

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 REPLY BRIEF

(Appeal from Judgment of Conviction)

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APPELLANT’S REPLY BRIEF

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

The State argues the district court did not violate double jeopardy by re-sentencing Donko to an additional term in prison because the court merely corrected a “clerical error.” (Answering Brief, 14). The State is incorrect. A clerical error is a copying, editing, or writing mistake or omission that does not result from the exercise of a judicial function. *Channel 13 of Las Vegas, Inc. v. Ettlinger*, 94 Nev. 578, 580, 583 P.2d 1085, 1086 (1978). “In other words, a clerical error is one which cannot reasonably be attributed to the exercise of judicial consideration or discretion.” *In re Humboldt River Sys.*, 77 Nev. 244, 248, 362 P.2d 265, 267 (1961).

Here, the district court's original imposition of sentence amounted to an exercise of judicial consideration or discretion; the court articulated an aggregate term that did not match the sentences imposed in the individual counts when Counts 1 and 2 were imposed consecutively to Counts 3, 4, and 5, although the aggregate term was consistent with the court's oral statement that *only* Counts 3, 4, and 5 would run consecutively. (I 194-96; V 974). The State maintains that the error was a simple mistake in writing or copying when the court added the aggregate sentence incorrectly. (AB, 13). However, the original aggregate sentence of 144 months, minimum, *was consistent* with the court's stated intent at sentencing: "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, including the deadly weapon enhancements." (V 974-75) (emphasis added). Thus, there is every indication that the court actually intended at the sentencing hearing to impose an aggregate sentence of 144-378 months, meaning that only Counts 3, 4, and 5 would run consecutively. That sentence would result in an aggregate of 144-378 months, or 12 to 31.5 years. Along with the statement that the court intended only to run the Attempt Murder with Use counts consecutive, the aggregate sentence of 144-378 months reflects the court's exercise of discretion in

sentencing. However, the resulting sentence was facially illegal because the individual sentences imposed varied from the required aggregate sentencing calculations when Counts 1 and 2 ran consecutively to Counts 3, 4, and 5. NRS 176.035(1); NRS 176.035(2)(b).

To correct this facial illegality, the court improperly increased the minimum and maximum sentences where a less severe option was available: the court could have corrected the sentence by imposing 24-60 month sentences on Counts 1 and 2, to run concurrent with the 48-126 month sentences on Counts 3, 4, and 5 (including the weapon enhancements), for a total legal sentence of 144-378 months, as reflected in the original judgment of conviction. This sentence would have been consistent with the court's statements at sentencing when the court repeatedly noted an intent to impose an aggregate calculation of 144-378 months, with the court's explicit statement that only Counts 3, 4, and 5 would run consecutively, and with the court's stated intent that appellant serve a total of 12 years minimum, and 31.5 years maximum. (I 194; V 974-76; VI 979). However, as in *Miranda v. State*, the district court improperly increased the sentence when another, less severe means was available to correct the illegality of the original sentence. *Miranda v. State*, 114 Nev. 385, 387, 956 P.2d 1377, 1378 (1998). Because the

sentencing correction improperly increased appellant's minimum and maximum sentences after he had already commenced serving the sentence, this correction to a facially illegal sentence violated the Double Jeopardy Clause of the Nevada Constitution and should be reversed.

CONCLUSION

Based on the foregoing argument, and on appellant's Opening Brief, hereby incorporated by reference, this Court must reverse these convictions and remand this case for a new trial.

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.

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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 10th day of February, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 10th day of February, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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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
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