IN THE SUPREME COURT OF THE STATE OF NEVADA

JACK PAUL BANKA,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Electronically Filed
Mar 09 2020 01:45 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

S. Ct. No.: **80181**

District Ct. No.: **C333254**

APPELLANT'S OPENING BRIEF

MICHAEL D. PARIENTE, ESQ,
COUNSEL FOR APPELLANT
Nevada Bar Number 9469
JOHN GLENN WATKINS, ESQ,
OF COUNSEL
Nevada Bar Number 1574
3960 Howard Hughes Parkway #615
Las Vegas, Nevada 89169
Telephone: (702) 966-5310
Facsimile: (702) 953-7055
michael@parientelaw.com
johngwatkins@hotmail.com

STEVEN WOLFSON,
DISTRICT ATTORNEY
STEVEN OWENS,
CHIEF DEPUTY DISTRICT ATTORNEY
200 Lewis, Floor 3
Las Vegas, Nevada 89101
Telephone: (702) 671-3847
Facsimile: (702) 385-1687
steven.owens@clarkcountyda.com

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

Docket 80181 Document 2020-09248

NRAP 26.1 DISCLOSURE STATEMENTS

The attorneys representing Appellant Jack Paul Banka herein state, "there is no such corporation" referred to in NRAP 26.1.

JURISDICTIONAL STATEMENT

This Court has jurisdiction of the instant appeal pursuant to NRAP 4(b) (criminal appeals), NRS 177.015(3) (appeal from a final judgment in a criminal case) and NRS 177.045 (intermediate order or proceeding reviewable on appeal).

ROUTING STATEMENT

The instant appeal is presumptively assigned to the Court of Appeals under NRAP 17(b)(1). However, Banka believes that the Supreme Court should retain his appeal because the State's commingling of the misdemeanor DUI statute (NRS 484C.110) with the felony DUI statute (484C.430), substituting the misdemeanor "location" elements for the felony "location" element to charge Banka, if found lawful will affect every current, future and pending appeal case prosecuted under NRS 484C.430. *See fn.8*. Charging DUI defendants by commingling two (2) separate and distinct offenses is of statewide public importance because it applies to DUI's throughout the State.

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

Additionally, the State's "commingled created offense" is an issue of first impression.

ISSUES

A. THE STATE'S COMMINGLING OF NRS 484C.110 (MISDEMEANOR) AND NRS 484C.430 (FELONY) FAILS TO CHARGE A LEGAL OFFENSE AND FAILS TO CONFER SUBJECT MATTER JURISDICTION ON THE DISTRICT COURT (OR ANY COURT).

B. THE DISTRICT COURT'S DENIAL OF APPELLANT BANKA'S REQUEST TO WITHDRAW HIS PREVIOUSLY ENTERED PLEA OF GUILTY (*ALFORD*) WAS CONTRARY TO CONTROLLING LAW AND AN ABUSE OF DISCRETION.

STATEMENT OF THE CASE

Banka's request for review by this Court challenges the State's commingling of NRS 484C.110 and NRS 484C.430 to charge Banka because the commingling is without legal authority, fails to charge a legal offense and fails to confer subject matter jurisdiction on the district court (or any court).

Banka also challenges the district court's denial of his motion to withdraw his previously entered plea.

On June 19, 2019, the district court denied Banka's request to substitute John G. Watkins, Esq. and Michael D. Pariente, Esq. as new counsel. The district court denied Banka's request because new counsel could not be ready for trial in three (3) days.

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

After Banka pled to the State's "commingled created DUI offense", attorney Watkins and attorney Pariente were allowed to substitute as Banka's attorneys. Sentencing had not occurred at this time.

Banka filed a motion in arrest of judgment on October 23, 2019, which was subsequently denied.

On November 15, 2019, Banka filed a motion to withdraw his plea which was subsequently denied.

Banka was sentenced on December 4, 2019.

Banka filed the notice of appeal on December 4, 2019.

Written orders denying Banka's motion in arrest of judgment and motion to withdraw the plea were filed on February 25, 2020.

STATEMENT OF RELEVANT FACTS[1]

On November 1, 2016 at approximately 5:50p.m. appellant Banka (hereinafter Banka) was arrested for DUI resulting in substantial bodily injury, a NRS 484C.430 felony.[2] An 83 year old female passenger in the other vehicle sustained a broken sternum from impact of the airbag. Banka hired Thomas Boley, Esq. to represent him.

---

1. NRAP 28(a)(8) states in relevant part: "a statement of facts relevant to issues submitted for review . . . ." Appellant Banka's two issues on appeal are legal not factual.

2. Banka was also arrested and charged with leaving the scene of an accident which is not an issue in the instant appeal.

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

On January 11, 2017, the State filed a criminal complaint which did not charge the felony substantial bodily injury under NRS 484C.430 but instead commingled NRS 484C.110 (misdemeanor) and NRS 484C.430 (felony), two (2) separate and distinct offenses, to charge Banka. AA 3-4. The State's unauthorized "commingled offense" substituted the misdemeanor elements of "on a highway or on premises to which the public has access" for the felony element "on or off the highways." *See also*, AA 5-6; AA 7-10; AA 11-13.

Attorney Boley did not file any motions on behalf of Banka. Banka became displeased with attorney Boley's representation and desired and attempted to retain new counsel, John G. Watkins, Esq. and Michael D. Pariente, Esq. Banka, attorney Boley and Michael D. Pariente, Esq. executed a Substitution of Attorneys which was filed. AA 22.

The district court judge, reading EDCR 7.40(c) as mandatory conditioned the substitution of new counsel being ready for trial in five (5) days. Since this condition could not be met, the substitution was denied. Additionally, John G. Watkins, esq. and Michael D. Pariente, esq. could not assist attorney Boley at trial with only three (3) days preparation.

The district court's denial to allow new counsel for Banka was appealed to the Nevada Supreme Court on an emergency motion for a Writ of Mandamus. The Supreme Court subsequently denied the Writ without addressing the merits. AA 23-24.

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

Before Banka's desire to have new counsel, the State offered a plea negotiation of two (2) to five (5) year sentence. AA 14-21. However, that negotiation was withdrawn when Banka filed the Substitution of Attorneys. Without being allowed to have new counsel, Banka had to plead to the State's new offer of a four (4) to ten (10) year sentence.

After Banka's plea (*Alford*) but before sentencing, attorney John G. Watkins, esq. and Michael D. Pariente, esq. were allowed to substitute as Banka's counsel.

Based on the State's "commingled created offense" not being a legal charge, Banka filed a motion in arrest of judgment on October 23, 2019 which was subsequently denied. AA 49-51.

Banka then filed a motion to withdraw his (Alford) plea November 15, 2019 which was subsequently denied. AA 52-54.

Banka appealed the district court's denial of his two motions on December 4, 2019. AA 106-107.

SUMMARY OF ARGUMENT A: COMMINGLING STATUTORY "ELEMENTS" FROM TWO (2) SEPARATE CRIMES, NRS 484C.110 (MISDEMEANOR) AND NRS 484C.430 (FELONY), DOES NOT CHARGE A LEGAL OFFENSE AND FAILS TO CONFER SUBJECT MATTER JURISDICTION ON THE DISTRICT COURT (OR ANY COURT)

To legally charge a public offense[3], there must be a formal accusation

3. This Court defined "legal" in *Gathrite v. Eighth Judicial District Court*, 135 Nev., Adv. Op. 54, 451 P.3d 891 (2019) as "required or permitted by law; not forbidden or discountenanced by law; good and effectual by law" or "[p]roper or sufficient to be

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

(indictment, information, or complaint) alleging the "elements" of the offense. *See, Post v. United States, infra; Albrecht v. United States, infra.* Each and every element of a public offense, not just some or most but all, must be alleged in the formal accusation to charge a legal offense. *Almendarez-Torres v. United States, infra; United States v. Cook, infra; Hamling v. United States, infra; Russell v. United States, infra and State v. Hancock, infra*. The "elements" of a statutory offense cannot be substituted with different "elements" from other statutes. An accusation which eliminates or substitutes the "elements" of the statutory offense by commingling separate and distinct statutes, here NRS 484C.110 (misdemeanor) and NRS 484C.430 (felony), does not charge a crime and fails to confer subject matter jurisdiction on a court. *See, fn.3; fn.6* ;*fn.7* ; *fn.21*. *See also, State v. Cimpritz*[4]. ("The elements necessary to constitute the crime must be **gathered wholly from the statute** and the crime must be described within the terms of the statute.") *Id*., 110 N.E. 2d at 417-18. (emphasis added.)

The Second Amended Information filed against Banka substituted the misdemeanor "elements" of "on a highway or on premises to which the public has

---

recognized by law; cognizable in the courts", *citing Legal, Black's Law Dictionary* (4th ed. 1951). *Id*., 135 Nev., Adv. Op. 54 at 5. A legal charge is a violation of a public law. NRS 171.010. A public offense must be conduct "prohibited by some statute of this state." NRS 193.050(1). There is no statute making the commingling of NRS 484C.110 and NRS 484C.430 a public offense. Therefore, the charge filed against Banka in Count 1 of the Second Amended Information is not a legal charge.

4. 158 Ohio St. 490, 110 N.E. 2d 416 (1953)

access" for the felony "element" of "on or off the highways."[5] *See, fn. 10*. The State admitted that the substitution was legally improper and the State would amend Banka's charge to comply with 484C.430 if Banka had went to trial. AA 61. The State's admission was ignored by the district court. AA 55-73. As a result of the commingled "elements," the Second Amended Information does not charge a legal offense in Count 1[6] and fails to confer subject matter jurisdiction on the district court.[7] **NRS 484C.110 has absolutely no application to a charge under NRS**

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

5. The misdemeanor and felony "location" elements define different areas where the offense must occur, thus the elements are not interchangeable. *See, fn.26; fn.28*. The different meanings produce drastically different results. An acquittal may be compelled applying the misdemeanor "elements" but a conviction mandated under the felony element based on the identical evidence. For example, if a person operates a vehicle on a residential driveway while impaired, causing substantial bodily injury or death, the impaired driver must be acquitted under the misdemeanor "location" elements because the residential driveway is not a "highway or premises to which the public has access" as a matter of law. *See*, NRS 484A.185(3)(b). However, on the felony "location" element "on or off the highways", the impaired driver would be convicted. The felony covers the entire State of Nevada. *See, fn.28*.

Additionally the substitution of the misdemeanor elements for the felony element by commingling NRS 484C.110 and NRS 484C.430 would require that the jury be instructed on "highway or premises to which the public has access" instead of "on or off the highways." This instruction would be contrary to law as NRS 484C.430 does not contain misdemeanor elements.

6. **There is no statute criminalizing conduct by the commingling of NRS 484C.110 (misdemeanor) and NRS 484C.430 (felony) as alleged in Count 1 of the Second Amended Information filed against Banka.** *See again,* NRS 193.050(1). ("No conduct constitutes a crime unless prohibited by some statute of this state or by some ordinance or like enactment of a political subdivision of this state.").

7. A court cannot act without subject matter jurisdiction and, if it does, all its acts are void. *Rhode Island v. Massachusetts,* 37 U.S. 657, 718 (1938); *State Indus. System v. Sleeper*, 100 Nev. 267, 269, 679 P.2d 1273 (1984). Jurisdiction cannot be waived or

484C.430. Therefore, Banka's request for relief should be granted.[8]

I

LAW AND ARGUMENT

A.

THE STATE'S COMMINGLING OF NRS 484C.110 (MISDEMEANOR) AND NRS 484C.430 (FELONY) FAILS TO CHARGE A LEGAL OFFENSE AND FAILS TO CONFER SUBJECT MATTER JURISDICTION ON THE DISTRICT COURT (OR ANY COURT)[9]

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

created when none exist. *Vaile v. Dist. Ct.*, 118 Nev. 262, 276, 44 P.3d 506 (2002). Jurisdiction cannot be conferred upon the court by actions of the parties and principles of estoppel and waiver do not apply. *Richardson v. United States*, 943 F.2d 1107, 1113 (9th Cir.) (1991); *State of Nevada v. Justice Court*, 112 Nev. 803, 806, 918 P.2d 401 (1996). *See also, fn.21.*

8. A finding that the State's "commingled created offense" is a lawful charge has far reaching implications. All present, future, and pending appeal cases will be affected. Every defendant charged with a violation of NRS 484C.430 would be entitled to the more favorable misdemeanor elements of "on a highway or on premises to which the public has access" in the State's prosecution. To hold otherwise would run afoul of equal protection under both the United States and the Nevada constitutions. U.S. Const. amend. XIV; Nev. Const. Art. 1, § 1 and Art. IV § 21.

A criminal statute violates equal protection if it treats similarly situated persons differently for reasons not initially related to a legitimate government interest. *Reed v. Reed*, 404 U.S. 71, 75-76 (1971). *See also, Laakonen v. District Court*, 91 Nev. 506, 508-509, 538 P.2d 574 (1975). There is no rational basis to treat alleged violators of NRS 484C.430 differently.

9. The Complaint, Information, and Amended Information contain the identical "commingled" language and statutory cites as the Second Amended Information, none of which charge a legally cognizable offense. AA 3-4; AA 5-6; AA 7-10.

a. There is no statute creating an offense by commingling NRS 484C.110 and NRS 484C.430. Without such a statute, there is no crime. NRS 193.050(1).[10]

A person can only be lawfully prosecuted ". . . by the laws of this state for a public offense . . . ." NRS 171.010. A public offense is an act in violation of a penal law. *Black's Law Dictionary* 975 (5th ed. 1979). Conduct not statutorily forbidden is not a crime. *See again*, NRS 193.050(1). Crimes are enacted and defined by the lawmakers, not prosecutors. *See, fn. 24*. The legal definition of a crime is the legislative description of what conduct is forbidden. The constituent parts of a penal definition are the "elements" of the offense. *See, Cordova v. State*,[11] ("[t]he phrase 'element of the offense' signifies an essential component of the legal definition of the crime. . . .")[12] There must be an indictment, information or complaint filed against the person charged.

---

10. The State cites NRS 484C.110 and NRS 484C.430 indicating that *both statutes* were commingled to charge Banka in Count 1. *See*, a copy of the Second Amended Information. AA 11-13.

11. 116 Nev. 664, 668, 6 P.3d 481 (2000), *citing People v. Hansen* 855 P.2d 1022 (Cal. 1994).

12. The location where the operation of the vehicle occurred is an "element of the offense" for DUI's in Nevada. However, the legal definition of the "location" varies depending on which DUI statute controls the State's prosecution. The misdemeanor statute requires that the offense occurred on a "on a highway or on premises to which the public has access." A felony prosecution under NRS 484C.430 requires "on or off the highways." The two elements have separate and distinct meanings. *See, fn. 26; fn. 28.*

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

A formal accusation is essential for every criminal case. *Post v. United States*.[13] ("Criminal proceedings cannot be said to be brought or instituted until a formal charge is openly made against the accused . . . ."); *Albrecht v. United States.*[14] ("A person may not be punished for a crime without a formal and sufficient accusation even if he voluntarily submits to the jurisdiction of the court.") To be sufficient, the formal accusation must charge a legal offense.

To charge a public offense, an indictment, information or complaint **must** allege every element of the offense. *See*, *Almendarez-Torres v. United States*.[15] ("An indictment **must** set forth each element of the crime that it charges." (emphasis added.); *United States v. Cook*.[16] (" . . . it is universally true that no indictment is sufficient if it does not accurately and clearly allege all the ingredients of which the offense is composed.")[17] *See also*, *Hamling v. United States*,[18]; *Russell v. United States*[19]. The Court in *State v. Hancock*,[20] recognized, "[a]n indictment,

---

13. 161 U.S. 583, 587 (1896)

14. 273 U.S. 1, 7 (1927)

15. 523 U.S. 224, 228 (1998)

16. 17 Wall. 168, 174 (1872)

17. This constitutional requirement applies to informations as well. *See,* NRS 173.075.

18. 418 U.S. 87, 117 (1974)

19. 369 U.S. 749, 763 (1962)

20. 114 Nev. 161, 164, 955 P.2d 183 (1998)

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

standing alone, **must contain**: (1) **each and every element of the crime charged** . . . . " (emphasis added.) Therefore, a charging document which fails to allege each and every element of the offense and substitutes "elements" from other statutes *does not* charge a legal offense.

The failure to charge an offense and/or lack of jurisdiction can be raised any time. NRS 174.105(3) states,

> Lack of jurisdiction or the failure of the indictment, information or complaint to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.[21]

(*fn*. added.)

These two issues can be raised by a motion in arrest of judgment. NRS 176.525 states,

> The court shall arrest judgment if the indictment, information or complaint does not charge an offense or if the court was without jurisdiction of the offense charged. The motion in arrest of judgment shall be made within 7

---

21. A court lacks subject matter jurisdiction if the formal accusation filed against the defendant does not charge an offense. *See*, *Williams v. Municipal Judge*, 85 Nev. 425, 429, 456 P.3d 440 (1969) (" . . . without a formal and sufficient accusation . . . a court acquires no jurisdiction whatever . . . ."). The Court in *State v. Ohio*, 181 Ohio App. 3d 86, 907 N.E. 2d 1238 (2009) noted "[a] valid complaint is a necessary condition precedent for the trial court to obtain jurisdiction in a criminal case." *Id*., 907 N.E. 2d at 1241. The Court in *Ex Parte Alexander*, 80 Nev. 354, 358, 393 P.2d 615 (1964) stated "[w]e are compelled to hold that the failure of the indictment to allege that the crime was committed in the State of Nevada was fatal and that the court never acquired jurisdiction to try the case, and that its judgment was void." *Ex Parte Alexander* further stated, " . . . the failure being fatal to the sufficiency of the information could not be cured by evidence tending to show where the crime was committed." *Id.*, 80 Nev. at 358. *See also, State v. Cimpritz*, supra. (A judgment of conviction based on an indictment which does not charge an offense is void for lack of subject matter jurisdiction.) *Id*., 110 N.E. 2d at 418.

> days after determination of guilt or within such further time as the court may fix during the 7-day period.

The word "shall" is mandatory.[22] The Second Amended Information filed against Banka does not charge a legal offense.[23]

The State commingled two (2) separate and distinct criminal statutes, NRS 484C.110 (misdemeanor) and NRS 484C.430 (felony), using elements from both to charge Banka. *See again, fn. 10*. **Commingling "elements" from two (2) separate offenses does not charge a legal offense.** *Almendarez-Torres v. United States, supra; United States v. Cook, supra; Hamling v. United States, supra; Russell v. United States, supra and State v. Hancock, supra.* There can be no addition, deletion or substitution of "elements" for those "elements" comprising a

---

22. The Court in *Goudge v. State*, 128 Nev. 548, 287 P.3d 301 (2012) stated,

> The use of the word "shall" in the statute divests the district court of judicial discretion. See NRS 0.025(1)(d); *see also Otak Nevada*, 127 Nev. at 598, 260 P.3d at 411. This court has explained that, when used in statute, the word "shall" imposes a duty on a party to act and prohibits judicial discretion and, consequently, mandates the result set forth by the statute. Id.; *see also Johanson v. Dist. Ct.*, 124 Nev. 245, 249-50, 182 P.3d 94, 97 (2008) (explaining that " ' "shall" is mandatory and does not denote judicial discretion'" (quoting *Washoe Med. Ctr. V. Dist. Ct.*, 122 Nev. 1298, 1303, 148 P.3d 790, 793 (2006))).

Id., 128 Nev. at 553.

23. Additionally, the Second Amended Information does not confer subject matter jurisdiction on the district court. *See again, fn. 7, and fn. 21.*

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

NRS 484C.430 violation.[24] *See again, State v. Cimpirtz*. ("The elements necessary to constitute the crime must be **gathered wholly from the statute** and the crime must be described within the terms of the statute.") *Id*., 110 N.E. 2d at 417-18. (emphasis added.) The State admitted that the commingling was improper.

> . . . the State. . . probably would have amended [the Second Amended Information] to get those three words in as opposed to the words that are there.

AA 61.

If the correct elements had been alleged, there would be no need for the State to amend.

The elements for an alcohol misdemeanor DUI under NRS 484C.110 are:

1. It is unlawful for any person who:

(a) Is under the influence of intoxicating liquor;

(b) Has a concentration of alcohol of 0.08 or more in his or her blood or breath; or

---

24. The State's commingling is paramount to "legislating" a crime, an act in the sole province of the legislature. *See, Nevada Const. art. 4 § 1*; *Galloway v. Truesdell*, 83 Nev. 13, 422 P.2d 237 (1967) (" . . . legislative power is the power . . . to frame and enact laws, and to amend or repeal them." *Id*., 83 Nev. at 20. *See also, United States v. Davis*, 588 U.S. ____, 139 S. Ct. 2319 (2019). ("Only the people's elected representatives in the legislature are authorized to 'make an act a crime.'") 139 S. Ct. at 2325.

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

(c) Is found by measurement within 2 hours after driving or being in actual physical control of a vehicle to have a concentration of alcohol of 0.08 or more in his or her blood or breath,

To drive or be in actual physical control of a vehicle **on a highway or on premises to which the public has access.**

(emphasis added.)[25]

The misdemeanor element defining the location where the driving or actual physical control of the vehicle occurred is "on a highway or on premises to which the public has access"[26]

The elements for an alcohol felony DUI under NRS 484C.430 are:

1. . . . a person who:

(a) Is under the influence of intoxicating liquor;

(b) Has a concentration of alcohol of 0.08 or more in his or her blood or breath;

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

---

25. The *Merrell* complaint is an example of a misdemeanor DUI charge under NRS 484C.110. AA 108-109.

26. "Highway" and "premises to which the public has access" are defined in NRS 484A.095 and NRS 484A.185, respectively. When these elements control, any person driving or being in actual physical control of a vehicle outside these defined locations cannot be legally charged, prosecuted and convicted for DUI.

(c) Is found by measurement within 2 hours after driving or being in actual physical control of a vehicle to have a concentration of alcohol of 0.08 or more in his or her blood or breath.

. . .

(f) . . .

and does any act or neglects any duty imposed by law while driving or actual physical control of any vehicle **on or off the highways** of this State, if the act or neglect of duty proximately causes the death of, or substantial bodily harm to, another person, ...

(emphasis added.)[27]

The felony element defining the location where the driving or actual physical control must occur is "on or off the highways" of Nevada.[28]

---

27. The *Vitale*, *Potts* and *Padilla* Informations are examples of how a charge under NRS 484C.430 is to be brought. AA 110-112; AA 113-114; AA 115-117. These pleadings show that the State is aware that misdemeanor elements are not part of a NRS 484C.430 violation.

28. The Court in *Hudson v. Warden,* 117 Nev. 387, 395-396 (2001) discussed the felony "element" "on or off the highways" and concluded that the term was clear and unambiguous. The felony element means everywhere within the State of Nevada.

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

The State admitted that Banka was improperly charged.[29] *See again* AA 61. However, the State intentionally ignored the improper commingling of NRS 484C.110 and NRS 484C.430 fails to charge a legal offense and instead created a "red herring" of "notice pleading."[30] The prosecutor argued to the district court, "[a]nd as a notice pleading state, Your Honor, we allege 44C.110 [sic], 44C.430 [sic] and sufficient facts to place the defendant on knowledge of what we would prove at trial." AA 61. The State's so called "notice pleading" argument lacks merit.

Banka never challenged the sufficiency of the Second Amended Information for lack of "notice." Banka admitted that the Second Amended Information put him on notice that the elements of "on a highway or on premises to which the public has access" were being used to prosecute him. Banka's claim is that the Second Amended Information fails to charge a legal offense and fails to confer subject

---

29. As further evidence that the State knew that Banka was illegally charged, the prosecutor stated, ". . . the State. . . probably would have amended [the Second Amended Information] to get those three words in as opposed to the words that are there," if Banka proceeded to trial. AA 61.

30. "Notice pleading" is generally recognized as applying to civil cases. For example, a civil complaint can be vague and indefinite so long as it generally states a cause of action cognizable before the court. A civil defendant has the "working tools" of depositions, interrogatories, and admissions to learn the basis of the plaintiff's claims. Constitutional notice of criminal charges require much more than what is deemed adequate in civil cases. In Nevada, notice in criminal cases comes from NRS 173.075(1), not "notice pleading." *Simpson v. District Court*, 88 Nev. 654, 656-657, 503 P.3d 1225 (1972).

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

matter jurisdiction on the district court. Even assuming *arguendo* that "notice pleading" applies, "notice pleading" would not cure the fatal defect that the commingling of separate and distinct statutes fails to charge a legal offense. "Notice pleading" does not turn an allegation which is not a crime into one which does.

The district court adopted the State's so called "notice pleading" argument, erroneously finding that the commingling of two separate and distinct statutes, NRS 484C.110 and NRS 484C.430, charge a legal offense. The district judge said, "I agree that there is – that it is a notice pleading State, and so . . . I feel that it does put him on sufficient notice. It [the Second Amended Information] does state a crime." AA 64. The district court ignored, overlooked or misunderstood that notice of the State's allegation and whether that allegation charges an offense are separate matters.

"Notice" is nothing more than being aware of the allegation made by the State, but whether the allegation constitutes an offense at law is a separate matter. "Notice" of the allegation does not make the allegation a crime. Whether or not the State's allegation charges a legal offense, is independent from "notice." "Notice" of conduct which is not a crime, does not make or render that conduct a crime[31].

31. Equally true, a plea of guilty does not make a legal offense out of one which is not. "A plea of guilty amounts to nothing more than an acknowledgement of the facts charged in the indictment, but whether such facts **constitute an offense at law** is left open to be decided by the court." *Ex Parte* Dickson, 36 Nev. 94, 101 (1913).

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

Again, the issue in Banka's case is not one of "notice" but rather that the State's Second Amended Information fails to charge a legal offense. The State's "notice pleading" argument and the district court's adoption of it ignores Banka's issue.

The district court admitted that the two statutes used to charge Banka were separate and distinct, charging different offenses. The district judge stated, "I think that they are separate statutes; however, there's a lot of – there's overlap." AA 63. Merely because NRS 484C.110 and NRS 484C.430 have a number of the same elements ignores those elements that are materially different. It is those dissimilar elements that is the basis of Banka's "fails to charge a legal offense and fails to confer subject matter jurisdiction on the court" issue. The district court's "overlap" position lacks merit.

It is indisputable that NRS 484C.110 (misdemeanor) and NRS 484C.430 (felony) are separate offenses with different "elements".[32] The State has improperly substituted the misdemeanor "elements" "highway or on premises to which the public has access" for the felony "element" "on or off the highways." **The State's**

(emphasis added.) *Dickson* further stated, "[i]f no crime is charged in the indictment, then none is confessed by pleading guilty." *Id*., 36 Nev. at 102.

32. Nevada applies the *Blockburger* test to determine whether two (2) statutes set forth separate offenses. *See, Estes v. State*, 122 Nev. 1123, 1143, 146 P.3d 1114 (2006), citing *Blockburger v. United States*, 284 U.S. 299 (1932). Under *Blockburger*, NRS 484C.110 and NRS 484C.430 are separate offenses as each offense requires proof of an element that the other does not, the "location elements." Guilt or innocence depends on which "location elements" controls. *See, fn.5*.

commingling of the misdemeanor and felony statutes does not charge a legal offense.[33] Banka's Appeal should be granted.

SUMMARY OF ARGUMENT B: THE ENTRY OF PLEA WAS CONSTITUTIONALLY INFIRM BECAUSE APPELLANT BANKA DID NOT UNDERSTAND THE ELEMENTS OF THE OFFENSE AND CONSEQUENCES OF HIS PLEA

Banka's issue in Argument B, supra, challenges the district court's denial of his request to withdraw the guilty (*Alford*) plea. The plea was constitutionally infirm. The location "elements" alleged in the Second Amended Information are not part of a NRS 484C.430 violation. The correct element should have been "on or off the highways." Banka had no knowledge of the correct location "element," thus he could not have understood the correct elements of a 484C.430 offense.

There is no evidence that Banka understood any of the elements. The District Judge never canvassed Banka on any element.

Banka believed that the language "however slight" alleged in the charging document meant that all the State had to prove was slight impairment. The trial judge never addressed the "however slight" language.

33. Since there is no statute commingling the DUI "charge" filed against Banka, the entire proceedings are null and void. The nullity would render an acquittal or conviction meaningless and without any affect whatsoever. *See, fn. 21*. For example, if the jury returned a verdict of NOT GUILTY the State could (and would) argue that jeopardy did not attach. The State would be correct.

