

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA, IN
AND FOR THE COUNTY OF CLARK,
AND THE HONORABLE STEFANY
MILEY, DISTRICT JUDGE

Respondent,

and

WILLIAM WITTER,

Real Party In Interest.

Electronically Filed
Mar 26 2018 09:20 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

CASE NO:

D.C. NO: 94C117513

PETITION FOR WRIT OF MANDAMUS

COMES NOW, the State of Nevada, Petitioner, by STEVEN B. WOLFSON, District Attorney, through his Chief Deputy, STEVEN S. OWENS, and submits this Petition for Writ of Mandamus. This Petition is based on the following memorandum and all papers and pleadings on file herein.

Dated this 22nd day of March, 2018.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar # 001565

BY /s/ Steven S. Owens

STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352
Office of the Clark County District Attorney

ROUTING STATEMENT

This proceeding is appropriately retained by the Nevada Supreme Court pursuant to NRAP 17(a)(1) because it is a death penalty case.

MEMORANDUM OF POINTS AND AUTHORITIES

ISSUE PRESENTED

Whether the district court acted in excess of its jurisdiction and abused its discretion by granting a motion ordering the filing of a Third Amended Judgment of Conviction.

PROCEDURAL HISTORY AND FACTS

William Witter was found guilty by jury verdict, on June 28, 1995, of Count 1: Murder of the First Degree With Use of a Deadly Weapon (Felony); Count 2: Attempt Murder With Use of a Deadly Weapon (Felony); Count 3: Attempt Sexual Assault With Use of a Deadly Weapon (Felony); and Count 4: Burglary (Felony). Petitioner's Appendix ("PA") 1-3. On August 4, 1995, a Judgment of Conviction was filed sentencing Witter to Death for Count 1. PA 1-3. On August 11, 1995, an Amended Judgment of Conviction was filed sentencing Witter as follows: Count 1: Death by Lethal Injection; Count 2: 20 years plus an equal and consecutive 20 years for the Use of a Deadly Weapon; Count 3: 20 years plus an equal and consecutive 20 years for the Use of a Deadly Weapon, to run consecutive to Count 2; and Count 4: 10 years to run consecutive to Count 3; Restitution in the amount of \$2,790.00,

with an additional amount to be determined. PA 4-7. On September 26, 1995, a Second Amended Judgment of Conviction was filed adding a \$25.00 administrative assessment fee. PA 8-11. On direct appeal, this Court affirmed the conviction and sentence. Witter v. State, 112 Nev. 908, 921 P.2d 886 (1996). Remittitur issued on December 13, 1996. PA 18-44.

After filing multiple habeas petitions and appeals, on January 11, 2017, Witter filed his fourth state habeas petition which raised issues based on Hurst v. Florida, 577 U.S. ___, 136 S. Ct. 616 (2016), Slaate v. State, 129 Nev. ___, ___, 298 P.3d 1170 (2013), and Whitehead v. State, 128 Nev. ___, 285 P.3d 1053 (2012). PA 45-63. The State filed its Response and Motion to Dismiss on January 31, 2017. PA 64-90. Witter filed an Opposition to the State's Response and Motion to Dismiss on March 8, 2017, PA 91-136, and the State filed a Reply to the Opposition on March 22, 2017. PA 137-144.

On April 14, 2017, the district court held a hearing on the matter and on May 31, 2017, the district court filed a Findings of Fact, Conclusions of Law and Order. PA 179-183. On June 7, 2017, Witter filed a Motion for Order requesting a Second Amended Judgment of Conviction¹ be entered. PA 145-183. The State filed an Opposition on June 23, 2017, PA 184-187, and Witter filed a Reply to the State's

¹ Although Witter requested a Second Amended Judgment of Conviction, he likely meant a Third Amended Judgment of Conviction.

Opposition on June 27, 2017. PA 188-192. On June 28, 2017, the district court held a hearing on Witter's Motion for Order where the district court judge ordered a Third Amended Judgment of Conviction. PA 197-199. On June 30, 2017, the State filed a Notice of Appeal challenging the district court's ruling on Witter's fourth Petition for Writ of Habeas Corpus. See SC # 73431. On July 10, 2017, Witter filed a Notice of Appeal from the Third Amended Judgment of Conviction. See SC # 73444. That same day, Witter also filed a Notice of Appeal challenging the district court's ruling on Witter's fourth Petition for Writ of Habeas Corpus. See SC # 73431. On July 12, 2017, the court filed a Third Amended Judgment of Conviction. PA 12-17. The State now seeks extraordinary relief to vacate the Third Amended Judgment of Conviction.

EXTRAORDINARY RELIEF IS WARRANTED

A writ of mandamus is appropriate in this case where the district court judge has acted outside her authority and abused her discretion in granting counsel's motion to order the filing of a Third Amended Judgment of Conviction. This Court may issue a writ of mandamus to compel the performance of an act which the law requires as a duty resulting from an office, trust, or station or to control a manifest abuse of or arbitrary or capricious exercise of discretion. NRS 34.160; Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981). The writ does not issue where the petitioner has a plain, speedy, and adequate remedy in

the ordinary course of law. NRS 34.170; NRS 34.330; Hickey, 105 Nev. at 731, 782 P.2d 1336, 1338 (1989).

In the present case, the State has no right of appeal from an order granting the Third Amended Judgment of Conviction outside of a habeas proceeding and the State has no other available remedy. The State is directly challenging the jurisdiction and authority of the District Court Judge. A writ of mandamus is the traditional remedy when there is no right of appeal and the lower court has acted in excess of its authority. Since the State has no right to appeal, this Court will have no opportunity to review the propriety and authority for ordering the third amended judgment of conviction outside of a habeas proceeding unless it entertains the issue by way of extraordinary writ. The Third Amended Judgment of Conviction can only be ordered stricken through mandamus.

I. The District Court Lacks Authority to Order the Third Amended Judgment of Conviction outside of a Habeas Proceeding

In his Motion for Order, Witter requested entry of an amended judgment of conviction after his recently denied habeas petition. PA 145-183. Written findings denying the habeas petition had already been signed and were filed on May 31, 2017. PA 178-183. When the habeas petition was argued in court on April 19, 2017, the district court held that the time bars did not apply under Slaatte and Whitehead because the prior judgment of conviction had ordered restitution in an uncertain amount. PA 163-166. The district court went on to deny the petition on the merits

and asked the State to prepare the findings. PA 167-174. In response, it was the State's prosecutor, not Witter's counsel, who requested permission to submit an amended judgment curing the alleged defect by striking the uncertain restitution order so as to start the time bars for future habeas filings in light of the court's ruling. PA 175. The district court agreed, "that may be a suggestion if you want to ensure finality given the Whitehead and Slaatte cases." Id.

However, after having drafted the findings to deny the habeas petition, the State's prosecutor no longer believed an amended judgment is necessary to start the time bars or to procedurally bar future habeas filings. PA 185, 198-199. The district court's reasoning and determination regarding the nonfinality of the prior judgment with its uncertain restitution award, is fully set forth in the written findings and the issues are preserved for appeal. PA 178-183. Accordingly, the State did not prepare or submit an amended judgment as it had requested permission to do. The transcript from April 19, 2017, shows that the amended judgment was merely permissive at the State's request and for the State's unique purpose, and had not been affirmatively "ordered" by the court or requested by the defense as part of any kind of habeas relief as is now asserted. At most, Witter's counsel simply agreed to the submission of an amended judgment, "consistent with what Mr. Owens is saying." PA 176. But at no time in his petition, in his pleadings, or at argument did Witter's counsel request the remedy of an amended judgment to cure the restitution defect.

Witter's counsel for the first time demanded the entry of an amended judgment of conviction for his own purposes in the Motion for Order in addition to the written findings already filed. PA 145-152. Witter claimed that the Nevada Supreme Court is "without jurisdiction to consider any appeal of Mr. Witter's case until the deficiency is cured." PA 150. The State would contend that this was utter nonsense. In Whitehead, the restitution defect in the judgment did not mean there was no jurisdiction for the subsequent habeas appeal, but rather that the district court was required to reach the merits of the habeas petition rather than applying the procedural bars. Whitehead v. State, 128 Nev. ___, 285 P.3d 1053 (2012). Significantly, there had not been any direct appeal between the filing of the judgment of conviction and the habeas petition, as there has been in the present case. Although the Court in Slaatte may have dismissed the appeal in that case for lack of jurisdiction, that was an appeal directly from the non-final judgment of conviction pursuant to a guilty plea, not a habeas appeal as in the present case. See Slaatte v. State, 129 Nev. ___, 298 P.3d 1170, 1171 (2013). In a habeas appeal the final judgment being appealed is the Findings of Fact and Conclusions of Law, not the judgment of conviction. NRS 34.575. No amended judgment was necessary for Witter to pursue his appeal.

