

Case No. 74050

IN THE COURT OF APPEALS FOR THE STATE OF NEVADA

JACK LEAL,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

FILED

SEP 13 2018

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On Appeal from the Eighth Judicial District Court of the State of Nevada
Case No. C-17-322664-2

OPPOSITION TO APPLICATION FOR BAIL PENDING APPEAL

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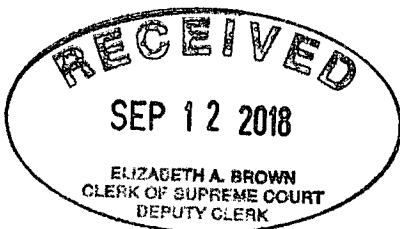
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MEMORANDUM OF POINTS AND AUTHORITIES

Respondent, the State of Nevada, hereby opposes Appellant Jack Leal's Application for Bail Pending Appeal ("Motion"). The district court already denied Leal's Motion, finding that Respondent retained the right to argue for a term of imprisonment in the event that Leal breached the Guilty Plea Agreement ("GPA") by failing to pay the restitution in full to the eleven (11) victims at or before the time of his sentencing. Respondent's Appendix (RA) 43, 45-47. The district court also found that no conflict-of-interest existed from the dual representation of Leal and his co-defendant, Jessica Garcia ("Garcia"), because he agreed to be held jointly and severally liable for paying the restitution; thus, regardless of whether the co-defendant paid, Leal remained liable for the full restitution. RA 43, 45-47. The district court further found that Leal is in fact a danger to unsuspecting individuals in the community based on his prior record of fraud in two other cases and the nature of his crime in this case, in which he defrauded eleven (11) victims of \$757,000 that he failed to pay in restitution. RA 43, 45-47. The district court's ruling is sound, and this Court should likewise deny Leal's request for bail pending appeal.

BACKGROUND

On September 30, 2016, the State filed in the district court a complaint for forfeiture against, *inter alia*, property located at 1024 Santa Helena Avenue,

Henderson, NV 89002 (“the Henderson property”). Appellant’s Appendix (AA) 89-90, RA 16. The request for forfeiture was based on the fact that the Henderson property constituted the proceeds or replacement of proceeds of fraudulent real estate transactions. AA 2-10, RA 16.

On November 29, 2016, the State filed a criminal complaint in the Las Vegas Township Justice Court (“justice court”). AA 15-38, RA 16. The charges stemmed from Appellant Jack Leal (“Leal”) and his co-defendant/estranged wife Garcia selling various parcels of real estate to various victims on the false representation that said parcels were not subject to any security interests, which resulted in Leal and Garcia fleecing their victims of \$757,420. AA 97-99, RA 16. Since the complaint for forfeiture and the criminal complaint were both based on the same fraudulent real estate transactions, the forfeiture proceedings were automatically stayed under NRS 179.1173(2). AA 15-38, RA 16. On April 11, 2017, the justice court bound the criminal case over to the district court. AA 14, 69-72, 79-80, RA 16.

Pursuant to negotiations, Leal agreed to plead guilty to one count of Multiple Transactions Involving Fraud or Deceit in Course of Enterprise or Occupation, a category B felony, a crime punishable by a term of imprisonment not to exceed twenty (20) years, and to be jointly and severally liable for paying \$757,420 in “restitution in full at or before the time [Leal is] sentenced...” in the GPA. AA 89-

90. Leal also agreed to “execute and file in the Clark County Recorder’s Office a lien agreement and lien in favor of the State of Nevada, Office of the Attorney General, in the amount of \$600,314.83 against the [Henderson property], with the proceeds of the sale of said home to be applied to my restitution requirements,” in order to provide the State with assurances that any proceeds from the sale would, in fact, be applied toward the restitution obligations of Leal and Garcia. AA 89-90. In exchange, the State agreed to dismiss one count of Racketeering and twelve counts of Theft in the Amount of \$3,500 or more and not oppose probation. AA 89-90. In the event that Leal failed to pay the restitution in full at or before his sentencing, the State expressly retained the right to argue for a term of imprisonment. AA 89.

Before his entry of plea, Leal executed two conflict-of-interest waivers consenting to the dual representation of himself and Garcia by their attorney, Jason Weiner (Weiner), and expressly and effectively waiving any actual or potential conflict-of-interest stemming from the dual representation. AA 82, 100-102. After entry of his plea, the district court set Leal’s sentencing four (4) months out to allow him some time to either sell the Henderson property to use the proceeds to pay restitution or come up with the money to pay full restitution to the eleven (11) victims. AA 112. Immediately following the entry of plea, the State stressed the importance of getting the money to pay restitution to the victims to Weiner, Leal,

and Garcia, directing special attention to the sale of the Henderson property to satisfy the restitution requirement. RA 17, 39-40.

Nearly four (4) months passed, and the State heard nothing from Leal, Garcia, or Weiner until approximately one week prior to sentencing, at which point Weiner requested a continuance of the sentencing hearing so that his clients could sell the Henderson property and pay the restitution with the proceeds. RA 17-18, 39-40. The State rejected the request, noting that Leal and Garcia failed to even execute the lien required under the terms of their GPAs, let alone make any legitimate effort to sell the Henderson property. RA 17-18, 39-40. The State informed Weiner that Leal had made no legitimate effort to comply with the terms of the GPA. RA 17-18, 39-40.

On August 16, 2017, the day before sentencing, Weiner informed the State that the lien had been filed in accordance with the terms of the GPA. RA 18, 39-40. However, a Deputy District Attorney representing the Clark County Recorder's Office informed the State that Leal attempted to file the lien the day before his sentencing, but because he did not have all of the necessary documents, an employee of the Clark County Recorder's Office informed Leal of the deficiency and suspended the filing of the lien. RA 18, 39-40. Notably, Leal informed that same employee that he would not be correcting the filing because he was returning to Florida the following day. RA 18, 39-40.

At the time set for sentencing, Leal appeared without having paid full restitution or executing the lien in favor of the State against the property as agreed in the GPA.¹ AA 89-90, 122. Leal represented to the district court that the Henderson property had no liens when in fact it did. AA 121-22, RA 18. Leal also represented to the district court that he had filed a lien against the Henderson property in favor of the State when he knew the filing had been suspended. AA 122, RA 18.

Weiner claimed a conflict of interest arose between Leal and Garcia after the entry of plea. AA 124. Upon inquiry from the district court as to the purported conflict-of-interest, Weiner explained that “[t]hey were supposed to be working together. Then they had a no contact order so they couldn’t. So they’re now basically pointing at each other saying this is – She’s saying this is his fault, he’s saying that’s her fault. That’s an antagonistic defense.” AA 124. AA 124-25. The district court explained that “it’s not a defense to the case...because if it says why the...restitution wasn’t paid and this is joint and several which means if one...doesn’t pay the other owes the full amount...” AA 124-25.

Although the record does not clearly reflect that Weiner moved to withdraw as counsel of record for Leal, the record does reflect that Weiner failed to file a

¹ Leal claims that the lien on the Henderson property would have prevented a sale, but if the Henderson property was worth as much as 1.2 million dollars as he claims, a lien for \$600,314.83 would have been paid through the proceeds of any sale and not affect the buyer of the Henderson property. RA 20, 40.

motion to withdraw before or on the day of sentencing. AA 124. Recognizing that Leal and Garcia had previously executed two conflict-of-interest waivers, and the GPA provided that Leal and Garcia agreed to be jointly and severally liable for paying the restitution in full, the district court proceeded with sentencing. AA 119.

Due to Leal's blatant breach of the GPA, the State argued for a term of imprisonment for a maximum of one hundred eighty (180) months and a minimum of sixty (60) months with no objection by Leal or his attorney. AA 120. The district court sentenced Leal to a maximum of one hundred eighty (180) months with a minimum parole eligibility of seventy-two (72) months in the Nevada Department of Corrections with zero days for time served. AA 140.

LEGAL ARGUMENT

This Court should deny Leal's motion because his appeal is frivolous, and he presents a danger to the community in the form of economic harm.

A. Legal Standard

"[T]here is no constitutional right to bail following conviction and pending appeal." *Bergna v. State*, 120 Nev. 869, 872, 102 P.3d 549, 551 (2004). Under NRS 178.488, bail is not permitted if the appeal is frivolous. *See also Bergna*, 120 Nev. at 877, 102 P.3d at 554. Bail should also be denied when defendant poses a flight risk or danger to the community. *See Lane v. State*, 98 Nev. 458, 652 P.2d 1174 (1982); *Bergna*, 120 Nev. at 874, 102 P.3d at 552. The Nevada Supreme

Court “give[s] great respect to the trial judge’s assessment” of whether appellant’s release poses a risk of flight or danger to the community, or if the appeal appears to be frivolous or taken for delay. *Bergna*, 120 Nev. at 877, 102 P.3d at 554.

