IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KYLE ADRIAN WILSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 72437

FILED

FEB 13 2018

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

ORDER OF AFFIRMANCE

Kyle Adrian Wilson appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on March 24, 2016, and supplemental petition filed on October 14, 2016. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

Wilson was convicted, pursuant to a jury verdict, of burglary, battery with intent to commit robbery, attempted robbery, and battery. On direct appeal, the Nevada Supreme Court ordered full briefing on whether Wilson's battery conviction violated *Blockburger v. United States*, 284 U.S. 299 (1932), in light of his conviction for battery with intent to commit robbery. *Wilson v. State*, Docket No. 65148 (Order Directing Full Briefing, November 14, 2014). Wilson's appellate counsel failed to brief the issue.

Wilson argues appellate counsel was ineffective for failing to brief the *Blockburger* issue. *See Kirksey v. State*, 112 Nev. 980, 987, 998, 923 P.2d 1102, 1107, 1113-14 (1996) (holding an appellant's constitutional right to the effective assistance of appellate counsel is violated where counsel's failure to raise a claim is objectively unreasonable *and* the omitted issue had a reasonable probability of success). The district court concluded appellate counsel was not ineffective but nevertheless granted relief and

dismissed Wilson's conviction for battery as a lesser-included offense of battery with intent to commit robbery.[1]

Wilson contends the district court erred in dismissing the lesser-included conviction for battery rather than the greater conviction for battery with intent to commit robbery. Wilson argues this court should not follow the Nevada Supreme Court's line of cases holding that the lesser offense should be dismissed, *see LaChance v. State*, 130 Nev. 263, 274-75, 321 P.3d 919, 927-28 (2014), because doing so would not resolve all violations of the Double Jeopardy Clause in his judgment of conviction. Specifically, Wilson contends attempted robbery is a lesser-included offense of battery with intent to commit robbery. Wilson's claim lacks merit.

Multiple convictions for a single act do not violate the Double Jeopardy Clause when "each offense contains an element not contained in the other." *Jackson v. State*, 128 Nev. 598, 607, 291 P.3d 1274, 1280 (2012) (quotation marks omitted) (applying the *Blockburger* test). Battery with intent to commit robbery requires the "use of force or violence upon the person of another," *see* NRS 200.400(1)(a), while attempted robbery does not require any contact with the victim, *see* NRS 200.380(1) (requiring "force or violence *or fear of injury*" (emphasis added)). At the same time, attempted robbery requires the attempt to unlawfully take personal property, *see* NRS

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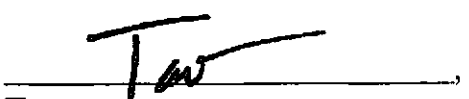
[1]Wilson claims these findings are inconsistent. Although we recognize the inconsistency, the district court nevertheless afforded Wilson relief on his ineffective-assistance-of-appellate-counsel claim, and we thus decline to address Wilson's complaints about the inconsistency in the order. *See Nat'l Collegiate Athletic Ass'n v. Univ. of Nevada, Reno*, 97 Nev. 56, 57, 624 P.2d 10, 10 (1981) ("[T]he duty of every judicial tribunal is to decide actual controversies by a judgment which can be carried into effect, and not . . . to declare principles of law which cannot affect the matter in issue before it.").

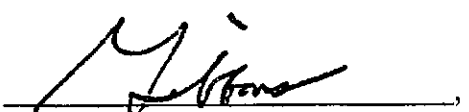
193.330(1); NRS 200.380(1), while battery with intent to commit robbery does not require any overt attempt to take personal property, *see* NRS 200.400(2). Each crime therefore contains an element the other does not. Accordingly, convictions for both crimes do not violate the Double Jeopardy Clause.

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Michael Villani, District Judge
Matthew D. Carling
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk