

IN THE SUPREME COURT OF THE STATE OF NEVADA

KYLE W. TURPIN, SR. A/K/A KYLE  
WARNER TURPIN,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 48509

**FILED**

MAR 17 2009  
TRACIE A. LINDEMAN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND  
REMANDING

This is a proper person appeal from a district court order denying appellant Kyle Turpin's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Stewart L. Bell, Judge.<sup>1</sup>

Facts

Turpin was charged with two counts of attempted murder with the use of a deadly weapon, two counts of first-degree kidnapping, one count of robbery with the use of a deadly weapon, and one count of grand larceny auto. At the close of the State's case-in-chief, Turpin moved for a directed verdict on the first-degree kidnapping charges on the basis that the kidnappings were incidental to the robbery. The State argued

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<sup>1</sup>Judge Bell presided over the post-conviction proceedings. Judge McGroarty presided over the trial.

that the kidnappings were not incidental to the robbery and there was sufficient evidence to support independent charges for kidnapping. The district court granted the motion, finding that under this court's decision in Wright v. State, 94 Nev. 415, 417-18, 581 P.2d 442, 443-44 (1978), which held that a conviction for kidnapping will not lie where the movement of the victims was incidental to the robbery and did not increase the danger to the victims,<sup>2</sup> the kidnappings were incidental to the robbery and therefore the State could not pursue those charges. The State requested a stay to allow it to file an extraordinary writ petition in this court, and the district court granted the motion.<sup>3</sup> Nevertheless, later that afternoon, the district court signed and filed an order granting Turpin's motion for a directed verdict.

The next morning, the State argued that Turpin could not seek a directed verdict and had to seek either an advisory instruction on a verdict of acquittal or a judgment of acquittal, in the event he was convicted of the charges. Turpin's counsel agreed with the State's assertion. The district court then entered an amended order stating that Turpin was not entitled to a directed verdict but he could pursue one of

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<sup>2</sup>This holding was later modified by Mendoza v. State, 122 Nev. 267, 270 n.2, 130 P.3d 176, 178 n.2 (2006), which held that "dual culpability may only result if the act of kidnapping stands alone with independent significance from the act of robbery itself." Id. at 270, 130 P.3d at 177.

<sup>3</sup>The State never filed a petition for extraordinary relief with this court.

the remedies identified by the State. The first-degree kidnapping charges were reinstated and the trial resumed.

Although the jury was given an advisory instruction to acquit on the first-degree kidnapping charges, the jury found Turpin guilty of those charges. The jury also found Turpin guilty of the two counts of battery with the use of a deadly weapon and grand larceny auto, but acquitted him of the robbery charge. The district court granted Turpin's post-conviction motion for acquittal and dismissed the convictions for first-degree kidnapping with the use of a deadly weapon. For the remaining convictions, the district court sentenced Turpin as a habitual criminal and ordered him to serve three consecutive terms of 5 to 20 years in the Nevada State Prison.

On appeal, this court vacated the district court's judgment of acquittal, remanded the matter to the district court for sentencing on the two counts of first-degree kidnapping with the use of a deadly weapon, and affirmed the convictions for the other counts. State v. Turpin, Docket No. 44630, Turpin v. State, Docket No. 44892 (Order Affirming in Part, Vacating in Part, and Remanding, April 21, 2006). On remand, the district court sentenced Turpin to serve a term of 5 to 15 years for each count of first-degree kidnapping, plus an equal and consecutive term for the deadly weapon enhancements. These sentences were imposed to run concurrently to each other and to the previously imposed sentences.

Turpin filed a timely proper person post-conviction petition for a writ of habeas corpus in the district court. He subsequently filed a motion for discovery and a motion to expand the record. The State opposed the petition and motions. Pursuant to NRS 34.750 and 34.770,

the district court declined to appoint counsel to represent Turpin or to conduct an evidentiary hearing. The district court denied the petition and motions. This appeal followed.<sup>4</sup>

In his petition, Turpin raised numerous claims of ineffective assistance of trial and appellate counsel. Among those claims were allegations that trial and appellate counsel were ineffective for failing to raise a double jeopardy claim. We conclude that these claims had merit and require reversal of Turpin's convictions for first-degree kidnapping. We decline to address Turpin's other claims relating to his first-degree kidnapping convictions, and we conclude the remainder of his claims lacked merit.

Ineffective assistance of trial and appellate counsel for failing to raise a double jeopardy claim

In his petition, Turpin claimed that trial counsel was ineffective for failing to object on double jeopardy grounds when the district court reinstated the first-degree kidnapping charges. See U.S. Const. amend. V; Benton v. Maryland, 395 U.S. 784, 794 (1969); accord Nev. Const. art. 1, § 8. Turpin also claimed that appellate counsel was ineffective for failing to raise the double jeopardy claim on direct appeal.

Because it appeared that these claims may have had merit, we ordered the State to show cause why we should not reverse the denial of

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<sup>4</sup>To the extent Turpin challenges the denial of his motions for discovery and expansion of the record, we conclude the district court did not abuse its discretion when denying these motions.

these claims and vacate his convictions for first-degree kidnapping. In response, the State argues that there was no double jeopardy violation and the district court did not err by denying these claims. We disagree.

To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and prejudice such that counsel's errors were so severe that they rendered the jury's verdict unreliable. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); Warden v. Lyons, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in Strickland). To state a claim of ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that the omitted issue would have had a reasonable probability of success on appeal. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one. Strickland, 466 U.S. at 697. In this case, trial and appellate counsel would have been ineffective for failing to raise a double jeopardy claim, if such a claim would have had merit.

The United States Supreme Court has held that if a trial judge grants an acquittal and "the prosecution has not yet obtained a conviction, further proceedings to secure one are impermissible" because "subjecting the defendant to postacquittal factfinding proceedings going to guilt or innocence violates the Double Jeopardy Clause." Smith v. Massachusetts, 543 U.S. 462, 467 (2005) (quoting Smalis v. Pennsylvania,

476 U.S. 140, 145 (1986)). According to the Supreme Court, a midtrial dismissal of charges will implicate double jeopardy when the dismissal constituted a final judgment of acquittal. See id. at 474; Price v. Vincent, 538 U.S. 634, 642-43 (2003).

To determine whether Turpin's double jeopardy rights were implicated, we must consider (1) whether the order granting his midtrial motion for a directed verdict constituted an acquittal and (2) whether the order was final. For the reasons discussed below, we conclude that (1) the district court's order granting the midtrial motion for a directed verdict constituted an acquittal and (2) the order was final. Thus, we conclude that the Double Jeopardy Clause prohibited reinstatement of the first-degree kidnapping charges. Because Turpin's double jeopardy claim had merit, we further conclude trial and appellate counsel were ineffective for failing to raise a double jeopardy claim and we reverse the denial of these claims and vacate Turpin's convictions for first-degree kidnapping with the use of a deadly weapon.

1. The order constituted an acquittal

The threshold issue for double jeopardy purposes is whether the district court's order constituted an acquittal. The State argues that the district court's order did not constitute an acquittal because the district court did not explicitly find that the prosecution failed to present sufficient evidence to support the charges. The State asserts that the district court's dismissal was based on the contemporaneous nature of the kidnapping to the robbery and was aimed at avoiding dual punishments because the kidnapping was merely incidental to the robbery. The State further asserts that the district court acknowledged that there was

sufficient evidence for a jury to find Turpin guilty of the kidnapping charges. We disagree.

The Supreme Court has held that “a defendant is acquitted only when ‘the ruling of the judge, whatever its label, actually represents a resolution [in the defendant’s favor], correct or not, of some or all of the factual elements of the offense charged.” United States v. Scott, 437 U.S. 82, 97 (1978) (quoting United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977)) (alteration in the original) (emphasis added).