B. Leal’s Appeal Is Frivolous.

In *Bergna*, the Nevada Supreme Court ruled that Nevada courts, in determining whether a motion for bail is frivolous, may properly evaluate not just indicia of guilt, but also the nature and circumstances of the offense. *Id.* at 874, 102 P.3d at 552. Leal contends on appeal that 1) the district court erred in permitting the State to breach the GPA without holding an evidentiary hearing to determine blame of the breach; and 2) the district court erred in denying Weiner’s alleged Motion to Withdraw Counsel due to an unwaivable conflict-of-interest. *See generally* Appellant’s Br.; RA 8-12. However, the district court properly proceeded with sentencing when Leal breached the GPA by not paying full restitution and no conflict existed to permit withdrawal of his counsel. Accordingly, Leal’s contentions lack a basis in law and fact and are frivolous.

1. The Record Establishes Leal’s Guilt.

Leal pleaded guilty to his crime. Even if he had not, the State had ample evidence to convict, including victim statements and testimony. In fact, Leal does not argue his innocence on appeal. As such, the record establishes Leal’s guilt.

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2. The District Court Properly Sentenced Leal, So His Appeal Is Futile.

Under the terms of the GPA, the State retained the right to argue for a term of imprisonment if Leal failed to pay full restitution at the time of sentencing. When Leal appeared for his sentencing without paying *any* restitution, his blatant and obvious breach of the GPA released the State from its obligation of not opposing probation. Because Leal is obviously to blame for the breach of the GPA, an evidentiary hearing to determine blameworthiness is unnecessary. *Villalpando v. State*, 107 Nev. 465, 468, 814 P.2d 78, 80 (1991). As a result, the State properly argued for a term of imprisonment in accordance with the terms of the GPA without any objection by Leal or his attorney.

Moreover, Leal's attorney did not file a motion to withdraw as required under EDCR 7.40, and any motion made the day of sentencing would have been barred under EDCR 7.40(c). Although the record is not clear as to whether Weiner made an oral request to withdraw, the district court properly found that no conflict existed because Leal agreed to be jointly and severally liable for paying the restitution. Nonetheless, even if a conflict existed, Leal and Garcia knowingly and effectively waived it in conformance with the requirements established by the Nevada Supreme Court in *Ryan v. Eighth Judicial Dist. Court ex rel. County of Clark*, 123 Nev. 419, 430, 168 P.3d 703, 710 (2007). Thus, the district court

properly proceeded with sentencing Leal because no conflict of interest existed, but even if it did, Leal knowingly and effectively waived it.

Based on the foregoing, Leal's appeal is frivolous.

C. Leal Presents a Danger of Economic Harm to the Community.

The Ninth Circuit has held that bail pending appeal can be denied in nonviolent criminal cases because criminals present a danger to the community in the form of economic harm. *United States v. Reynolds*, 956 F.2d 192, 192 (9th Cir. 1992). Leal's contention that bail should be granted because he is not a danger to the community or a flight risk is therefore insufficient to support an award of bail pending appeal. In *Reynolds*, the Ninth Circuit held that danger to the community can encompass pecuniary or economic harm. *Id.* In this case, Leal stole a total of \$757,420² from eleven (11) unsuspecting victims resulting in wrecked retirement plans and wiping out a grandchild's college savings. RA 22, 45-47. Additionally, Leal has a past criminal history involving fraudulent conduct in two (2) cases in Illinois in addition to the instant case. RA 23, 40, 46. Thus, the district court properly denied Leal's bail pending appeal, because his criminal conduct is a danger to the community.

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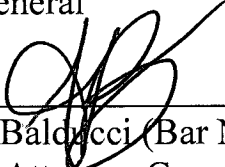
² In his motion, Leal incorrectly contends that the restitution total is \$694,420. AA 89-90.

CONCLUSION

This Court should deny Appellant Jack Leal's Application for Bail Pending Appeal.

RESPECTFULLY SUBMITTED this 6th day of September, 2018.

ADAM PAUL LAXALT
Attorney General

By: 
Ashley Baldicci (Bar No. 12687)
Deputy Attorney General

CERTIFICATE OF COMPLIANCE

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 2016, 14 pt. Times New Roman type style.

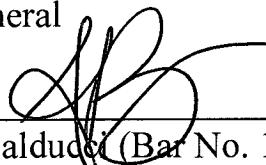
I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 2,237 words.

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: September 6, 2018.

ADAM PAUL LAXALT
Attorney General

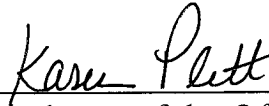
By: 
Ashley Balducci (Bar No. 12687)
Deputy Attorney General

CERTIFICATE OF SERVICE

I hereby certify that I have mailed the foregoing OPPOSITION TO APPLICATION FOR BAIL PENDING APPEAL to the Clerk of the Court to be filed, on the 6th day of September, 2018.

I further certify that I have also mailed the foregoing document by First-Class Mail, postage prepaid, to the following participants:

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An employee of the Office of the Attorney General