

IN THE SUPREME COURT OF THE STATE OF NEVADA

TED MICHAEL DONKO,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

NO. 83037

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APPELLANT'S OPENING BRIEF

(Appeal from Judgment of Conviction)

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APPELLANT’S OPENING BRIEF

JURISDICTIONAL STATEMENT

- A. Statute granting jurisdiction to review the judgment: NRS 177.015.
- B. Amended Judgment of Conviction filed May 25, 2021; Notice of Appeal filed April 21, 2020.
- C. This appeal is from a final judgment entered on May 26, 2021.

ROUTING STATEMENT

- D. This case is not presumptively assigned to the Court of Appeals under NRAP 17(b)(1) because appellant was convicted of Category B felonies.

ISSUES PRESENTED FOR REVIEW

- I. The Court violated Donko’s protections from double jeopardy by improperly increasing his sentence.**

STATEMENT OF THE CASE

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. (I 1). After a preliminary hearing on December 18, 2019, Donko was bound over to District Court. (I 7). 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. (I 8). On December 20, 2019, Donko appeared in district court and entered a plea of not guilty. (I 205). On February 7, 2020, the defense filed a motion to withdraw due to conflict. (I 120). The court denied the motion. (I 208). 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. (I 123). On February 13, 2020, the State filed a Second Amended Information alleging the bifurcated weapon charge. (I 127). 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. (I 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). The State filed an Amended Judgment of Conviction on May 25, 2021. (V 979). Donko filed a second Notice of Appeal filed April 21, 2020. (V 985). On June 15, 2021, Donko filed a motion to consolidate his appeals on the grounds that the resentencing issue had already been fully briefed in Case No. 81075, and

that the only issue arising from the Amended Judgment of Conviction was the resentencing issue. The State did not oppose consolidation. On June 17, 2021, this Court denied the motion to consolidate.

STATEMENT OF THE FACTS

On October 1, 2019, Las Vegas resident Ted Donko lived at 299 North Linn Lane. (IV 845). He spent most of that morning at home, and went to Sonic for food and to AutoZone across the street. (IV 846). Donko is a mechanic, and often worked on several cars at a time at his house. (IV 847). After high school, Donko admitted that he got into trouble and incurred convictions for attempted grand larceny and attempted burglary. (IV 845). Donko described his neighborhood as “rough,” and said it is generally not a safe area of town; Donko testified that the neighborhood sees a lot of gang activity and gang violence. (IV 848). Donko had recently heard that a man nicknamed “Shorty” had been attacked in the area in the days leading up to the subject incident. (IV 849). Donko knew a man named DeAndre Woods from the neighborhood, and he admitted that he and Woods had occasionally smoked marijuana together. (IV 847). Donko met Woods sometime in 2017, and had bought marijuana from Woods at times. (IV 847, 849). Donko testified that on the night of September 30, 2019, he had driven around the neighborhood in an older model sedan with a friend, and testified

that the friend had taken him to a dispensary at about ten p.m. (IV 855, 858).

Jonathan Sanchez-Loza (Sanchez) lived at 104 Linn Lane in Las Vegas, Nevada. (III 680). At about 11:30 a.m. on the morning of October 1, 2019, he received a phone call from his friend, Fernando Espinoza, and went to meet him at 56 North Linn Lane. (III 681). Another friend named Chuck was already there with a friend named Gilbert. DeAndre Woods was also present. Sanchez and Espinoza planned to load some items from the house into a pickup truck. (III 663; 681).

Woods testified that the previous night, on September 30, 2019, he had been at his ex-girlfriend's house at 56 Linn Lane when two men asked him if he knew someone named "Shorty." Woods testified that one man wore a black shirt and that the other wore a red shirt. Woods claimed that he did not know the men, and that he told them he didn't know Shorty. He described one man as short and Mexican, and later identified the other as Ted Donko. (III 705-06). The men left in an older Toyota after Woods's conversation with them. (III 706; IV 708).

The next day, Woods testified that he was clearing out some things from his ex-girlfriend's house at 56 Linn Lane and loading them into the white truck in the driveway. (IV 708). Although Woods did not know

Espinoza and Sanchez very well, the two were helping him move things out of the house, along with Gilbert. (IV 709-10).

At around 12:15 p.m., Woods was sitting in a chair between the driveway and the truck when a Toyota pulled up in front of the house. (IV 712). Woods testified that a man got out of the car, said “Fuck Shorty,” and started shooting. Woods heard multiple shots. (IV 713). Woods claimed that the shooter was the same man who had asked him about Shorty the previous night, and testified that the man was wearing a red shirt. (IV 713, 714). Woods testified that the car left and headed toward Charleston Boulevard. (IV 715).

Sanchez testified that as he was in the driveway sometime after noon, he heard someone ask, “Where’s Shorty?” He looked around and saw a Toyota in the street and a man pointing a gun at him. Espinoza was behind Sanchez and behind the truck. (III 682-83). Sanchez testified that he was shot and fell to the ground in the driveway. (III 683). He heard about ten rounds fired, and saw Espinoza also fall to the ground. (III 684). Sanchez called his uncle, and lost consciousness intermittently. He was shot in the thigh and leg. (III 684). Sanchez now walks with a cane and has a bullet permanently lodged in his leg. (III 685). Espinoza was shot in the arm and the abdomen, and spent weeks in the hospital. He underwent surgery on his

right arm. (III 664). He bears a scar that runs from the middle of his hand to his wrist (III 664).

Local resident Genaro Ramos was working on his mother's car in the driveway of 5617 White Cap Street on the day of this incident. (III 693). He heard between eight and ten gunshots at around 12:15 p.m. (III 694). He testified that he subsequently saw an older, gold-colored Toyota Corolla speeding down his street a couple of minutes after he heard the gunshots. (III 695). The car stopped and a man got out of the car and began patting his waist and searching his pockets. (III 696). The man briefly returned to the car and then started walking north on Surf Lane. (III 696). Ramos described the man as a white male in his thirties who was wearing a red shirt. (III 697). Ramos identified the Toyota Corolla impounded by Metro as the car he saw speeding down his street. (III 698). Cathryn All resides at 5675 Big Sea Street. She provided video from her home's security system to Metro officers which showed a man in a red shirt walking by her house at the approximate time of these events. (III 591-93).

On October 1, 2019, Metro police officer Alan Hennig was dispatched to the scene of a shooting at 56 North Linn Lane in Las Vegas, Nevada. The suspects had been described on the 911 call as two Hispanic men who had pulled up in a gray Toyota Corolla; the shooter was described as wearing red

and about five feet, eleven inches in height; the driver was wearing black.

When Hennig arrived at the scene, he found Sanchez and Espinoza lying in the driveway with gunshot wounds. One had been hit in the leg and the other through the hand and in the stomach. (III 544-45; 551). Hennig saw two bullet holes in the white truck parked in the driveway, and found eight shell casings in the street. (III 546). CSA Strumillo examined the casings and determined they were Winn 40 casings. (III 568-69). She identified three bullet holes on the white truck in the driveway, two bullet holes in the garage door, and damage to a chair in the driveway of the house. (III 572-76).

Metro Det. Jason Marin was also dispatched to the scene. (IV 806).

During his interview at the scene with DeAndre Woods, Woods told Marin that the shooter was a Hispanic male adult, about five feet eleven inches, with a shaved or bald head, and wearing a red t-shirt. (IV 809). Marin testified that the cartridges found in the Toyota matched the casings found at the scene of the shooting. (IV 812).

Metro Officer Corbett was also dispatched to the scene and assisted in locating the Corolla involved in the shooting. Officers found the car in the general area of the shooting, a few blocks away from 56 N. Linn Lane. (III 553). The Corolla was unregistered and unoccupied when located. (III 554).

An unspent round was found on the passenger floor of the car. (III 555).

Metro Officer Gadea was also dispatched to the scene and canvassed the area for evidence. He found a red shirt on the side of the road near Big Sea and Sea Way streets, a few blocks from Linn Lane. (III 557-58).

CSA Strumillo examined several items of clothing from the scene, including a white tank top, shorts, DeAndre Woods's sweatpants, and a blue shirt. (III 579-82). Strumillo also located several bullet fragments under the white truck, in the bed of the truck, and near the chain link fence. (III 583-84). CSA Grover examined the grey Toyota Corolla found at 5677 White Cap. (III 601). Grover impounded a Win 40 Smith & Wesson cartridge from the car. (III 605). Grover also found a license plate between the seat and the console that he processed for prints. (III 606). Grover also looked for prints on the exterior and interior of the car, and submitted prints from the car doors and the license plate for testing. (III 607; 612).

Allison Rubino, a Metro forensic analyst, testified that she obtained a mixture of two DNA profiles from the red shirt retrieved by Metro officers; she testified that Donko's DNA profile was included in 99 percent of the DNA mixture, with the remaining one percent from an unknown contributor. (III 638). Metro forensic analyst Kathryn Aoyama testified that only one of the nine fingerprints collected by investigators was of sufficient quality for

submission to the national Automated Fingerprint Identification System (AFIS). She testified that the print, taken from the license plate found inside the Toyota, matched with the left middle finger of Donko. (III 656, 659).

After viewing a photo lineup, Woods identified Donko as the shooter, and testified that he was “95 percent” sure of his identification. (IV 714; 720). Woods admitted that he had previously told detectives at the scene that the shooter was Hispanic. (IV 721). Woods admitted that he told detectives that the shooter had no tattoos, although Donko has numerous tattoos on his arms, neck, and face. (IV 721, 860). Although he failed to identify Donko during his initial testimony, Genearo Ramos was permitted to retake the stand during trial over the objection of the defense. Ramos testified that during his initial examination, he recognized Donko as the man he saw exiting the Toyota on the day of the shooting. (IV 759).

At trial, Donko testified in his own defense. He denied owning a gun, and denied being involved in this shooting. (IV 845). Donko denied meeting or knowing Fernando Espinoza. Donko denied having any problems with Woods or Sanchez, both of whom he knew from the neighborhood. (IV 849). Donko testified that he had stored some of his clothing in a car for a brief period while he was homeless, and that some of his clothes had been taken in a car burglary. (IV 861). Donko steadfastly maintained his

innocence in these events and testified under oath that he had no involvement in this shooting. (IV 845-46).

SUMMARY OF THE ARGUMENT

This Court should find that the trial court violated Donko's constitutional rights by improperly increasing his sentence after the Judgment of Conviction was filed.

ARGUMENT

I. The Court violated Donko's protections from double jeopardy by improperly increasing his sentence.

"The Double Jeopardy Clause of the United States Constitution precludes courts from increasing a sentence when the defendant has a reasonable expectation that the sentence is final." *Miranda v. State*, 114 Nev. 385, 386, 956 P.2d 1377, 1378 (1998), citing *United States v. DiFrancesco*, 449 U.S. 117, 135, 101 S. Ct. 426, 436 (1980). A district court lacks jurisdiction to amend a judgment of conviction when the defendant begins serving his sentence. *State v. Kinsey*, 109 Nev. 519, 523, 853 P.2d 109, 112 (1993). In Nevada, the showing of necessity required to correct an illegal sentence without violating the Double Jeopardy Clause is "more heightened under the Nevada Constitution than its federal counterpart." In this area of jurisprudence, "Nevada law embraces a more expansive interpretation of

constitutional rights than federal law.” *Wilson v. State*, 123 Nev. 587, 595, 170 P.3d 975, 980 (2007).

Under NRS 176.555, a district court may correct an illegal sentence at any time. The Nevada Supreme Court has defined an “illegal” sentence as a sentence “at variance with the controlling sentencing statute or when ‘the court goes beyond its authority by acting without jurisdiction or imposing a sentence in excess of the statutory maximum provided ...’” *Edwards v. State*, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996)N (internal citations omitted). At the sentencing hearing on April 20, 2020, the court sentenced Donko to 24-60 months on count 1, 24-60 months on count 2, concurrent; and 36-96 months on Count 3, plus a consecutive term of 36-96 months for the weapon enhancement. The court initially suggested that Count 3 would run consecutive to counts 1 and 2. (V 974). The court imposed 36-96 months on Count 4, plus a consecutive term of 36-96 months for the weapon enhancement, consecutive to Count 3; 36-96 months on Count 5, plus a consecutive term of 12-30 months for the weapon enhancement, consecutive to Count 4; 12-30 months on Count 6, concurrent to Count 5; 12-30 months on Count 7, concurrent to Count 6; and 12-30 months on Count 8, concurrent with Count 7, with 150 days credit for time served. (V 974-75).