Initially, we note that Turpin improperly sought a directed verdict, and the district court erred in granting the motion. Under Nevada law, a defendant is precluded from seeking a midtrial acquittal. See NRS 175.381; State v. Corinblit, 72 Nev. 202, 205, 298 P.2d 470, 471 (1956) (noting that a defendant could not be retried on charges that were improperly dismissed midtrial, but allowing appeal to proceed to express the opinion that a district court errs by taking a case from the jury midtrial); see also Smith, 543 U.S. at 474 (noting that Nevada precludes midtrial acquittals). Instead, a defendant may request that the jury be given an advisory instruction for acquittal and, if the jury returns a verdict of guilty, a defendant may seek a judgment of acquittal based on insufficient evidence. NRS 175.381(1), (2). Nevertheless, this court has held that even though Nevada law does not allow a midtrial acquittal, if the district court grants a midtrial motion to dismiss charges based on the sufficiency of the evidence, the order constitutes an acquittal of those charges, which the State may not appeal. See State v. Combs, 116 Nev. 1178, 1180-81, 14 P.3d 520, 521 (2000) (dismissing the State’s appeal from a district court order granting a midtrial motion to dismiss on the basis

that, although the district court obviously erred in granting the motion, the Double Jeopardy Clause barred a retrial of the defendant and prevented an appeal from the order); see also Corinblit, 72 Nev. at 204-05, 298 P.2d at 471.

In his motion for a directed verdict, Turpin argued that under this court's holding in Wright v. State, 94 Nev. 415, 581 P.2d 442 (1978), the kidnappings were contemporaneous with the robbery and the State did not provide sufficient evidence to support a conviction for kidnapping that was not incidental to the robbery. Contrary to the State's assertion, the district court did not determine that sufficient evidence was presented to find Turpin guilty of the kidnapping charges. Rather, the district court acknowledged the State's argument regarding the sufficiency of the evidence, but found that the kidnappings were contemporaneous with the robbery under Wright and, therefore, the State could not proceed with the charges for kidnapping. By granting the directed verdict on this basis, the district court necessarily determined that the State failed to demonstrate sufficient evidence to establish Turpin's factual guilt on the two independent charges of kidnapping. Although the district court erred by making this determination,<sup>5</sup> this was a factual resolution regarding the

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<sup>5</sup>Our review of the record reveals that sufficient evidence was presented at trial to support charges for first-degree kidnapping that were not incidental to the robbery. See State v. Turpin, Docket No. 44630, Turpin v. State, Docket No. 44892 (Order Affirming in Part, Vacating in Part, and Remanding, April 21, 2006).



kidnapping charges. Thus, the district court's order granting Turpin's midtrial motion for a directed verdict constituted an acquittal.

2. The order was final

The next consideration for double jeopardy purposes is whether the district court's order was final. The State argues that the order was not final because the district court granted a stay to allow the State to challenge the ruling, the State immediately sought reconsideration, and the district court entered an amended order rescinding its prior order before Turpin proceeded with his case-in-chief. See Smith, 543 U.S. at 471-72, 474-75 (suggesting that seeking reconsideration of a ruling before the proceedings move forward could eliminate any prejudice to the defendant and may be sufficient to render an order granting an acquittal nonfinal, thereby preventing the implication of the Double Jeopardy Clause). We disagree.

This court has repeatedly held that a district court's oral pronouncement is not final and may be modified before a written order is filed. See Miller v. Hayes, 95 Nev. 927, 929, 604 P.2d 117, 118 (1979). However, once an order is reduced to writing, signed, and filed with the clerk, the order becomes final. See State, Div. Child & Fam. Servs. v. Dist. Ct., 120 Nev. 445, 451, 92 P.3d 1239, 1243 (2004); Bradley v. State, 109 Nev. 1090, 1094-95, 864 P.2d 1272, 1275 (1993); State v. Connery, 99 Nev. 342, 344, 661 P.2d 1298, 1299 (1983); Miller, 95 Nev. at 929, 604 P.2d at 118.

We conclude that because the order granting Turpin's midtrial motion for a directed verdict was reduced to writing, signed, and filed, the

order was final. The granting of a stay to permit the State to challenge the district court's order did not affect the finality of the order.

The district court's order granting Turpin's midtrial motion for a directed verdict was a final judgment of acquittal and terminated initial jeopardy on the first-degree kidnapping charges. See Smalis v. Pennsylvania, 476 U.S. 140, 145 (1986). The district court's reconsideration and subsequent reversal of the order was improper because it resulted in postacquittal factfinding proceedings on the first-degree kidnapping charges.<sup>6</sup> The facts that the district court's reconsideration and reversal occurred before Turpin proceeded with his case-in-chief and the jury was never informed of the order granting a directed verdict do not alter this conclusion. Because the order granting Turpin's midtrial motion for a directed verdict constituted a final judgment of acquittal on the first-degree kidnapping charges, Turpin was not required to show any prejudice resulting from the reconsideration. Smith, 543 U.S. at 473 n.7 ("Requiring someone to defend against a charge of which he has already been acquitted is prejudice *per se* for the purposes of the Double Jeopardy Clause—even when the acquittal was erroneous because the evidence was sufficient."). The reinstatement of the first-degree kidnapping charges required Turpin to defend against the charges

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<sup>6</sup>We note that under our holding in Combs the State could not appeal the order because a successful appeal also would have resulted in postacquittal factfinding proceedings in violation of the Double Jeopardy Clause. State v. Combs, 116 Nev. 1178, 1181, 14 P.3d 520, 521 (2000).

in violation of the Double Jeopardy Clause. We therefore conclude that Turpin's double jeopardy claim had merit.

Because Turpin's double jeopardy claim had merit, trial and appellate counsel were ineffective and acted unreasonably by failing to raise the double jeopardy claim. Therefore, we conclude that the district court erred by denying Turpin's claims that trial and appellate counsel were ineffective in this regard, and we reverse the district court's denial of these claims.<sup>7</sup> Further, the Double Jeopardy Clause requires us to vacate the convictions for first-degree kidnapping with the use of a deadly weapon.

Additional claims of ineffective assistance of trial counsel

Turpin raised nine additional claims of ineffective assistance of trial counsel. Specifically, he claimed trial counsel was ineffective for (1) failing to present any evidence of self-defense, (2) collaborating with the prosecutor to remove five pages of proposed self-defense jury instructions, (3) failing to call any witnesses on his behalf, (4) denying him the right to testify on his own behalf, (5) failing to test blood evidence collected by the police at the crime scene, (6) failing to present any mitigating or favorable evidence on his behalf at trial or sentencing, (7) failing to present any evidence in defense of the grand larceny auto charge, (8) failing to make any factual investigation prior to trial, and (9) failing to withdraw due to a conflict of interest. We have carefully

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<sup>7</sup>In light of this order, we decline to address the other claims Turpin raised relating to the first-degree kidnapping convictions.

considered these claims, and we conclude that Turpin failed to demonstrate that trial counsel was deficient or that, but for counsel's allegedly deficient performance, the result of his trial would have been different. See Strickland v. Washington, 466 U.S. 668, 690, 694 (1984); Warden v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984). Therefore, we conclude the district court did not err by denying these claims.

