

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHELLE MARCH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53747

FILED

MAR 11 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
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; Robert H. Perry, Judge.

Appellant Michelle March argues that the district court erred in rejecting her claims that counsel provided ineffective assistance at sentencing, at the probation revocation hearing, and in failing to file an appeal from the order revoking probation.¹ When reviewing the district court's resolution of an ineffective-assistance claim, we give deference to the 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

¹This court has recognized that an ineffective assistance of counsel claim will lie only where the defendant has a constitutional or statutory right to the appointment of counsel. See McKague v. Warden, 112 Nev. 159, 164, 912 P.2d 255, 258 (1996). Here, the State did not argue below or in this appeal that March was not entitled to the effective assistance of counsel at the probation revocation hearing. We therefore assume that she was entitled to such assistance. See Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973); Fairchild v. Warden, 89 Nev. 524, 516 P.2d 106 (1973).

(2005). To prevail on an ineffective-assistance claim, the petitioner bears the burden of proving both that counsel's performance was deficient in that it fell below an objective standard of reasonableness and that, but for counsel's errors, there was a reasonable probability of a different outcome. See 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); Means v. State, 120 Nev. 1001, 1011-13, 103 P.3d 25, 31-33 (2004).

March failed to demonstrate prejudice based on the alleged deficiencies of counsel at sentencing and the probation revocation hearing. The district court determined that even if counsel had made the arguments and presented the information included in the post-conviction proceedings, there was no reasonable probability of a different outcome at the sentencing hearing or probation revocation based on March's record and her performance in the short time that she was on probation. March has not demonstrated that the district court erred.²

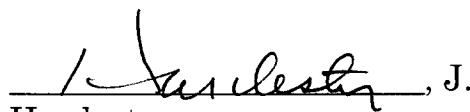
March failed to demonstrate that counsel was deficient in failing to file an appeal from the order revoking probation. Counsel

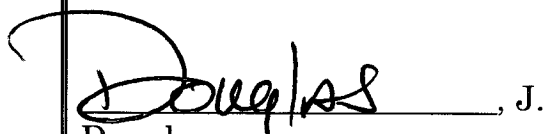
²We note that March suggests that the district court was mistaken in its understanding of her criminal history. She has not, however, provided this court with the presentence investigation report that was considered by the district court. We therefore must assume that the record supports the district court's decision. See Riggins v. State, 107 Nev. 178, 182, 808 P.2d 535, 538 (1991) ("It is the responsibility of the objecting party to see that the record on appeal before the reviewing court contains the material to which they take exception. If such material is not contained in the record on appeal, the missing portions of the record are presumed to support the district court's decision, notwithstanding an appellant's bare allegations to the contrary."), rev'd on other grounds, 504 U.S. 127 (1992).

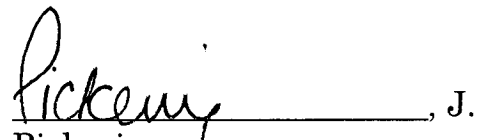
testified that he informed March of the possibility of filing an appeal but explained that the chances of success were slight given the applicable law and that a better option was to try to get the district court to change its mind by pursuing a motion for reconsideration. According to counsel, March elected to pursue the motion for reconsideration. Accordingly, even assuming that March had the right to effective assistance of counsel in pursuing an appeal from the order revoking probation, she failed to prove that she was deprived of the right to file an appeal due to ineffective assistance of counsel.

Finally, March argues that the district court erred in rejecting her claim that NRAP 3C chills the right to a direct appeal based on "the forced representation of indigent defendants by counsel who have completed the work they were retained to do." This argument is unavailing for two reasons. First, NRAP 3C does not require attorneys to work without compensation. See NRAP 3C(b) ("Trial counsel shall . . . adjust their public or private contracts for compensation to accommodate the additional duties imposed by this Rule."). Second, March was represented by the Alternate Public Defender's Office, not a privately retained attorney who was being "forced" to provide "a free appeal."

Having concluded that March's claims lack merit, we
ORDER the judgment of the district court AFFIRMED.


Hardesty


Douglas


Pickering

cc: Hon. Robert H. Perry, District Judge
Karla K. Butko
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk