assistance-of-counsel claims raised in his petition filed on August 10, 2015, his supplemental petition filed on September 10, 2015, and his reply to the State's response filed on September 28, 2015.

To prove ineffective assistance of counsel, a petitioner must demonstrate counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different. *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*). Both components of

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<sup>1</sup>This appeal has been submitted for decision without oral argument. NRAP 34(f)(3).

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the inquiry must be shown, *Strickland*, 466 U.S. at 697, and the petitioner must demonstrate the underlying facts by a preponderance of the evidence, *Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). We give deference to the district court's factual findings if supported by substantial evidence and not clearly erroneous but review the court's application of the law to those facts de novo. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

First, Banark claims trial counsel was ineffective for failing to file a motion to dismiss based on the "fruits of the poisonous tree doctrine." Banark fails to demonstrate counsel was deficient or resulting prejudice. Banark fails to demonstrate the motion would have been granted had counsel filed the motion. *See Donovan v. State*, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978) (stating counsel is not deficient for failing to file futile motions). Therefore, the district court did not err in denying this claim.

Second, Banark claims trial counsel was ineffective for failing to object to any introduction of the "fruits" of the illegal search and seizure. Banark fails to demonstrate counsel was deficient or resulting prejudice because Banark fails to demonstrate any "fruits" of the search were introduced at trial. Banark's blood alcohol test result was suppressed prior to trial pursuant to *Missouri v. McNeely*, 569 U.S. \_\_\_, 133 S. Ct. 1552 (2013), and the test result was not used at trial. Therefore, the district court did not err in denying this claim.

Finally, Banark claimed there was insufficient evidence to convict him, his blood alcohol test was illegally obtained, the district court failed to hold a *Petrocelli*<sup>2</sup> hearing regarding the knife evidence, suborned


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<sup>2</sup>*Petrocelli v. State*, 101 Nev. 46, 692 P.2d 503 (1985).

and conflicting testimony was presented by a police officer, video surveillance of the casino was not presented, the district court erred by failing to sua sponte dismiss the driving under the influence charge, the district court willfully participated in a malicious prosecution, the district court erred by allowing "fruits of the poisonous tree" to be admitted at trial, the district court was biased against him, the district court should have known trial counsel was a retired district attorney, the district court did not allow the search and seizure issue to be fully litigated, the district court failed to acknowledge the exclusionary rule, and the district court misinterpreted the verdict.

These claims could have been raised on direct appeal from Banark's judgment of conviction and were therefore waived absent a demonstration of good cause and prejudice. *See* NRS 34.810(1)(b). Banark fails to demonstrate good cause and prejudice to overcome the procedural bar. Therefore, the district court did not err in denying these claims. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Silver

cc: Hon. Michael Villani, District Judge  
Lonnie Lee Banark  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk