

IN THE SUPREME COURT OF THE STATE OF NEVADA

TED MICHAEL DONKO,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

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Case No. 83037

RESPONDENT'S ANSWERING BRIEF

**Appeal From Amended Judgment of Conviction
Eighth Judicial District Court, Clark County**

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STATEMENT OF THE ISSUE

1. Whether the district court did not violate Donko’s protections against Double Jeopardy.

STATEMENT OF THE CASE

On December 19, 2019, TED MICHAEL DONKO (hereinafter “Donko”) was charged by way of 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, and 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 - NOC 50201); Count 7 – Discharging Firearm At or Into Occupied Structure, Vehicle, Aircraft, or Watercraft (Category B Felony – NRS 202.285); and Count 8 – Ownership or

Possession of Firearm by Prohibited Person (Category B Felony – NRS 202.360). I AA 8-11.

On February 10, 2020, the State filed an Amended Information whereby it severed Count 8 – Ownership or Possession of Firearm by Prohibited Person. I AA 123-25. Donko’s jury trial commenced that same day. II AA 326. On February 13, 2020, the State filed a Second Amended Information that reflected the bifurcated charge of Ownership or Possession of Firearm by Prohibited Person. I AA 127-28.

On February 13, 2020, after four (4) days of trial, the jury found Donko guilty of the following: Counts 1 and 2 – Battery with Use of a Deadly Weapon; Counts 3, 4, and 5 – Attempt Murder with Use of a Deadly Weapon; Count 6 – Assault with a Deadly Weapon; and Count 7 – Discharging Firearm At or Into Occupied Structure, Vehicle, Aircraft, Watercraft. IV AA 942-43. After reaching this verdict, the second phase of the trial, involving solely Donko’s bifurcated charge Ownership or Possession of Firearm by Prohibited Person, commenced. V AA 949. The jury also found Donko guilty of such charge. V AA 958.

On April 20, 2020, the district court adjudicated Donko guilty of all charges and orally pronounced the following terms of years for his sentence to the Nevada Department of Corrections (“NDOC”): Count 1 – 24 to 60 months; Count 2 – 24 to 60 months, concurrent with Count 1; Count 3 – 36 to 96 months, consecutive to Counts 1 and 2, plus 12 to 30 months for the Use of a Deadly Weapon, consecutive

to Count 3;¹ Count 4 – 36 to 96 months, plus a consecutive term of 12 to 30 months for the Use of a Deadly Weapon, to run consecutive to Count 3; Count 5 – 36 to 96 months, plus 12 to 30 months for the Use of a Deadly Weapon, to run consecutive to Count 4; Count 6 – 12 to 30 months, to run concurrent; Count 7 – 12 to 30 months, to run concurrent; and Count 8 – 12 to 30 months, to run concurrent. V AA 973-74.

The Court further clarified that the only sentences that would run consecutive were “the three Attempt Murders with Use of a Deadly Weapon,” Donko would receive an aggregate sentence of 12 to 31.5 years, including the deadly weapon enhancements, the district court would retain jurisdiction over the restitution, and he would receive 150 days credit for time served. V AA 974-75. The Judgment of Conviction was filed on April 28, 2020, provided the aforementioned sentences, and clarified more fully that Count 3 would run consecutive to Counts 1 and 2, but listed the aggregate total sentence, including the deadly weapon enhancements, as 144 to 378 months, and the aggregate sentence, not including the deadly weapon enhancements, as 108 to 288 months. I AA 194-96.

On June 3, 2020, the State filed a Notice of Motion and Motion to Address Aggregate Sentence Calculations, wherein the State argued that the appropriate aggregate sentence, based upon the charges at sentencing, was 168 to 438 months. I

¹ Appellant’s Statement of the Case mistakenly lists the weapons enhancements as 36-96 months. AOB at 3.

AA 197-204. On November 24, 2020, the district court explained by way of Minute Order that while it made a clerical error in calculating the aggregate sentence, it appropriately held that the weapons enhancements would run consecutive to the Attempt Murder charges, and Count 3 would run consecutive to Counts 1 and 2. I AA 217A. Accordingly, the district court found that the appropriate aggregate sentence was 168 to 438 months and ordered that an Amended Judgment of Conviction be filed. V AA 217A.

The Amended Judgment of Conviction was filed on May 25, 2021. Donko filed a Notice of Appeal on June 1, 2021 and his Opening Brief (“AOB”) on November 16, 2021.

STATEMENT OF THE FACTS

On October 1, 2019, at around 12:15 PM, Las Vegas Metropolitan Police Department (“LVMPD”) officers responded to a shooting at 56 North Linn Lane in Clark County, Nevada. III AA 544-45. The call to law enforcement described the shooter as a Hispanic male, about 5 foot 11, and was wearing red. III AA 545, 550. Additionally, a gray Toyota Corolla was seen fleeing the scene of the shooting. III AA 545.

When officers arrived at the crime scene, they saw the two male shooting victims lying on the ground next to a truck. III AA 545. One of the men, Jonathan Sanchez-Loza, had been shot in the leg, while the other, Fernando Espinoza, had

been shot in the abdomen and the hand. III AA 545, 662, 684. Officers also observed bullet impacts on the truck and the garage bay door of the residence as well as eight shell casings in the street. III AA 546.

Sanchez-Lopez testified that on the day of the shooting, he received a call at around 11:30 AM from Espinoza. III AA 681. Eventually, he met up with Espinoza, a man named Gilbert, a man named DeAndre Woods, and the owner of the home to take trash to the dump. III AA 681. Ultimately, however, he helped moved furniture into the white truck that was at the scene. III AA 682. At about 12:00 PM he recalled someone saying “Hey, where’s Shorty?” III AA 682. Sanchez-Loza then looked over in the direction of the voice and saw the passenger of a Toyota, with the passenger door open, pointing a firearm at him. III AA 682, 687. Sanchez-Loza was then shot and dropped to the ground. III AA 682-83. While lying on the ground, he recalled seeing Espinoza fall into the back of the truck and, while in and out of consciousness, he called his uncle who lived up the street. III AA 684. Sanchez-Lopez heard about ten gunshots total. III AA 684.

The next thing Sanchez-Lopez remembered was waking up in the hospital. III AA 684. He had been shot in the right thigh and left thigh. III AA 684. As of the day of his trial testimony, he still had a bullet lodged in his left leg and had to walk with a cane. III AA 685. Sanchez-Lopez further testified that he had undergone surgery in his leg, still had pain, and had scars from the injuries. III AA 685.

Espinoza confirmed that he too was at the residence moving furniture using his brother's vehicle. III AA 663. However, Espinoza testified that while he was facing the street at the time of the shooting, he did not know from where the shots originated. III AA 671. Espinoza also testified that he almost did not come to court because he did not want to testify and only participated because he was under subpoena. III AA 666-67. However, LVMPD Detective Jason Marin testified that when he interviewed Espinoza at UMC the day after the shooting, Espinoza told him that while Espinoza was at the address of the shooting on October 1, 2019, an older model Toyota pulled up to the residence. IV AA 818. He further explained to Detective Marin that he saw a passenger get out of the vehicle and had either asked about Shorty or said "Fuck Shorty." IV AA 818. However, Espinoza stated he did not get a good look at the shooter. IV AA 818.

The day before the shooting, on September 30, 2019, Woods recalled sitting on a chair at his ex-girlfriend's house when two young men pulled up in an older Toyota. III AA 704-05; IV AA 707-08. The two men, one wearing a black shirt and the other wearing a red shirt, came up to Woods and asked if he knew someone named Shorty. III AA 704-05. Woods responded to the men that he did not know who Shorty was and the men left. III AA 705.

At the time of the shooting on the following day, Woods testified that he was sitting on a chair while the other men were moving furniture to the truck. IV AA

708. While sitting, Woods saw the same Toyota pull up. IV AA 712. Woods then saw the same white male wearing a red shirt that had asked him who Shorty was on the previous day, and that he later identified as Donko, exit the vehicle and point a gun at the person in front of Woods. IV AA 713-14. Donko then said “Fuck Shorty” and started shooting. IV AA 713. The Toyota subsequently fled from the scene. IV AA 714. Woods, appearing scared, later described the shooter to responding officers. IV AA 809. He described the shooter as a Hispanic male, about 5 foot 11, 200 pounds, had nearly bald hair, and was wearing a red t-shirt. IV AA 809.

Genaro Ramos, who was down the street working on his mother’s vehicle at her home, heard about eight to ten gunshots. III AA 694-95. A couple of minutes later, he noticed a vehicle driving quickly down the street. III AA 694-95. Ramos recalled that the vehicle he saw speeding was an older model, gold, sand colored, Toyota Corolla. III AA 695. After the Toyota sped by, he saw the vehicle stop, and then saw a person, wearing a red shirt, exit the vehicle, look around suspiciously, and search his pockets. III AA 696. The person then tried to go back to the vehicle, but then started running or walking down the street. III AA 696. Ramos described this person as a white male in his 30s. III AA 697. Although Ramos did not initially identify Donko as the individual he saw at trial, after he was excused and the State explained he was free to leave, Ramos indicated to the State that he was nervous. IV AA 755-56. When the State asked why that was, Ramos stated it was his first time

testifying and that the man he saw in court was the man he saw exiting the Toyota on the day of the shooting. IV AA 756. Based on this new information, the State recalled Ramos who nervously identified Donko as the man he saw wearing a red shirt, parking the Toyota Corolla, and walking up the street on the day of the shooting. IV AA 759-760.

After LVMPD officers responded to the crime scene, they canvassed the surrounding streets for evidence. III AA 557-58. Eventually, officers found a vehicle matching the description provided, an unregistered, gray or silver, four-door Toyota Corolla, in the same neighborhood as the shooting. III AA 553; IV AA 811, 813. When officers brought Ramos to view the Toyota Corolla, he told them it was the same vehicle he saw speed by after he heard the gunshots. III AA 698. After locating the vehicle, investigators processed the vehicle for fingerprints and recovered a license plate, a .40 caliber cartridge, as well as a bullet that had a head stamp that matched the casings found at the scene. IV AA 812. The latent prints that were removed from the license plate that was recovered were later determined to be a match to Donko's left middle finger. IV AA 818-19.

Officers also found a red shirt which appeared to have been laid on the side of the road in the same neighborhood as the crime scene. III AA 557-58; IV AA 814. The DNA buccal swab that was later obtained from Donko matched the DNA that was swabbed from the red shirt. IV AA 823. Officers also recovered surveillance

video from a resident that depicted an individual matching the description of the shooting suspect who was wearing a red shirt and had nearly bald hair in the video. IV AA 814-15. The suspect in the video was seen walking in the direction where the red shirt was eventually found. IV AA 815.

Later, officers conducted a photo lineup with Woods. IV AA 819. They showed Woods six photos, including one of Donko. IV AA 819. Complying with routine practice, all of the men in the photos met the same description as Donko as far as height, weight, skin tone, and hair style. IV AA 819. LVMPD Detective Jason Marin, who had conducted the photo lineup, provided the directions to Donko and after Donko signed the form stating he understood the instructions for the photo lineup, Woods wrote down that the man in photo number five was the shooter and he was 95% sure. IV AA 821. Donko was photo number five. IV AA 821. Woods testified that the reason he was 95% sure as opposed to 100% was because when he had previously seen the shooter his hair was shorter which made him only 95% sure. IV AA 720. Further, when asked whether learning later on that Donko was white instead of Hispanic changed his mind on his identification, he stated no. IV AA 721. Moreover, seeing that Donko did not have tattoos did not change Woods' mind about Donko being the shooter because Woods was not focused on the tattoos when he was trying to get out of the crossfire on the day of the shooting. IV AA 721.

Detective Marin testified at trial that it did not change the officers' investigation when Woods originally described the shooter as a Hispanic male because he could have interpreted it differently since he had such a brief interaction with the shooter. IV AA 820. In fact, a race mix up is common. IV AA 820. Notably, Detective Marin also testified that after Donko was apprehended the first time, he only noticed Donko's tattoos was when he was sitting two feet from him because Donko's tattoos were not immediately apparent. IV AA 822.

When Detective Marin later interviewed Donko, Donko stated that he knew Shorty, but there was no evidence that Donko and Woods knew each other. IV AA 877. When Detective Marin asked Donko about his fingerprint in the vehicle, Donko said he was the passenger in the vehicle, which he described as an older model sedan, the night before the shooting. IV AA 878. Donko testified he met Woods in the past and hung out with him. IV AA 794, 844-847.

SUMMARY OF THE ARGUMENT

The district court did not violate Donko's protections against Double Jeopardy, as it appropriately corrected a clerical error by amending Donko's aggregate sentence.

ARGUMENT

I. DONKO WAS NOT SUBJECT TO DOUBLE JEOPARDY

Donko complains he was subject to double jeopardy when his Judgment of Conviction was amended. AOB at 16. He argues the district court's miscalculation was not a clerical error. AOB at 18. Donko claims not amending the Judgment of conviction would have been a "less severe option." AOB at 16.

Donko asserts the district court "explicitly stated: 'So the only things that will run consecutive are the three Attempt Murders with Use of a Deadly Weapon.'" APB at 13. This is true. V AA 974. However, Donko then claims the State sought to correct his sentence "because the judgment of conviction implied that Counts 1 and 2 were to run consecutive." AOB at 13. This is not true. Counts One and Two were never intended to run consecutively; instead, the State requested correction of "the total aggregate sentence based upon the charges at sentencing." I AA 198.

The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution provides that "no person shall 'be subject for the same offense to be twice put in jeopardy of life or limb.'" Jackson v. State, 128 Nev. 598, 604, 291 P.3d 1274, 1277-78 (2012). The Clause protects against multiple punishments for the same offense. Id.

However, “a judgment of conviction may be amended at *any time* to correct a clerical error...” Sullivan v. State, 120 Nev. 537, 540, 96 P.3d 761, 764 (2004). NRS 176.565 states:

Clerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders.

Donko claims that his minimum and maximum sentences were increased after he began serving his sentence. AOB at 14. He points to nowhere in the record, however, to show that his sentence for any given count was increased. The only change is to the aggregate sentence, which now reflects a correct tally of the individual sentences.

Donko’s sentence is comprised of concurrent and consecutive terms of imprisonment. Counts Three, Four, and Five ran consecutively to all other counts as well as each of their respective deadly weapons enhancements. V AA 974-75. The enhanced sentences for use of a deadly weapon *must* run consecutively to the sentence imposed for the underlying crime. NRS 193.165(2).

Donko’s terms of imprisonment can be organized into seven groups, each consecutive to the others:

1. Counts One, Two, Six, Seven, and Eight run concurrently, and the longest term is 24 to 60 months
2. Count Three is 36-96 months, consecutive to counts One, Two, Six, Seven, and Eight
3. Count Three’s weapons enhancement is 12-30 months
4. Count Four is 36-96 months, consecutive to count Three

5. Count Four's weapons enhancement is 12-30 months
6. Count Five is 36-96 months, consecutive to count Four
7. Count Five's weapons enhancement is 12-30 months

Adding the minimum for each of these sentences equals 168 months and adding the maximum sentence for each equals 438 months. The aggregated sentence is 168-438 months.

The transcript of the sentencing hearing shows this is the sentence the district court imposed, though the court added the aggregate incorrectly. V AA 973-74. The original Judgment of Conviction shows this is the sentence imposed, though it incorporates the incorrect aggregate. I AA 195-96. The Amended Judgment of Conviction shows this is the sentence imposed, though it reflects the correct aggregate sentence. V AA 980-82.

Donko argues the district court increased Donko's sentence even though there was a less severe option available for correcting its error. Donko relies on Miranda v. State, 114 Nev. 385, 956 P.2d 1377 (1998), to support his argument. AOB at 15. In Miranda, the defendant's maximum sentence for each count was increased from thirty-six months to forty-five months. Id. at 386, 956 P.2d at 1377.

Here, there have been no changes to Donko's sentence for any count. His term of incarceration for each count remains the same as at his sentencing hearing. There exists no "less severe option" for adding this set of numbers.

Unlike the district court in Miranda that altered an illegal sentence by increasing it, here the district court did not correct Donko's illegal sentence *or* increase Donko's sentence. Since the district court never ran Counts One and Two consecutively, they were never at an illegal variance. AOB at 16.

Thus, NRS 176.555, relating to correcting illegal sentences as in Miranda, is inapplicable. The relevant statute is NRS 176.565, allowing for the correction of clerical errors. Donko's sentence for each count remains the same; the only change is that the aggregate sentence now reflects the correct addition of his sentences. The court merely corrected a mathematical error in its calculations. The modified sentence now complies with the original individual sentences pronounced at Donko's sentencing hearing.

Donko asserts the district court's miscalculation of the aggregate sentence in this case was not a clerical error that the district court could amend. AOB at 17-18. He claims a clerical error is one which is not the result of the exercise of judicial function. AOB at 18 (*citing* Channel 13 of Las Vegas, Inc. v. Ettlinger, 94 Nev. 578, 583 P.2d 1085 (1978)). He further states a clerical error is one that fails to "make the record speak the truth concerning acts done." AOB at 18 (quoting Robertson v. State, 109 Nev. 1086, 1088 n.1, 863 P.2d 1040, 1041 n.1 (1993)).

The Channel 13 case concerns a mathematical error similar to the one at bar. 94 Nev. at 581, 583 P.2d at 1086. There, the Court held the miscalculation was a

mere clerical error and the judgment could be amended. Id. The Court held that since the “complaint does contain adequate information to determine that the sum actually due and owing is in fact the amount of judgment,” the “appellant should not be given a windfall.” Id. Sentencing Donko for each of his counts was an exercise of judicial function, but mathematical calculations were not. This Court has held a miscalculation of an aggregate sentence in a judgment of conviction is a clerical error that a district court can amend. Devlin v. State, 448 P.3d 550, 2019 WL 4392531, Docket No. 73518 (Nev. 2019) (unpub). Unlike in Robinson, correcting the aggregate sentence would actually serve to make the record speak the truth concerning acts done. Donko is not entitled to a windfall.

The district court has not punished Donko for the same crime twice, nor has it changed his sentence after he began serving it. Donko is not entitled to benefit from the court’s clerical error when the sentence in the Amended Judgment of Conviction reflects that imposed at his sentencing hearing.

CONCLUSION

Based on the foregoing, the State respectfully requests the Amended Judgment of Conviction be affirmed.

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Dated this 14th day of December, 2021.

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 Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page and type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, contains 3,609 words and does not exceed 30 pages.
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 14th day of December, 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on December 14, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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