Just as the State had reconsidered its position regarding its need for an amended judgment, the defense apparently had also thought about it and decided an

amended judgment would benefit them. There is probably some kind of tolling or restarting of the federal habeas bars that works to the defendant's advantage should an amended judgment be entered. An amended judgment can always be entered following Witter's appeal if this Court agrees that the habeas time bars never started running due to the defect in the judgment. But if this Court disagrees, it only has the ability to affirm the judgment on other grounds. "[I]f a judgment or order of a trial court reaches the right result, although it is based on an incorrect ground, the judgment or order will be affirmed on appeal". Wyatt v. State, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970). See Bellon v. State, 121 Nev. 436, 443-44, 117 P.3d 176, 180 (2005) (noting that trial court's decision may be upheld if court reached right result even though it was based on incorrect grounds). In neither of the two appeals will this Court have the ability to vacate or strike the Third Amended Judgment of Conviction as is being sought in this mandamus petition.

The State filed a Notice of Appeal, not in bad faith or an improper purpose, but to protect its interests because the Third Amended Judgment granted relief to Witter by removing an order for restitution and potentially rendering all prior rulings in this case for the past 20 years a nullity. In its response to Witter's Motion to Dismiss the State's Notice of Appeal, the State argued that if the district court judge ordered the filing of the Third Amended Judgment upon motion of Witter and within the context of the habeas petition, then the State is an aggrieved party per NRS

34.575(2) and may appeal from the granting of partial habeas relief. See SC # 73431. But if the Third Amended Judgment was not part of the habeas ruling and was ordered as an independent decision, then there was no authority for the judge's action and the State's remedy may very well be mandamus instead. Id. This Court's decision to dismiss the State's Appeal, on February 23, 2018, gives rise to the inference that Witter's Motion was granted outside the context of the habeas petition and thus the State has no adequate remedy at law. Id. This Court is unable to strike the Third Amended Judgment of Conviction in the context of an appeal from that judgment absent the instant Petition for Writ of Mandamus.

The Third Amended Judgment that was entered before this Court had an opportunity to review the issue will have irreversible consequences that could potentially render all prior rulings in this case for the past 20 years a nullity, as evidenced by Witter's *second* Notice of Appeal challenging the judgment of conviction. See SC # 73444. Because the defense did not ask for such relief in their petition and the petition had already been denied by a final written order, there was no authority for the district court judge to belatedly grant the defense such relief by way of motion outside of the context of the habeas petition. Harris v. State, 130 Nev. Adv. Op. 47, 329 P.3d 619 (2014). Per NRS 34.724(2)(b), habeas is the exclusive remedy for post-conviction challenges to the judgment of conviction except for a few specific statutory remedies which are "incident to the trial proceedings". Id. A

“Motion for Order” is not one of these specific statutory remedies. Id. Therefore, the district court had no authority to entertain a post-conviction “Motion for Order” which requested and sought the filing of an amended judgment of conviction to remove certain language.

