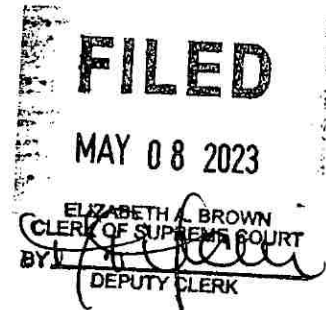


IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ORVILLE SAMUAL CURTIS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 85133-COA



ORDER OF AFFIRMANCE

Orville Samuel Curtis appeals from an order of the district court dismissing in part and denying in part a postconviction petition for a writ of habeas corpus filed on August 1, 2019, and a supplemental petition filed on September 20, 2021. Second Judicial District Court, Washoe County; Egan K. Walker, Judge.

Curtis argues the district court erred by denying his claim that trial counsel was ineffective. To demonstrate ineffective assistance of trial 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*). Both components of the inquiry must be shown, *Strickland*, 466 U.S. at 687, 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

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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).

Curtis claimed that counsel was ineffective for failing to argue that his conviction for conspiracy to sell a controlled substance and his conviction for unlawful sale of a controlled substance should have merged because the conspiracy charge is redundant to the sale charge and thus violated the Double Jeopardy Clause.

The Double Jeopardy Clause prohibits multiple punishments for the same offense. *Jackson v. State*, 128 Nev. 598, 604, 291 P.3d 1274, 1278 (2012). Nevada has rejected the "same conduct" analysis and uses the *Blockburger*¹ elements test to determine whether two statutory provisions penalize the same offense. *Jackson*, 128 Nev. at 608, 604, 291 P.3d at 1280, 1278. "The *Blockburger* test inquires whether each offense contains an element not contained in the other; if not, they are the same offense and double jeopardy bars additional punishment and successive prosecution." *Id.* (internal quotation marks omitted).

The elements of unlawful sale of a controlled substance are that the person had possession of a controlled substance and sold that controlled substance. NRS 453.321(1)(a). The elements of conspiracy to violate the Uniform Controlled Substances Act² are that two or more persons conspired to commit a felony under the Uniform Controlled Substances Act and one of the conspirators did an act in furtherance of the conspiracy. NRS

¹*Blockburger v. United States*, 284 U.S. 299 (1932).

²Curtis's judgment of conviction lists his conviction as conspiracy to sell a controlled substance; however, the statute under which he was convicted was for conspiracy to violate the Uniform Controlled Substances Act. Conspiring to sell a controlled substance is a way to violate the act.

453.401(1). Each crime contains an element the other does not. Sale requires a completed transaction, while conspiracy does not. Conspiracy requires that two or more persons conspire to sell a controlled substance, while sale does not. Therefore, Curtis failed to demonstrate counsel was deficient or there was a resulting prejudice from counsel's alleged failure to argue that the counts violated the Double Jeopardy Clause. Therefore, we conclude that the district court did not err by denying this claim.

Curtis appears to urge the adoption in Nevada of the buyer-seller rule that is used in some federal courts to limit the situations in which a defendant can be convicted of both a conspiracy to sell a controlled substance and the sale of a controlled substance. *See, e.g., United States v. Moe*, 781 F.3d 1120, 1123 (9th Cir. 2015). Curtis did not argue below that trial counsel was ineffective for failing to argue the application of the buyer-seller rule, and we decline to consider it in the first instance on appeal. *See McNelton v. State*, 115 Nev. 396, 415-16, 990 P.2d 1263, 1275-76 (1999). To the extent Curtis raises the adoption of the rule as a substantive claim, the claim is waived because it could have been raised on direct appeal. *See NRS 34.810(1)(b)(2)*. Therefore, we conclude Curtis is not entitled to relief on this claim. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

cc: Hon. Egan K. Walker, District Judge
Orrin Johnson Law
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk