

IN THE SUPREME COURT OF THE STATE OF NEVADA

RAYMOND ALBERT GALTON,

No. 37316

Appellant,

vs.

DIRECTOR, NEVADA DEPARTMENT OF
PRISONS,

Respondent.

FILED

MAY 18 2001

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

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus.

Appellant was originally convicted, pursuant to a guilty plea, of one count of child abuse causing substantial bodily harm, and two counts of lewdness with a child under the age of 14 years. The district court sentenced appellant to a prison term of 48 to 170 months for child abuse, and two terms of 48 to 120 months for lewdness, with one count running consecutive and one concurrent.

Appellant filed a direct appeal in this court, but that appeal was dismissed pursuant to appellant's motion to dismiss the appeal voluntarily.¹ Appellant filed a proper person petition for a writ of habeas corpus, and the district court appointed counsel, who filed a supplement to the petition. The State filed an opposition to the petition, and the district court conducted an evidentiary hearing. On December 19, 2001, the district court entered an order denying the petition. This appeal followed.

¹Galton v. State, Docket No. 29713 (Order Dismissing Appeal, April 16, 1997).

In the petition, appellant claimed that the counts charged were actually part of one transaction, and that trial counsel was therefore ineffective for failing to argue that it violated the Double Jeopardy clauses of the Nevada and United States constitutions to run the child abuse count and one of the lewdness counts consecutively.

To state a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that, but for counsel's errors, there is a reasonable probability that the outcome of the proceedings would have been different.² The court need not consider both prongs of the Strickland test if the defendant makes an insufficient showing on either prong.³

This court uses the Blockburger⁴ test to determine whether two distinct statutory provisions proscribe the "same offense" such that prosecution for violation of each statute implicates the Double Jeopardy Clause.⁵ The Blockburger test provides that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."⁶ As the United States Supreme Court has explained, the Blockburger test "inquires whether each offense contains an element not contained in the other; if not, they

²See Strickland v. Washington, 466 U.S. 668, 687 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

³See Strickland, 466 U.S. at 697.

⁴Blockburger v. United States, 284 U.S. 299 (1932).

⁵See Brown v. State, 113 Nev. 275, 286, 934 P.2d 235, 242-43 (1997); Woofter v. O'Donnell, 91 Nev. 756, 760-61, 542 P.2d 1396, 1399 (1975).


⁶Blockburger, 284 U.S. at 304.


are the 'same offence' and double jeopardy bars additional punishment and successive prosecution."⁷

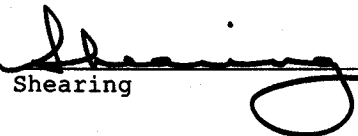
After reviewing the elements of the two offenses involved in this case, we conclude that they are not the same offense. Child abuse⁸ and lewdness⁹ each require different elements. Moreover, the counts of the information described different acts, although all the crimes charged were committed in a relatively short period of time. There was, therefore, no violation of the double jeopardy clause when the district court convicted appellant of both offenses and sentenced him to consecutive terms.

Because appellant has not satisfied the prejudice prong of Strickland, the district court did not err by denying appellant's petition. Having considered appellant's contention and concluded it is without merit, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Rose


_____, J.
Agosti


_____, J.
Shearing

cc: Hon. Michael R. Griffin, District Judge
Attorney General
Carson City District Attorney
Erik R. Johnson
Carson City Clerk

⁷United States v. Dixon, 509 U.S. 688, 696 (1993).

⁸See NRS 200.508.

⁹See NRS 201.230.