II. This Court should revisit and reconsider its holdings in *Whitehead* and *Slaatte*

To prevent any further issues like those present in this case, the State would request that this Court take the opportunity to revisit its holdings in Whitehead and Slaatte to the extent that they hold uncertain amounts of restitution make judgments non-final and thus not appealable. Not only do the holdings in Whitehead and Slaatte have the potential to cause many concerning issues, like the ability of a district court judge to effectively rule that this Court lacked jurisdiction to hear Witter’s first direct appeal because the judgment was not final, but the holdings represent the minority opinion in contrast to other jurisdictions. See United States v. Gilbert, 807 F.3d 1197, 1199-200 (9th Cir. 2015) (“We note that several of our sister circuits have held that a judgment that imposes a sentence and an unspecified amount of restitution is a sufficiently final judgment for appellate purposes. See, e.g., United States v. Cheal, 389 F.3d 35, 51-52 (1st Cir. 2004); Gonzalez v. United States, 792 F.3d 232, 237 (2d Cir. 2015) (per curiam); United States v. Muzio, 757 F.3d 1243, 1250 (11th Cir. 2014).”); United States v. Bogart, 576 F.3d 565, 571 (6th Cir. 2009) (The undetermined restitution amount meant that restitution provision was void and the

remainder of the sentence was a final appealable order); United States v. Muzio, 757 F.3d 1243, 1244 (11th Cir. 2014) (quoting Corey v. United States, 375 U.S. 169, 174-175, 84 S. Ct. 298, 302-303 (1963))(Regardless of whether a final judgment reflecting the amount of restitution has been entered, a judgment imposing a term of imprisonment is ““freighted with sufficiently substantial indicia of finality to support an appeal.””); United States v. Tulsiram, 815 F.3d 114, 117-19 (2nd Cir. 2016) (Judgment of conviction that imposes a sentence including incarceration and restitution is final even if the sentence defers determination of the amount of restitution.). As such, this Court should revisit its holdings in Slaatte and Whitehead to follow the majority of jurisdictions in holding that a judgment that imposes a definite sentence, but indefinite amount of restitution, is still final for the purposes of appeal.

To the extent that this Court refuses to visit its holding in Whitehead and Slaatte, they are still inapplicable to Witter’s case as their holdings are not retroactive. The law in effect at the time of Witter’s direct appeal in 1996 was that an uncertain amount of restitution did not defeat jurisdiction for the appeal, but was simply an error which could be corrected upon remand after deciding the merits of the appeal. E.g., Washington v. State, 112 Nev. 1067, 1075, 922 P.2d 547, 551-52 (1996); Smith v. State, 112 Nev. 871, 873, 920 P.2d 1002, 1003 (1996); Roe v. State, 112 Nev. 733, 736, 917 P.2d 959, 960-61 (1996); Botts v. State, 109 Nev. 567, 569,

854 P.2d 856, 857 (1993). Because Slaatte disapproves of practices the court has sanctioned in prior cases and overturns a longstanding practice, it is a new rule that is not retroactively applicable. See also Sullivan v. State, 120 Nev. 537, 96 P.3d 761 (2004) (filing of amended judgment not good cause to overcome one year time bar where habeas claims were unrelated to the amendment). Therefore even if this Court decides against revisiting its holdings in Slaatte and Whitehead, they still are inapplicable to the case since they are not retroactive. Thus the district court, who failed to even address this issue in its ruling, exceeded its jurisdiction by granting Witter's Motion for Order outside of habeas proceedings when no such procedural vehicle exists in Nevada and the Motion is not one of the very few statutory motions that may be filed in post-conviction because they are incident to the trial proceedings.

CONCLUSION

Ultimately, the district court abused its discretion and exceeded its authority when it granted Witter's motion to order the filing of a Third Amended Judgment of Conviction. Neither Witter nor the district court judge offered any precedent or law that provides the district court with the authority to grant such a motion.

WHEREFORE, the State requests a writ for extraordinary relief issue to strike the Third Amended Judgment of Conviction filed by the district court.

Dated this 22nd day of March, 2018.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ Steven S. Owens*

STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671- 2840

AFFIDAVIT

I certify that the information provided in this mandamus petition is true and complete to the best of my knowledge, information and belief.

Dated this 22nd day of March, 2018.

BY */s/ Steven S. Owens*

STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352
Office of the Clark County District Attorney

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on March 22, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

ADAM PAUL LAXALT
Nevada Attorney General

TIFFANY NOCON
DAVID ANTHONY
Assistant Federal Public Defenders

STEVEN S. OWENS
Chief Deputy District Attorney

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

JUDGE STEFANY MILEY
Eighth Judicial District Court, Dept. 23
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89101

BY /s/ E. Davis
Employee, District Attorney's Office

SSO/Jordan Christensen-Intern/ed