

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

TED MICHAEL DONKO,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

CASE NO:

Electronically Filed  
Dec 21 2020 12:49 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court  
81075

**MOTION TO DISMISS APPEAL**

COMES NOW the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through his Deputy, JOHN NIMAN, and submits this Motion to Dismiss Appeal pursuant to NRAP 27. This motion is based on the following memorandum, declaration, and all papers and pleadings on file herein.

Dated this 21<sup>st</sup> day of December, 2020.

Respectfully submitted,

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

BY */s/ John T. Niman*

JOHN T. NIMAN  
Deputy District Attorney  
Nevada Bar #014408  
Office of the Clark County District Attorney  
Regional Justice Center  
200 Lewis Avenue  
P.O. Box 552212  
Las Vegas, Nevada 89155-2212  
(702) 671-2500

## **ARGUMENT**

This case is an appeal from a Judgment of Conviction. In this appeal, Ted Donko (hereinafter “Donko”) raised seven issues. In one issue, Donko argues that the district court erroneously retained jurisdiction over Appellant’s Judgment of Conviction as to restitution. AOB at 26-28. The State agrees and respectfully requests that Donko’s appeal be dismissed and the case be remanded to the district court to enter a final, appealable Judgment of Conviction.

On February 10, 2020, Donko was charged by way of Amended Information as follows: Counts 1 and 2– Battery with Use of a Deadly Weapon Resulting in Substantial Bodily Harm (Category B Felony– NRS 200.481); Counts 3, 4, 5– Attempt Murder with Use of a Deadly Weapon (Category B Felony– NRS 200.010, 200.030, 193.330, 193.165); Count 6– Assault with a Deadly Weapon (Category B Felony– NRS 200.471); Count 7– Discharging Firearm At or Into Occupied Structure, Vehicle, Aircraft, or Watercraft (Category B Felony– NRS 202.285). I Appellant’s Appendix (“AA”) 123-25. Additionally, on February 13, 2020, Donko was charged by way of Second Amended Information with one count of Ownership or Possession of Firearm by Prohibited Person (Category B Felony– NRS 202.360). I AA 127-28.

On February 10, 2020, Appellant's jury trial commenced. II AA 326. On February 13, 2020, after four days of trial, the jury found Appellant guilty on all counts. I AA 186-89.

On April 20, 2020, the district court sentenced Donko as follows: Count 1—twenty-four (24) to sixty (60) months in the Nevada Department of Corrections (“NDC”); Count 2—twenty-four (24) to sixty (60) months, concurrent with Count 1; Count 3—thirty-six (36) to ninety-six (96) months, plus twelve (12) to thirty (30) months for the Use of a Deadly Weapon, consecutive to Counts 1 and 2; Count 4—thirty-six (36) to ninety-six (96) months, plus twelve (12) to thirty (30) months for the Use of a Deadly Weapon, consecutive to Count 3; Count 5—thirty-six (36) to ninety-six (96) months, plus twelve (12) to thirty (30) months for the Use of a Deadly Weapon, consecutive to Count 4; Count 6—twelve (12) to thirty (30) months, concurrent with Count 5; Count 7—twelve (12) to thirty (30) months, concurrent with Count 6; Bifurcated Count 1, originally Count 8—twelve (12) to thirty (30) months, concurrent with Count 7. I AA 194-96; V AA 973-75. Donko received one hundred fifty (150) days credit for time served and an aggregate total sentence, including the deadly weapon enhancements, of one hundred forty-four (144) months to three hundred seventy-eight (378) months in the NDC. I AA 196. The Judgment of Conviction was filed on April 28, 2020. I AA 194.

Subsequently, on June 3, 2020, the State filed a Motion to Address Aggregate Sentence Calculations requesting that an Amended Judgment of Conviction to recalculate Donko's aggregate sentence. I AA 197-202. On November 24, 2020, the district court filed a Minute Order confirming that the aggregate total sentence reflected in the Judgment of Conviction was correct. I AA 217A-217B.

At Donko's sentencing hearing and as reflected in the Judgment of Conviction, the district court stated that it would retain jurisdiction as to any Restitution. I AA 195; V AA 972. The State agrees that a Judgment of Conviction is not final when it omits an amount for Restitution. NRS 176.105(1)(c); Whitehead v. State, 128 Nev. 259, 263, 285 P.3d 1053, 1055 (2012) (concluding "that a judgment of conviction that imposes a restitution obligation but does not specify its terms is not a final judgment."). Accordingly, because the Judgment of Conviction was not final, this Court does not have jurisdiction over the instant appeal.

This Court addressed a similar issue in Slaatee v. State, 129 Nev. 219, 221, 298 P.3d 1170, 1171 (2013). In Slaatte, the district court failed to provide a specific amount of restitution because it was concerned that the victim might incur additional medical expenses. Id. at 221-22, 298 P.3d at 1171. While recognizing

the district court's reasoning, this Court dismissed the defendant's appeal because of a lack of jurisdiction as it stated:

None of our prior decisions addressed whether the judgment was final given its failure to comply with NRS 176.105(1). If such a judgment is not appealable as a final judgment, see NRS 177.015(3), we lack jurisdiction over this appeal. See Castillo v. State, 106 Nev. 349, 352, 792 P.2d 1133, 1135 (1990) (explaining that court has jurisdiction only when statute or court rule provides for appeal). Our recent decision in Whitehead v. State, 128 Nev. —, 285 P.3d 1053 (2012), is controlling. In that case, we considered whether a judgment of conviction that imposed restitution but did not specify the amount of restitution was sufficient to trigger the one-year period under NRS 34.726 for filing a post-conviction petition for a writ of habeas corpus. Id. at —, 285 P.3d at 1055. Based on the requirement in NRS 176.105(1)(c) that the amount of restitution be included in the judgment of conviction if the court imposes restitution, we concluded “that a judgment of conviction that imposes a restitution obligation but does not specify its terms is not a final judgment” and therefore it does not trigger the one-year period for filing a habeas petition. Id. *Given our decision in Whitehead that such a judgment is not a final judgment, we necessarily conclude that it also is not appealable.*

(emphasis added). Accordingly, the instant appeal should be dismissed and remanded to the district court to calculate the appropriate restitution and to enter a final, appealable Judgment of Conviction. Appellant may appeal from that Judgment of Conviction, when filed, in the ordinary course.

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Dated this 21<sup>st</sup> day of December, 2020.

Respectfully submitted,

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

BY */s/ John T. Niman*

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JOHN T. NIMAN  
Deputy District Attorney  
Nevada Bar #014408  
Office of the Clark County District Attorney  
Regional Justice Center  
200 Lewis Avenue  
P.O. Box 552212  
Las Vegas, Nevada 89155-2212  
(702) 671-2500

## **CERTIFICATE OF SERVICE**

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 21<sup>st</sup> day of December, 2020. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON D. FORD  
Nevada Attorney General

DEBORAH L. WESTBROOK  
Chief Deputy Public Defender

JOHN T. NIMAN  
Deputy District Attorney

*/s/ J. Garcia*

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Employee, Clark County  
District Attorney's Office

JTN/Brittini Griffith/jg