

IN THE SUPREME COURT OF THE STATE OF NEVADA

CLEOTHAS JAMES FLUCKER A/K/A
CLEOTHAS JAMES FLUKER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45575

FILED

JAN 24 2006

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

This is an appeal from a district court order denying appellant's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Steven P. Elliott, Judge.

Appellant Cleothas James Flucker was charged with one count each of attempted murder with the use of a deadly weapon and robbery with the use of a deadly weapon for shooting the victim several times in the torso, causing permanent paralysis. In exchange for Flucker's guilty plea to the attempted murder count, the State agreed to dismiss the robbery count and recommend a sentence of no more than two consecutive prison terms of 4 to 10 years. The district court accepted Flucker's guilty plea, and on October 8, 2002, convicted him of one count of attempted murder with the use of a deadly weapon, sentencing him to serve two consecutive prison terms of 4 to 10 years. Flucker did not file a direct appeal.

On October 8, 2003, Flucker filed a proper person post-conviction petition for a writ of habeas corpus. The State opposed the petition. The district court appointed counsel to represent Flucker, and counsel filed a reply to the State's opposition. After conducting an

evidentiary hearing, the district court denied Flucker's petition. This appeal followed.

Flucker claims that his defense counsel was ineffective for failing to file a notice of appeal after Flucker expressly requested that his counsel do so. Flucker argues that this court should accept his testimony that he requested an appeal because (1) his defense counsel, Steven L. Sexton, failed to obtain a written waiver from Flucker of his right to appeal; and (2) Sexton has filed very few appeals, testifying that he has filed approximately 10 fast track appeal in ten years. We conclude that the district court did not err in rejecting Flucker's claim.

"[T]here is no constitutional requirement that counsel must always inform a defendant who pleads guilty of the right to pursue a direct appeal" unless the defendant inquires about an appeal or there exists a direct appeal claim that has a reasonable likelihood of success.¹ Here, the district court found that Flucker failed to demonstrate that he requested an appeal. The district court's factual finding is supported by substantial evidence.² In particular, Sexton, testified at the evidentiary hearing that he asked Flucker if he wanted to appeal, and Flucker responded "no." Although Flucker testified that he requested an appeal,³

¹See Thomas v. State, 115 Nev. 148, 150, 979 P.2d 222, 223 (1999).

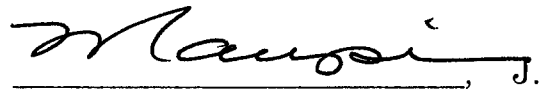
²See Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).


³A letter that Flucker sent to Sexton was admitted into evidence at the hearing. In the letter, which was sent six months after the sentencing hearing, Flucker inquired about the status of his appeal. Sexton sent a letter in response to Flucker, which was also admitted into evidence. The letter stated that Sexton had not filed an appeal on Flucker's behalf because Flucker had unequivocally told Sexton that he did not want to appeal the conviction.

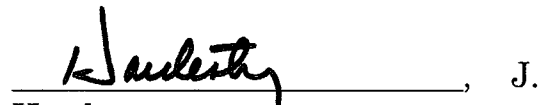
the district court acted within its discretion in finding Sexton's testimony to the contrary more credible. Accordingly, we conclude that the district court did not err in rejecting Flucker's claim that he was deprived of his right to a direct appeal.

Having considered Flucker's contention and concluded that it lacks merit, we

ORDER the judgment of the district court AFFIRMED.

 J.

Maupin
 J.
Gibbons

 J.
Hardesty

cc: Hon. Steven P. Elliott, District Judge
John J. Kadlic
Attorney General George Chanos/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk