

IN THE SUPREME COURT OF THE STATE OF NEVADA

MINDY SWARTZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 59466

FILED

APR 11 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *R. Malone*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Doug Smith, Judge.

First, appellant Mindy Swartz argues that the district court erred in denying her claim that she was denied the effective assistance of counsel because she was not represented at her arraignment or sentencing by her retained counsel of choice.¹ Swartz claimed in her petition that she had retained specific counsel to represent her, but she was represented by counsel's associate, who was less experienced. The record shows that Swartz appeared in court with the associate at her arraignment and sentencing and did not object to his representation nor indicate to the district court that he was not her counsel of choice. Thus, we conclude

¹Swartz also argues that the district court's order did not specifically articulate its findings of fact and conclusions for denying this claim. We conclude that the district court's order is sufficient to allow for meaningful appellate review.

that her claim is belied by the record, and the district court did not err in summarily denying her claim that she was denied her right to counsel.²

Next, Swartz claims that the district court erred in denying her claim of ineffective assistance of counsel based on trial counsel's failure to file a direct appeal. To prove ineffective assistance of counsel, a petitioner must demonstrate that her counsel's performance was deficient and that the petitioner was prejudiced by her counsel's performance. Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996) (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)). 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 (2005). Here, the district court conducted an evidentiary hearing during which Swartz and defense counsel testified. Swartz asserted that immediately after she was sentenced, counsel asked her if she wanted to appeal her sentence, she told him that she did, and counsel assured her that he would file an appeal. Defense counsel testified that he did not recall Swartz asking him to file an appeal, that he would have filed a notice of appeal if she had asked him to do so, and that he did not believe that there were any non-frivolous issues for appeal. The district court found trial counsel to be credible, rejected Swartz's conflicting testimony,

²To the extent that Swartz argues on appeal that her contract with counsel specifically stated that she was retaining his services, and not the services of his associate, she fails to show how this warrants post-conviction relief. See NRS 34.724(1).

and found that trial counsel was not ineffective. We conclude that the district court's findings were based upon substantial evidence and were not clearly wrong, and Swartz has failed to show that the district court erred in denying this claim. See Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004) (petitioner bears the burden of proving ineffective assistance); see also State v. Rincon, 122 Nev. 1170, 1177, 147 P.3d 233, 238 (2006) (“[T]he district court is in the best position to adjudge the credibility of the witnesses and the evidence, and unless this court is left with the definite and firm conviction that a mistake has been committed, this court will not second-guess the trier of fact.” (internal quotation marks omitted)).

Swartz also appears to argue that the district court erred by failing to provide her with an opportunity to review and correct the errors in the proposed findings of fact, conclusions of law, and order prepared by the State. However, she has failed to show that any lack of opportunity to review the proposed factual findings and conclusions of law adversely affected the outcome of the proceedings or her ability to seek full appellate review. See NRS 178.598 (“Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.”).

Having considered Swartz's contentions and concluded they are without merit, we

ORDER the judgment of the district court AFFIRMED.

Cherry, J.
Cherry

Hardesty, J.
Hardesty

Pickering, J.
Pickering

cc: Hon. Doug Smith, District Judge
Carmine J. Colucci & Associates
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk