



IN THE SUPREME COURT OF THE STATE OF NEVADA

INDICATE FULL CAPTION:

Electronically Filed
Jun 16 2021 11:56 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

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

No. 83037

**DOCKETING STATEMENT
CRIMINAL APPEALS**

(Including pretrial and post-conviction
habeas corpus and petitions for post-
conviction relief)

GENERAL INFORMATION

1. Judicial District Eighth County Clark
Judge Jacqueline Bluth District Ct. No. C-19-345584-1
2. If the defendant was given a sentence,
(a) what is the sentence? Counts 1 & 2, Battery With Use of a Deadly Weapon Resulting in Substantial Bodily Harm, Cts. 3, 4, & 5 - Attempt Murder With use of a Deadly Weapon, Ct. 6 - Assault with a Deadly Weapon, Ct. 7 - Discharging a Firearm at or into Occupied Structure Vehicle Aircraft or Watercraft and Ct. 8 - Ownership or Possession of a Firearm by Prohibited Person and sentenced to \$25 Admin. Fee; \$150 DNA analysis fee waived, \$3 DNA collection fee; \$250 Indigent Defense Civil Assessment fee; as to Ct. 1 - 24-60 months in prison; Ct. 2 - 24-60 months in prison concurrent with Ct. 1; Ct. 3 - 36-96 months in prison plus a consecutive term of 12-30 months in prison consecutive to Cts. 1 & 2, Ct. 4 - 36-96 months in prison plus a consecutive term of 12-30 months consecutive to Ct. 3; Ct. 5 - 36-96 months in prison plus a consecutive term of 12-30 months in prison consecutive to Ct. 4, Ct. 6 - 12-30 months in prison concurrent with Ct. 5; Ct. 7 - 12-30 months in prison concurrent with Ct. 6; Ct. 8 - 12-30 months in prison concurrent with Ct. 7; 150 days CTS; jurisdiction retained as to restitution, aggregate including the deadly weapon enhancement is 144 months with a maximum of 378 months. Aggregate not including the deadly weapon enhancement of 108 months to 288 months. Following proceedings, court ordered sentenced Amended as to Aggregate sentence.

(b) has the sentence been stayed pending appeal? No.
(c) was defendant admitted to bail pending appeal? No.
3. Was counsel in district court appointed XX or retained _____?
4. **Attorney filing this docketing statement:**
Attorney Howard S. Brooks, #3374 Telephone 455-4576
Firm Clark County Public Defender's Office
Address 309 S. Third St., #226
Las Vegas, Nevada 89155
Client Ted Michael Donko

If this is a joint statement by multiple appellants, add the names and addresses of other counsel on an additional sheet accompanied by a certification that they concur in the filing of this statement.

5. Is appellate counsel appointed X or retained _____?

6. **Attorney(s) representing respondent(s):**

Attorney STEVEN B. WOLFSON Telephone 455-4741
Firm Clark County District Attorney's Office
Address 200 S. Third St.
Las Vegas, Nevada 89155
Client(s) The State of Nevada

Attorney _____ Telephone _____
Firm _____
Address _____
Client(s) _____
(List additional counsel on separate sheet if necessary)

7. **Nature of disposition below:**

<input type="checkbox"/> Judgment after bench trial	<input type="checkbox"/> Grant of pretrial habeas
<input checked="" type="checkbox"/> Judgment after jury verdict	<input type="checkbox"/> Grant of motion to suppress evidence
<input type="checkbox"/> Judgment upon guilt plea	<input type="checkbox"/> Post-conviction relief (NRS ch. 177)
<input type="checkbox"/> Grant of pretrial motion to dismiss	<input type="checkbox"/> grant <input type="checkbox"/> denial
<input type="checkbox"/> Parole/Probation revocation	<input type="checkbox"/> Post-conviction habeas (NRS ch. 34)
<input type="checkbox"/> Motion for new trial	<input type="checkbox"/> grant <input type="checkbox"/> denial
<input type="checkbox"/> grant <input type="checkbox"/> denial	<input type="checkbox"/> Other disposition (specify) _____
<input type="checkbox"/> Motion to withdraw guilty plea	_____
<input type="checkbox"/> grant <input type="checkbox"/> denial	_____

8. **Does this appeal raise issues concerning any of the following:**

<input type="checkbox"/> death sentence	<input type="checkbox"/> juvenile offender
<input type="checkbox"/> life sentence	<input type="checkbox"/> pretrial proceedings

9. **Expedited appeals:** The court may decide to expedite the appellate process in this matter. Are you in favor of proceeding in such manner?

Yes _____ No XX

10. **Pending and prior proceedings in this court:** List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal (e.g., separate appeals by co-defendants, appeal after post-conviction proceedings) Case No: 81075.

11. **Pending and prior proceedings in other courts.** List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (e.g., habeas corpus proceedings in state or federal court, bifurcated proceedings against co-defendants): N/A

12. **Nature of action:** Briefly describe the nature of the action and the result below: The State filed a complaint on November 26, 2019, alleging two counts of battery with use of a deadly weapon resulting in substantial bodily harm; two counts of attempt murder with use of a deadly weapon; and one count of ownership or possession of a firearm by a prohibited person. After a preliminary hearing on December 18, 2019, Donko was bound over to District Court. On December 19, 2019, the State filed an Information alleging two counts of battery with use resulting in substantial bodily harm; three counts of attempt murder with use; one count of assault with a deadly weapon; one count of discharging a firearm at or into an occupied structure; and one count of ownership or possession of a firearm by a prohibited person. On December 20, 2019, Donko appeared in district court and entered a plea of not guilty. On February 7, 2020, the defense filed a motion to withdraw due to conflict. The court denied the motion. On February 10, 2020, the State filed an Amended Information reflecting severance of the charge of ownership or possession of a firearm by a prohibited person. On February 13, 2020, the State filed a Second Amended Information alleging the bifurcated weapon charge. Jurors convicted on all counts after a four-day trial. The court sentenced 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. 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.

13. **Issues on appeal.** State specifically all issue(s) in this appeal:

- I. The court violated Donko's federal and state due process rights under the Fifth, Sixth, and Fourteenth Amendments by admitting an unconstitutionally unreliable in-court identification.
- II. The Court violated Donko's protections from double jeopardy by improperly increasing his sentence.
- III. The court erred in retaining jurisdiction over restitution without legal basis.
- IV. The Court violated the Fifth, Sixth, and Fourteenth Amendments and the Nevada Constitution by rejecting proposed defense jury instructions.
- V. The State committed misconduct, violating the Fifth, Sixth, and Fourteenth Amendments and the Nevada Constitution.
- VI. The State failed to prove beyond a reasonable doubt that appellant committed these crimes.
- VII. Cumulative error warrants reversal of these convictions.

14. **Constitutional issues.** If the States is not a party and if this appeal challenges the constitutionality of a statute or municipal ordinance, have you notified the clerk of this court and the attorney general with NRAP 44 and NRS 30.130?

N/A _____ Yes _____ No _____ Unknown at this time.

15. **Assignment to the Court of Appeals or retention in the Supreme Court.** Briefly set forth whether the matter is presumptively retained by the Supreme Court or assigned to the Court of Appeals under NRAP 17 and cite the subparagraph(s) of the Rule under which the matter falls. If appellant believes that the Supreme Court should retain the case despite its presumptive assignment to the Court of Appeals, identify the specific issue(s) or circumstance(s) that warrant retaining the case, and include an explanation of their importance or significance: Among the amendments is "Rule 17: Division of Cases Between the Supreme Court and the Court of Appeals." Subsection (b) of Rule 17 provides that certain cases shall "presumptively" be heard and decided by the court of appeals. NOT INCLUDED in the cases to be "presumptively" assigned to the court of appeals are appeals of convictions for persons convicted of Category

A and Category B felonies. No provision of the Nevada Rules of Appellate Procedure suggests that Category A or Category B felonies should be assigned to the court of appeals for resolution. Pursuant to the Judgment of Conviction, Mr. Donko was adjudicated guilty of two counts of Battery With Use of a Deadly Weapon resulting in Substantial Bodily Harm, three counts of Attempt Murder with Use of a Deadly Weapon; one count of Assault with a Deadly Weapon; one county of discharging a firearm at or into occupied structure, vehicle, aircraft or watercraft and one count of Ownership or Possession of a Firearm by Prohibited Person which are classified as a "category B" felonies. That because this case is a Category B felony, and because the provisions that "presumptively" assign certain cases to the Court of Appeals expressly exclude cases involving Category B felonies, the Appellant respectfully requests this Court retain this case for resolution.

16. **Issues of first-impression or of public interest.** Does this appeal present a substantial legal issue of first-impression in this jurisdiction or one affecting an important public interest?

First-impression: Yes _____ No XX
Public interest: Yes _____ No XX

17. **Length of trial.** If this action proceeded to trial in the district court, how many days did the trial last?

4 days.

18. **Oral argument.** Would you object to submission of this appeal for disposition without oral argument?

Yes XX No _____

TIMELINESS OF NOTICE OF APPEAL

19. Date district court announced decision, sentence or order appealed from 04/20/2020.
20. Date of entry of written judgment or order appealed from Amended Judgment filed 05/25/2021.

(a) If no written judgment or order was filed in the district court, explain the basis for seeking appellate review: N/A.

21. If this appeal is from an order granting or denying a petition for a writ of habeas corpus, indicate the date written notice of entry of judgment or order was served N/A

(a) Was service by delivery or by mail _____ (specify).

22. If the time for filing the notice of appeal was tolled by a post-judgment motion:

(a) Specify the type of motion, and the date of filing of the motion:

Arrest judgment _____ Date filed _____
New trial _____ Date filed _____
(newly discovered evidence)
New trial _____ Date filed _____
(other grounds)

(b) Date of entry of written order resolving motion _____

23. Date notice of appeal filed 06/01/2021.

24. Specify statute or rule governing the time limit for filing the notice of appeal, e.g.,
NRAP 4(b), NRS 34.710, NRS 34.815, NRS 177.015(2), or other NRAP 4(b)
-

SUBSTANTIVE APPEALABILITY

25. Specify statute, rule or other authority which grants this court jurisdiction to review
the judgment or order appealed from:

NRS 177.015(1) (b) _____	NRS 34.710(3) _____
NRS 177.015(2) _____	NRS 34.710(4) _____
NRS 177.055 _____	NRS 34.815 _____
NRS 177.385 _____	NRS 177.015(3) <u>XX</u>

VERIFICATION

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

Ted Michael Donko
Name of appellant

AUDREY M. CONWAY, #5611
Name of counsel or record

June 16, 2021
Date

/S/ Audrey M. Conway
Signature of counsel of record

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 16th day of June, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON D. FORD
ALEXANDER CHEN

AUDREY M. CONWAY

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