Significantly, after imposing sentence on the individual counts, the court explicitly stated: “*So the only things that will run consecutive* are the three Attempt Murders with Use of a Deadly Weapon.” (V 974) (emphasis added). Consistent with this pronouncement, the court stated: “That is an aggregate of -- it should be a minimum of 12 years, a maximum of 31.5, a minimum of 12 years, a maximum of 31.5 [sic], including the deadly weapon enhancements.” (V 974-75). The original judgment of conviction reflected an aggregate sentence of 144-378 months as specifically articulated by the court, consistent with only Counts 3, 4, and 5 running consecutive to the other sentences. (I 194-196). The State filed the judgment of conviction on April 28, 2020, also reflecting an aggregate sentence of 144-378 months. (I 194).

On June 3, 2020, the State filed a motion to address the aggregate sentence calculations, noting that the Nevada Department of Corrections sought clarification based on the position that the actual sentences imposed resulted in an aggregate sentence of 168-438 months because the judgment of conviction implied that Counts 1 and 2 were to run consecutively to Counts 3, 4, and 5 and their weapon enhancements. (I 197-199). At a hearing on the State’s motion on June 15, 2020, the defense opposed any changes to sentence, and noted that the court had clearly indicated that an aggregate

sentence of 12 years to 31.5 years had been imposed. The defense noted that the court had explicitly stated an intention to run only counts 3, 4, and 5, the attempt murder counts and weapons enhancements, consecutive to each other. (V 977-78). However, on November 24, 2020, the court granted the State's motion in a minute order, and ordered that Donko's aggregate sentence reflect an increase to 168-438 months. The State filed the Amended Judgment of Conviction on May 25, 2021. (V 979).

NRS 176.035(1) provides in relevant part, "For offenses committed on or after July 1, 2014, if the court imposes the sentences to run consecutively, the court must pronounce the minimum and maximum aggregate terms of imprisonment." Here, after Donko filed his Notice of Appeal and after he commenced serving his sentence, the district court improperly increased his minimum and maximum sentences in violation of Nevada's prohibition against double jeopardy. First, a district court generally lacks jurisdiction to amend a judgment of conviction once the defendant begins serving his sentence. *State v. Kimsey*, 109 Nev. 519, 523, 853 P.2d 109, 112 (1993). A defendant begins serving his sentence when the judgment of conviction signed by the judge is entered by the clerk. *See* NRS 176.105(3); NRS 176.335(3); *Miller v. Hayes*, 95 Nev. 927, 929, 604 P.2d 117, 118 (1979). Before the written judgment of conviction is entered, "the

district judge ha[s] jurisdiction to modify or suspend his earlier decision” because the defendant has not yet begun serving his sentence. *Miller*, 95 Nev. at 929, 604 P.2d at 118. Here, Donko had commenced serving his sentence and had filed a notice of appeal when the State sought to change the sentence.

Generally, a district court retains jurisdiction to correct an illegal sentence at any time under NRS 176.555. An “illegal” sentence is “one at variance with the controlling sentencing statute” or when “the court goes beyond its authority by acting without jurisdiction or imposing a sentence in excess of the statutory maximum provided....” *Edwards v. State*, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996) (internal citations omitted). When the district court has jurisdiction to correct an illegal sentence, it may do so “only to the extent necessary to bring the sentence into compliance with the statute.” *Miranda v. State*, 114 Nev. 385, 387, 956 P.2d 1377, 1378 (1998) (citing *U.S. v. Fogel*, 829 F.2d 77, 88 (D.C. Cir. 1987)). In *Miranda*, the district court sentenced the defendant to 18 to 36 months in prison. *Miranda*, 114 Nev. at 386, 956 P.2d at 1377. The sentence violated Nevada’s 40% rule and was facially illegal. NRS 193.130(1). To correct the illegality, the district court subsequently increased the maximum term to

45 months. *Miranda*, 114 Nev. at 386, 956 P.2d at 1377. On appeal, the Nevada Supreme Court reversed:

. . . [t]o comply with the Double Jeopardy Clause of the Nevada Constitution, a district court may correct an illegal sentence by increasing its severity only when necessary to bring the sentence into compliance with the pertinent statute, and a correction that increases sentence severity is ‘necessary’ only when there is no other, less severe means of correcting the illegality.

Id. at 387, 956 P.2d at 1378. The Court noted that “the sentencing illegality in the present case could have been corrected by lowering the minimum terms rather than increasing the maximum terms, and, therefore, the correction imposed was not necessary to bring the sentences into compliance with the pertinent sentencing statute.” *Id.*

Here, the district court articulated an aggregate term that did not match the sentences imposed in the individual counts when Counts 1 and 2 ran consecutively to Counts 3, 4, and 5. (I 194-96). Thus, the sentence was facially illegal because the individual sentences were at variance with the required aggregate sentencing calculations under the controlling sentencing statute. NRS 176.035(2)(b). However, to correct this illegality, the court impermissibly increased the minimum and maximum sentences where a less severe option was available: the court could have corrected the sentence by instead ordering the 24-60 month sentences on Counts 1 and 2 to run concurrent with the 48-126 month sentences on Counts 3, 4, and 5, for a

total legal sentence of 144-378 months, as actually intended by the court at the sentencing hearing when the court repeatedly stated an aggregate calculation of 144-378 months. This interpretation would also remain consistent with the court's statement that only Counts 3, 4, and 5 would run consecutively. (I 194; V 974-76). *Miranda*, 114 Nev. at 387, 956 P.2d at 1378.

Double jeopardy applies when a defendant has begun serving his sentence. *Dolby v. State*, 106 Nev. 63, 65, 787 P.2d 388, 389 (1990). When correcting an illegal sentence, a court may only do so to "to the extent necessary to bring the sentence into compliance with the statute." *Miranda v. State*, 114 Nev. 385, 387, 956 P.2d 1377, 1378 (1998) (citations omitted). Here, the aggregate portion of the judgment of conviction provides for a sentence of 144-378 months, and an alternate, less severe method of correcting the illegality was available where the court could have stricken the language regarding Counts 1 and 2 running consecutive to Counts 3, 4, and 5. (I 195-96; V 974-75).

The State will contend that the district court did not violate double jeopardy by re-sentencing Donko to an additional 24-60 months in prison because the State will take the position that the Court merely corrected a "clerical error" under NRS 176.565. However, a clerical error is "... a

mistake in writing or copying” or “[a]s more specifically applied to judgments and decrees a clerical error is a mistake or omission by a clerk, counsel, (or) judge, or printer which is not the result of the exercise of a judicial function.” *Channel 13 of Las Vegas, Inc. v. Ettlinger*, 94 Nev. 578, 580, 583 P.2d 1085, 1086 (1978) (interpreting NRCP 60(a), the civil counterpart to NRS 176.565) (emphasis added); *Robertson v. State*, 109 Nev. 1086, 1088 fn. 1, 863 P.2d 1040, 1041 fn. 1 (1993) (overruled on other grounds by *Krauss v. State*, 116 Nev. 307, 310, 998 P.2d 163, 165 (2000) (a clerical error is an error that fails to “make the record speak the truth concerning acts done”).

Here, the district court’s original sentence resulted from a miscalculation, not a “clerical error.” The miscalculation, later incorporated into the original judgment of conviction, was not due to a “mistake in writing or copying” or a “mistake or omission” by the clerk, judge, or printer, in the judgment or decree. Likewise, the miscalculation did not fail to “make the record speak the truth concerning acts done” because the original judgment of conviction accurately reflected the court’s oral pronouncement that Donko should serve a total of 144-378 months, which was the “act done.” (V 973-975). Therefore, when the court re-sentenced Donko and increased the minimum and maximum sentences, the court

violated Donko's federal and State protections from double jeopardy. The sentencing illegality in the present case could have been corrected by deleting references to Counts 1 and 2 running consecutive to Counts 3, 4, and 5; therefore, the correction imposed was not necessary to bring the sentences into compliance with the pertinent sentencing statute. Because the sentencing correction unnecessarily increased the severity of the sentences, the correction violated the Double Jeopardy Clause of the Nevada Constitution and warrants reversal. *Miranda v. State*, 114 Nev. 385, 387, 956 P.2d 1377, 1378 (1998).

CONCLUSION

Based on the foregoing argument, this Court should find that the amended sentence violated Donko's constitutional rights and should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

This brief has been prepared in a proportionally spaced typeface using Times New Roman in 14 size font.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

Proportionately spaced, has a typeface of 14 points or more and contains 19 pages which does not exceed the 30 page limit.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in

the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 16th day of November, 2021.

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CERTIFICATE OF SERVICE

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

AARON D. FORD

AUDREY M. CONWAY

ALEXANDER CHEN

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

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