Additional claims of ineffective assistance of appellate counsel

Turpin raised ten additional claims of ineffective assistance of appellate counsel. Specifically, he claimed appellate counsel were ineffective for (1) failing to argue that the district court erred when it failed to instruct the jury on the defense theory of the case, (2) failing to argue that the district court abused its discretion by admitting live testimony about details of prior bad acts and erred by not making explicit findings on the record weighing the probative value of the evidence against its prejudicial effect, (3) failing to argue that the district court erred by denying Turpin's motion for the victim's medical records, (4) failing to argue that the district court erred when it failed to make findings on the record that Turpin's criminal record warranted habitual criminal status, (5) raising only one issue on appeal and failing to cite to federal case law to support the claim, (6) failing to submit an adequate fast track statement on direct appeal, (7) failing to file a notice of appearance with this court until thirteen months after counsel had been appointed, (8) failing to file a supplemental fast track statement as requested, (9) failing to file a petition for rehearing on direct appeal, and

(10) failing to give Turpin updates about the status of the direct appeal and not providing him with copies of the appellate findings.<sup>8</sup> We have carefully considered these claims, and we conclude that Turpin failed to demonstrate that appellate counsels' performance was deficient or that any of the claims would have had a reasonable probability of success on appeal. See Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). Therefore, we conclude the district court did not err by denying these claims.

#### Cumulative error

Turpin claimed that cumulative error warranted the reversal of his convictions. Although Turpin's convictions for first-degree kidnapping with the use of a deadly weapon must be vacated for the reasons stated above, we conclude that no additional error occurred that individually, or cumulatively, warrants the reversal of Turpin's other convictions.

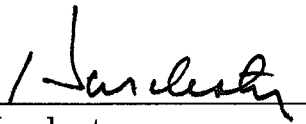
#### Conclusion


Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Turpin is only entitled to the relief set forth above and that briefing and oral argument are unwarranted. See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975). Accordingly, we

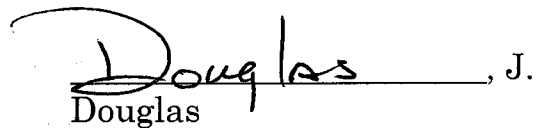
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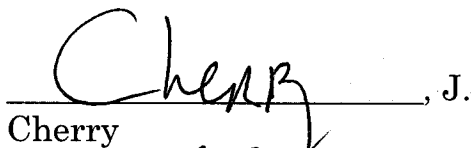
<sup>8</sup>To the extent that Turpin raised any of these claims in other contexts, the claims were waived because they could have been raised on direct appeal, and Turpin failed to demonstrate good cause for failing to raise them earlier and actual prejudice. See NRS 34.810(1)(b), (3).

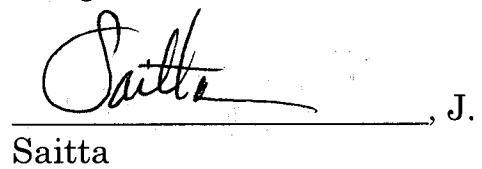
ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND we REMAND this appeal for the entry of an amended judgment of conviction that vacates the convictions for first-degree kidnapping with the use of a deadly weapon.<sup>9</sup>

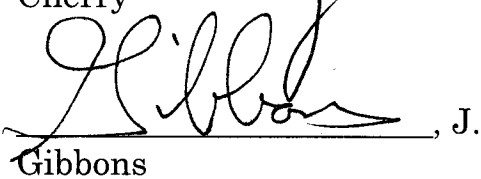
  
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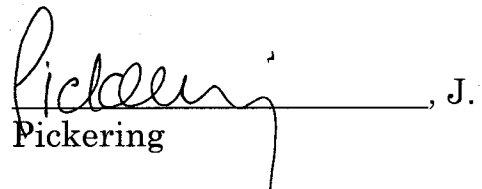
  
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Gibbons

  
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Pickering

cc: Eighth Judicial District Court Dept. 7, District Judge  
Kyle W. Turpin Sr.  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk

<sup>9</sup>This order constitutes our final disposition of this appeal. Any subsequent appeal shall be docketed as a new matter. We have considered all proper person documents filed or received in this matter. We conclude that Turpin is only entitled to the relief described herein.