

IN THE SUPREME COURT OF THE STATE OF NEVADA

KIMBERLY JASPER,

Appellant,

vs.

DIRECTOR, NEVADA DEPARTMENT OF  
PRISONS, ROBERT BAYER,

Respondent.

No. 35855

**FILED**

JUL 27 2000

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *[Signature]*  
CHIEF DEPUTY CLERK

ORDER DISMISSING APPEAL

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

On January 27, 1999, the district court convicted appellant, pursuant to a guilty plea, one count of issuing a series of checks without sufficient funds within a 90-day period and four counts of issuing a check without sufficient funds. The court sentenced appellant to a total of 38 to 96 months in prison and ordered appellant to pay restitution in the amount of \$17,906.39. This court dismissed appellant's direct appeal. *Jasper v. State*, Docket No. 33689 (Order Dismissing Appeal, April 16, 1999).

On October 19, 1999, appellant filed a proper person post-conviction petition for a writ of habeas corpus. The district court appointed counsel to represent appellant and conducted an evidentiary hearing. Thereafter, the district court denied the petition. This appeal followed.

Appellant contends that the district court erred in rejecting appellant's claims that she received ineffective assistance from counsel at sentencing and on appeal. Both ineffective assistance claims addressed in this appeal involve

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alleged errors in the presentence investigation report. Appellant claims that trial counsel provided ineffective assistance by failing to correct the alleged errors and that appellate counsel provided ineffective assistance by failing to argue that the sentence was based on a misapprehension of appellant's criminal record. We conclude that the district court did not err in rejecting either claim.

A claim of ineffective assistance of counsel presents a mixed question of law and fact and is therefore subject to independent review. *State v. Love*, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993). However, a district court's factual findings regarding a claim of ineffective assistance are entitled to deference so long as they are supported by substantial evidence and are not clearly wrong. See *Riley v. State*, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

To state a claim of ineffective assistance of counsel, a defendant must demonstrate that: (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defense. See *Hill v. Lockhart*, 474 U.S. 52 (1985); *Strickland v. Washington*, 466 U.S. 668 (1984); *Kirksey v. State*, 112 Nev. 980, 923 P.2d 1102 (1996). "Deficient" assistance of counsel is representation that falls below an objective standard of reasonableness. Strickland, 466 U.S. at 688. To establish prejudice based on the deficient assistance of counsel at sentencing, a defendant must show that but for counsel's mistakes, there is a reasonable probability that the sentence imposed would have been different. See id. at 694. To establish prejudice based on the deficient assistance of appellate counsel, a defendant must show that the omitted issue would have a reasonable probability of success on appeal. Kirksey, 112 Nev. at 998, 923 P.2d at 1114. The court need not consider both prongs of the Strickland test if

the defendant makes an insufficient showing on either prong. Strickland, 466 U.S. at 697.

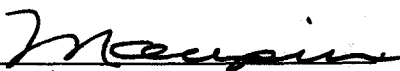
Having reviewed the documents submitted with this appeal and giving the appropriate deference to the district court's factual findings, we conclude that the district court did not err in denying Jasper's post-conviction petition. Appellant claimed that the presentence investigation report stated that she had several prior felony convictions in California when, in fact, the prior convictions were for misdemeanors. At the evidentiary hearing, trial counsel testified that appellant reviewed the presentence report and that he did not recall her telling him that the prior convictions were for misdemeanors. Also, appellant did not specifically testify that she told counsel that the priors were misdemeanors, not felonies. It is therefore difficult to conclude that counsel's performance was deficient. Moreover, the district court specifically found that the characterization of the prior convictions as felonies or misdemeanors did not affect the sentence, which was based, in part, on the nature of the conduct underlying the prior convictions--conduct that was similar to that underlying the charges for which appellant was being sentenced. Appellant therefore failed to demonstrate that she was prejudiced by the alleged failure to correct the presentence report. Accordingly, we conclude that the district court did not err in rejecting this claim.

We further conclude that appellant's claim that appellate counsel should have raised the alleged error in the report on appeal lacks merit. Because the alleged error in the report was not part of the record at the time of the appeal, appellate counsel could not have successfully raised this issue on appeal. Moreover, as previously noted, the


district court has explained that it did not rely on the felony characterization of the prior convictions in imposing sentence. For these reasons, we conclude that the district court did not err in rejecting appellant's claim of ineffective assistance of appellate counsel because appellant has not met either prong of the Strickland test.

Having considered appellant's contentions and concluded that they lack merit, we

ORDER this appeal dismissed.

  
Maupin J.

  
Shearing J.

  
Becker J.

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