

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 STATE’S
MOTION TO DISMISS**

Comes Now TED MICHAEL DONKO, by and through Chief Deputy Public Defender Audrey Conway, and files this Response to the State’s Motion to Dismiss filed on December 21, 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 21st day of December, 2020.

Respectfully submitted,

DARIN F. IMLAY
CLARK COUNTY PUBLIC DEFENDER

By /s/ Audrey Conway
Audrey Conway, #5611
Chief Deputy Public Defender

DECLARATION OF AUDREY CONWAY

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 appeal 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,” the court sentenced Mr. Donko to 24-60 months on count I; 24-60 months on count II, concurrent; 36-96 months on Count III, plus a consecutive term of 36-96 months for the weapon enhancement; 36-96 months on Count IV, plus consecutive 36-96 months for the weapon enhancement, consecutive to Count III; 36-96 months on Count V, plus a

consecutive term of 12-30 months for the weapon enhancement, consecutive to Count IV; 12-30 months on Count VI, concurrent to Count V; 12-30 months on Count VII, concurrent to Count VI; and 12-30 months on Count VIII, concurrent with Count VII, with 150 days credit for time served. The State filed the judgment of conviction on April 28, 2020. Although the judgment of conviction provides for Counts I and II to run consecutively to Counts III, IV, and V, the judgment also provides for an aggregate sentence of 144-378 months. (Appellant's Appendix Vol. I at 194). On June 3, 2020, the State filed a motion to address the aggregate sentence calculations based on a variance between the aggregate sentence and the individual sentences. On November 24, 2020, the Court granted the State's motion and ordered that Donko's aggregate sentence reflect an increase to 168-438 months. (I 197; 217A-217B). At sentencing, the court indicated that it would retain jurisdiction as to restitution in the event 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. On May 7, 2020, Appellant filed a Response to Order to Show Cause addressing whether this Court had jurisdiction in light of the District Court's retention of jurisdiction over the restitution issue. On July 27, 2020, this Court issued an order reinstating briefing and finding that this appeal may proceed. As set forth in the below Memorandum of Points and Authorities (and in Mr. Donko's Response to Order to Show Cause filed on May 7, 2020), 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).

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

EXECUTED on the 21st day of December, 2020.

/s/ Audrey Conway
AUDREY CONWAY

MEMORANDUM OF POINTS AND AUTHORITIES

In the State’s motion to dismiss, the State contends that the judgment of conviction is not final because it contains the phrase “Jurisdiction retained as to any restitution.” The State relies on the following authority: 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). (State’s Motion to Dismiss, 3). However, this Court previously reviewed precisely the same issue and determined that this appeal should proceed on the merits.

As noted in appellant’s Response to Order to Show Cause, in *Whitehead*, 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 post-conviction habeas petition pursuant to NRS 34.726. *Whitehead*, 128 Nev. at 263, 285 P.3d at 1055. 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. At the sentencing hearing, the State advised the court that the victims wanted the court to focus more on the prison sentence than on restitution. (V 972). When the court asked the State whether she should “retain jurisdiction” over the restitution issue, the State responded, “Sure.” (V 972). Although the State submitted no documentation in support of restitution, the court stated that the victims had incurred “very serious medical bills.” (V 972). Under these circumstances, it would frustrate Mr. Donko’s appellate rights if he had to wait for the possibility of a restitution order at an indeterminate future hearing before he could initiate his direct appeal.

Mr. Donko agrees that including an indeterminate restitution amount in his judgment of conviction constitutes reversible error, and has addressed this issue in the Opening Brief. *Witter*, 135 Nev. at 414, 452 P.3d at 408; NRS 176.015(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 that has been addressed on the merits of the direct

appeal, and should not be considered a jurisdictional issue. Accordingly, Mr. Donko respectfully requests that this Honorable Court retain jurisdiction and deny the State's Motion to Dismiss his appeal.

DATED this 21st day of December, 2020.

DARIN IMLAY
CLARK COUNTY PUBLIC DEFENDER

By /s/ Audrey Conway
AUDREY CONWAY, #5611
Chief Deputy Public Defender

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 21st 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
ALEXANDER CHEN
JOHN T. NIMAN

AUDREY M. CONWAY

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, NDOC No: 1080899, 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