IN THE SUPREME COURT OF THE STATE OF NEVADA

JERRY HOWELL, IN HIS CAPACITY AS WARDEN OF THE FLORENCE MCCLURE WOMEN'S CORRECTIONAL CENTER,
Appellant/Cross-Respondent,
vs.
PATIENCE MARIE FRAZIER,
Respondent/Cross-Appellant.

No. 83224

FILED

AUG 10 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal and cross-appeal from a district court order granting a postconviction petition for a writ of habeas corpus. Sixth Judicial District Court, Humboldt County; Charles M. McGee, Senior Judge. Appellant/cross-respondent Warden Jerry Howell (the State) argues that the district court erred in concluding that respondent/cross-appellant Patience Frazier entered her guilty plea without effective assistance of counsel. We disagree and affirm.

In 2018, Frazier experienced an adverse pregnancy outcome at home and buried the fetal remains on the property. Law enforcement discovered those remains after learning about a social media post by Frazier. Frazier told law enforcement that she took steps—including consuming cinnamon pills and lifting heavy objects—to induce a miscarriage. An autopsy of the fetal remains revealed the presence of methamphetamine. Pursuant to a guilty plea agreement, Frazier pleaded guilty to manslaughter under NRS 200.220. In exchange for her guilty plea, the State agreed to recommend probation. The trial court imposed a prison

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sentence of 30 to 96 months.[1] The Court of Appeals affirmed the judgment of conviction on direct appeal. *Frazier v. State*, No. 78823-COA, 2020 WL 733994 (Nev. Ct. App. Feb. 11, 2020) (Order of Affirmance).

Frazier filed a postconviction petition for a writ of habeas corpus. Among other claims, Frazier alleged that she entered her guilty plea without effective assistance of counsel. Specifically, Frazier alleged that trial counsel did not understand the elements of NRS 200.220, which prohibits any conduct done to intentionally terminate a post-24-week pregnancy and results in the death of the child, and that trial counsel did not adequately investigate trial defenses before advising her to plead guilty. She claimed that she would not have pleaded guilty if counsel had informed her that the State had to prove she knew the gestational age and that her conduct caused her pregnancy outcome. The district court held a three-day evidentiary hearing on this claim, at which it heard testimony from several witnesses, including counsel, multiple experts, and Frazier. The court found that counsel was ineffective and granted Frazier's postconviction petition. The State appealed.

Ineffective assistance of counsel

To demonstrate ineffective assistance of counsel, a petitioner must show that counsel's performance was deficient in that it fell below an objective standard of reasonableness and that 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*). To demonstrate prejudice regarding the decision to enter a

[1]Michael R. Montero, Judge, presided at the guilty plea and sentencing hearings.

guilty plea, a petitioner must demonstrate a reasonable probability that, but for counsel's errors, petitioner would not have pleaded guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985); *Kirksey v. State*, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996). 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), and both components of the inquiry must be shown, *Strickland*, 466 U.S. at 697. For purposes of the deficiency prong, counsel is strongly presumed to have provided adequate assistance and exercised reasonable professional judgment in all significant decisions. *Id.* at 690. We defer to the district court's factual findings that are supported by substantial evidence and not clearly wrong, but we review its application of the law to those facts de novo. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

The State argues that the district court erred because counsel made a reasonable decision to pursue a "live birth" defense. Counsel must adequately investigate a defendant's case to satisfy the objective standard of reasonableness. *Doleman v. State*, 112 Nev. 843, 848, 921 P.2d 278, 280 (1996). "Once a reasonable inquiry is made, counsel should make a reasonable strategy decision on how to proceed with [the] client's defense." *Id.* Decisions about what defenses to develop are tactical decisions that rest with counsel, *Rhyne v. State*, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002), and counsel's tactical decisions are virtually unchallengeable absent a showing of extraordinary circumstances, *see Lara v. State*, 120 Nev. 177, 180, 87 P.3d 528, 530 (2004).

At the evidentiary hearing, trial counsel testified that he initially intended to present a "live birth" defense at trial and moved for a court order requiring the State to prove in utero death of the fetus.

However, counsel later realized that a live-birth defense would not benefit Frazier and advised her to plead guilty.

Medical experts testified that they could not determine the cause of death of the fetus or whether it was born living or stillborn. Furthermore, the testimony showed that Frazier's consumption of cinnamon pills, drug use, or lifting heavy objects would not have been effective in inducing labor or causing a stillbirth. The expert testimony also showed that Frazier likely did not know the gestational age of the fetus because she did not see a doctor and has a highly irregular menstrual cycle.[2] Finally, Frazier testified that she told counsel she was innocent, did not want to admit guilt, and wanted to fight the charge. Frazier also testified that she would not have pleaded guilty had counsel informed her of the available defenses, including that medical experts could not determine the cause of her adverse pregnancy outcome and that Frazier did not know the gestational age of the fetus. The district court found that counsel failed to consult with relevant medical experts or adequately investigate defenses to undermine the essential elements of the offense such that Frazier entered her guilty plea without the effective assistance of counsel.

Contrary to the State's arguments, Frazier overcame the presumption that counsel provided adequate assistance and exercised reasonable professional judgment. We agree with the district court that Frazier demonstrated that counsel's lack of preparation for trial and advice that Frazier plead guilty fell below an objective standard of reasonableness. Trial counsel's deficient performance in both respects stems from a

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[2]A gynecologist explained that doctors medically determine the gestational age of a fetus based on the date of the last menstrual period in women with regular menstrual cycles or based on ultrasound examination.

misunderstanding as to the elements of the charged offense. NRS 200.220 defines the offense of "[t]aking drugs to terminate pregnancy" as follows:

> A woman who takes or uses, or submits to the use of, any drug, medicine or substance, or any instrument or other means, with the intent to terminate her pregnancy after the 24th week of pregnancy, unless the same is performed upon herself upon the advice of a physician acting pursuant to the provisions of NRS 442.250, and thereby causes the death of the child of the pregnancy, commits manslaughter . . . .

The statute's plain language shows that the specific intent element necessarily includes knowledge of the fetus' gestational age. *See Moore v. State*, 136 Nev. 620, 623, 475 P.3d 33, 36 (2020) (concluding that the State had to prove specific intent for the "portion of the statute that follows the word 'intent'"). And the act done intentionally to terminate a post-24-week pregnancy must "cause[ ] the death of the child of the pregnancy." The statute does not specify that the child must die in utero. *Cf.* NRS 200.210 (prohibiting the killing of "an *unborn* quick child" (emphasis added)). Accordingly, a defense strategy built on a "live birth" or lack of evidence that the fetus died in utero was objectively unreasonable. Further, based on the statute's plain language and considering the expert testimony offered at the preliminary hearing and the postconviction evidentiary hearing, an objectively reasonable defense strategy would have focused on evidence that Frazier did not know that the fetus had passed the 24-week mark and the lack of medical evidence that Frazier caused her pregnancy outcome.

The State next argues that even if counsel's performance was deficient, Frazier did not show prejudice. The State asserts that counsel's performance did not prejudice Frazier because (1) the charge had been bound over to the district court and the trial court denied her challenge to

the probable-cause determination, and (2) counsel secured a recommendation for probation in exchange for a guilty plea. We disagree with both points, focusing on the relevant inquiry, set out above, as to whether Frazier demonstrated a reasonable probability that, but for counsel's errors, Frazier would not have pleaded guilty and insisted on going to trial.[3] *See Kirksey*, 112 Nev. at 988, 923 P.2d 1107.

First, in resolving counsel's challenge to the probable-cause determination, the trial court concluded there was probable cause based on a forensic pathologist's testimony that there was a *chance* that Frazier's drug use caused the adverse pregnancy outcome. While that may have met the probable cause standard, *see Sheriff v. Potter*, 99 Nev. 389, 391, 663 P.2d 350, 352 (1983) ("Probable cause to support an information may be based on slight, even marginal evidence." (internal quotation marks omitted)), it falls far short of the beyond-a-reasonable-doubt standard the State would have had to meet had Frazier gone to trial absent counsel's objectively unreasonable advice that Frazier plead guilty.

Second, although Frazier received a benefit by pleading guilty, that benefit was not substantial under the circumstances. Frazier pleaded guilty to a category B felony (NRS 200.220) and the State dismissed the gross misdemeanor charge of concealing birth (NRS 201.150). And while the State agreed to recommend probation, the plea agreement was conditioned on 364 days in county jail, which is tantamount to the

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[3]The State proposes that Frazier did not show a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different because Frazier could have been convicted at trial regardless of what evidence the defense presented. We conclude this contention lacks merit because the result of a hypothetical trial is irrelevant to the issue of whether Frazier demonstrated prejudice in this case.

mandatory minimum sentence for manslaughter. *See* NRS 200.220 (providing a "minimum term of not less than 1 year"). Furthermore, the record supports Frazier's testimony that she believed she had not committed a crime. And she testified that she would not have pleaded guilty had counsel informed her that the State had to prove beyond a reasonable doubt that she knew the gestational age of the fetus exceeded 24 weeks and that her conduct caused the adverse pregnancy outcome. Given the available defense strategies discussed above, there is a reasonable probability that, but for counsel's deficient performance, Frazier would not have pleaded guilty and would have insisted on going to trial. Thus, sufficient evidence supports the district court's finding that counsel's deficient performance resulted in prejudice.[4]

Frazier's cross-appeal

On cross-appeal, Frazier argues that trial counsel should have raised constitutional challenges to NRS 200.220 and preserved those issues for direct appeal. She asks this court to declare the statute unconstitutional. We decline to entertain Frazier's constitutional challenge to NRS 200.220 for three reasons. First, it was not decided by the district court. *See Mason v. Fakhimi*, 109 Nev. 1153, 1158, 865 P.2d 333, 336 (1993) (providing "that this court may decline to decide an issue that was not fully litigated or decided by the district court"). Second, it is unclear whether the State intends to proceed with the prosecution under NRS 200.220. *See*

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[4]Given our conclusion, we need not consider the State's assertion that the district court erred in finding that Frazier did not knowingly and intelligently enter her guilty plea. Furthermore, we conclude that the State's contention that the district court erred in denying its motion to stay Frazier's discharge from custody lacks merit. *See* NRS 177.085(1); NRAP 23(c).

White v. Warden, 96 Nev. 634, 637 n.1, 614 P.2d 536, 537 n.1 (1980) ("This court will avoid consideration of constitutional questions when such consideration is unnecessary to the determination of an appeal."); *City of North Las Vegas v. Cluff*, 85 Nev. 200, 201, 452 P.2d 461, 462 (1969) ("This court is confined to controversies in the true sense. . . . We do not have constitutional permission to render advisory opinions."). Finally, if the State proceeds with the prosecution under NRS 200.220, Frazier can challenge the statute in an appropriate filing in the district court to fully develop the factual and legal issues, giving this court an adequate record to review should she be convicted. Frazier's remaining arguments on cross-appeal address alternative grounds to affirm the district court's order. Because those alternative grounds would not entitle her to more relief than that afforded by the district court and we affirm the district court's order in her favor, we decline to address Frazier's other arguments on cross-appeal.

Having determined that no relief is warranted, we

ORDER the judgment of the district court AFFIRMED.

Stiglich, C.J.

Cadish, J.

Pickering, J.

Herndon, J.

Lee, J.

Parraguirre, J.

Bell, J.

cc: Hon. Charles M. McGee, Senior Judge
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