

IN THE SUPREME COURT OF THE STATE OF NEVADA

TED MICHAEL DONKO,)	
)	
Appellant,)	
)	
vs.)	
)	
THE STATE OF NEVADA,)	
)	
Respondent.)	
)	

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Elizabeth A. Brown
Clerk of Supreme Court
Case No. 81075

APPELLANT’S RESPONSE TO ORDER TO SHOW CAUSE
FILED MAY 6, 2020

Comes Now TED MICHAEL DONKO, by and through Chief Deputy Public Defender DEBORAH L. WESTBROOK, and files this Response to the Order to Show Cause Filed May 6, 2020. As set forth herein, this Court has jurisdiction to hear Mr. Donko’s appeal from a jury verdict pursuant to **NRS 177.015(3)** and **Witter v. State**, 135 Nev. 412, 415, 452 P.3d 406, 409 (2019).

DATED this 7 day of May, 2020.

Respectfully submitted,

DARIN F. IMLAY
CLARK COUNTY PUBLIC DEFENDER

By /s/ Deborah L. Westbrook
DEBORAH L. WESTBROOK, #9285
Chief Deputy Public Defender

DECLARATION OF DEBORAH L. WESTBROOK

1. I am an attorney licensed to practice law in the State of Nevada; I am a chief deputy public defender assigned to respond to the Order to Show Cause filed in this matter; I am familiar with the procedural history of this case.

2. After a four-day jury trial that took place between February 10, 2020 and February 13, 2020, Appellant Ted Donko was found guilty of two (2) counts of battery with use of a deadly weapon resulting in substantial bodily harm, three (3) counts of attempt murder with use of a deadly weapon, one (1) count of assault with a deadly weapon, one (1) count of discharging a firearm at or into an occupied structure, vehicle, aircraft or watercraft, and one (1) count of ownership or possession of firearm by prohibited person.

3. On April 20, 2020, Mr. Donko appeared in district court for sentencing, and “by virtue of the Jury verdict” was adjudged guilty of all eight (8) counts and given an aggregate sentence of 144 months to 378 months, including the deadly weapon enhancement, with 150 days credit for time served. At sentencing, the court indicated that it would retain jurisdiction as to restitution in case the named victims ever submitted medical expense records to the court.

4. On April 21, 2020, Mr. Donko filed his Notice of Appeal from the jury verdict pursuant to **NRS 177.015(3)** and **NRAP 4(b)**.

5. On April 28, 2020, the district court filed Mr. Donko's Judgment of Conviction.

6. On April 30, 2020, the district court filed a certified copy of Mr. Donko's Judgment of Conviction (JOC) with the Nevada Supreme Court.

7. On May 6, 2020, this Court issued an Order to Show Cause and Suspending Briefing, directing Appellant to show cause why his appeal should not be dismissed for lack of jurisdiction within 21 days. As set forth in the below Memorandum of Points and Authorities, this Court has jurisdiction over Mr. Donko's appeal from a jury verdict pursuant to **NRS 177.015(3)** and **Witter v. State**, 135 Nev. 412, 415, 452 P.3d 406, 409 (2019).

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED on the 7 day of May, 2020.

/s/ Deborah L. Westbrook
DEBORAH L. WESTBROOK

MEMORANDUM OF POINTS AND AUTHORITIES

In its Order to Show Cause, the Court states that the JOC has a “potential jurisdictional defect”, because it contains the phrase “Jurisdiction retained as to any restitution”:

This court’s review of this appeal reveals a potential jurisdictional defect. Specifically, the order does not appear to be a final, appealable order because it states “Jurisdiction retained as to any Restitution” and therefore, it contemplates the district court will be imposing restitution in a yet to be determined amount. *See* NRS 176.105(1)(c); *Slaatte v. State*, 129 Nev. 219, 298 P.3d 1170 (2013); *Whitehead v. State*, 128 Nev. 259, 285 P.3d 1053 (2012).

In **Whitehead**, 128 Nev. at 263, 285 P.3d at 1055, this Court held that a JOC that imposed an uncertain amount of restitution was not a “final judgment” for purposes of the one-year deadline for filing a postconviction habeas petition pursuant to NRS 34.726. A year later, in **Slaatte**, 129 Nev. at 221, 298 P.3d at 1171, this Court relied on **Whitehead** to conclude that it lacked jurisdiction over a direct appeal from a judgment that imposed an indeterminate amount of restitution. 129 Nev. at 221, 298 P.3d at 1171.

However, in **Witter v. State**, the *en banc* Nevada Supreme Court distinguished **Slaatte** on the basis that **Slaatte** involved an appeal from a guilty plea, rather than an appeal from a jury verdict:

Our decision in *Slaatte* focused on the provision in NRS 177.015(3) that allows a defendant to appeal from a “final judgment.” But NRS 177.015(3) also allows a defendant to

appeal from a “verdict.” That part of the jurisdiction statute was not at issue in *Slaatte* because the conviction in that case resulted from a guilty plea. *See Slaatte*, 129 Nev. at 220, 298 P.3d at 1170. **In contrast, the conviction in this case arose from a jury verdict. Because Witter could appeal from the verdict, the finality of the subsequently entered judgment of conviction would not have been determinative of this court's jurisdiction under NRS 177.015(3), unlike in *Slaatte*.**

Witter v. State, 135 Nev. 412, 415, 452 P.3d 406, 409 (2019) (emphasis added). As in **Witter**, because Mr. Donko is appealing from a jury verdict, not from a guilty plea, the “finality of the subsequently entered judgment of conviction [is not] determinative of this court’s jurisdiction under NRS 177.015(3)”. **Id.**

It is unclear whether the district court will ever order restitution in this case. The district court apparently wanted to leave the matter of restitution open in case one of the named victims ever came forward with medical records seeking reimbursement. Under such circumstances, it would frustrate Mr. Donko’s appellate rights if he had to wait for the possibility of a restitution order before he could initiate his direct appeal.

Mr. Donko agrees that including an indeterminate restitution amount in his judgment of conviction was error. *See Witter*, 135 Nev. at 414, 452 P.3d at 408; *see also* **NRS 176.105(1)(c)** (stating that a judgment of conviction must include the amount and terms of any restitution); **NRS 176.033(1)(c)** (directing district court to set forth the “amount of restitution

for each victim of the offense”). However, this is a substantive matter to be addressed on the merits of his direct appeal and not a jurisdictional issue.

Accordingly, Mr. Donko respectfully requests that this Honorable Court retain jurisdiction and reinstate briefing in his direct appeal.

DATED this 7 day of May, 2020.

DARIN IMLAY
CLARK COUNTY PUBLIC DEFENDER

By /s/ Deborah L. Westbrook
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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 7 day of May, 2020. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON D. FORD
ALEXANDER CHEN

DEBORAH L. WESTBROOK
HOWARD S. BROOKS

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

TED MICHAEL DONKO
c/o High Desert State Prison
P.O. Box 650
Indian Springs, NV 89070

BY /s/ Carrie M. Connolly
Employee, Clark County Public
Defender's Office