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

The Admonishment of Rights indicated that Banka was charged under NRS 484.379 [now NRS 484C.110]. There is no mention of NRS 484C.430 in the Admonishment of Rights. This misleading conflict was never addressed by the court below.

Banka was given erroneous information regarding the amount of the fine which the court could impose. Banka was led to believe that the fine could be as low as $1 up to $5,000. Yet, the law required at least a minimum fine of at least $2,000. Therefore, it cannot be held that Banka understood the consequences of his plea.

Banka made a claim of ineffective assistance of counsel, Thomas Boley, Esq. However, the district court ignored the claim.

Banka had arguable issues which would have merited the filing of several motions which never happened. The court below ignored this issue as well.

Banka had presented several "fair and just" reasons to be allowed to withdraw his plea. Banka's request to withdraw his plea was made before sentencing, thus the district court was required to use a relaxed standard to review Banka's request. It appears that this requirement was ignored by the lower court.

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

B.

THE DISTRICT COURT'S REFUSAL TO ALLOW APPELLANT BANKA TO WITHDRAW HIS PLEA OF GUILTY (ALFORD)[34] WAS CONTRARY TO LAW AND AN ABUSE OF DISCRETION FOR THE FOLLOWING REASONS: (1) APPELLANT BANKA DID NOT UNDERSTAND THE ELEMENTS OF THE DUI OFFENSE, (2) APPELLANT BANKA DID NOT UNDERSTAND THE CONSEQUENCES OF THE PLEA, (3) APPELLANT BANKA'S PRIOR COUNSEL WAS INEFFECTIVE AND (4) APPELLANT BANKA HAD LEGAL DEFENSES TO THE DUI CHARGE

a. Banka should have been allowed to proceed to trial.

The district court has "vast discretion" under NRS 176.165 to allow a defendant to withdraw his plea before sentencing. *See, State v. Lewis.*[35]

> A district court has vast discretion with respect to determining the merits of a presentence motion to withdraw a guilty plea and, in fact, **may grant such motion for any reason that is fair and just.** Moreover, when the district court grants a presentence motion to withdraw a guilty plea, the state generally suffers no substantial prejudice. The state may proceed to trial on the original charges or enter into a new plea bargain with the defendant.

Id., 124 Nev. at 137 (footnotes omitted.) (emphasis added.)[36]

---

34. *North Carolina v. Alford*, 400 U.S. 25 (1970). "[W]henever a defendant maintains his or her innocence but pleads guilty pursuant to *Alford*, the plea constitutes one of nolo contendere. *State v. Gomes*, 112 Nev. 1473, 1479, 930 P.2d 701, 705 (1996)." Such a plea is not an admission of guilt.

35. 124 Nev. 132, 178 P.3d 146 (2008).

36. The withdrawal of Banka's guilty plea (*Alford*) would not have resulted in substantial prejudice to the State. A trial could have been set within three (3) months. Any absence of a material witness could have been remedied by use of the

"Any reason" can be as few as one.[37] A "fair and just" reason is no longer limited solely to a determination of whether the plea was knowingly, intelligently and voluntarily entered. *See, Stevenson v. State*[38], 131 Nev. at 603. The court's "vast discretion" extends to "any reason that is fair and just." *See again, Lewis*, 124 Nev. at 137.

Additionally, a presentence motion to withdraw a guilty plea must be judged by a relaxed standard. *See, Molina v. State*.[39] ("Accordingly, Nevada trial and appellant courts must apply a more relaxed standard to presentence motions to withdraw guilty pleas than post-sentencing motions.") *Id*., 120 Nev. at 191. A trial judge's denial of a motion to withdraw the plea is reviewed for an abuse of discretion. *See, State v. Second Judicial Dist. Court (Bernardelli)*[40], 85 Nev. at 385[41]. The "vast discretion" and "relaxed standard" requirements for deciding

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

---

preliminary hearing transcript at trial. Evidence of injury can be presented through medical reports.

37. A court's discretion must be limited to the determination of whether the reason is "fair and just." Once a "fair and just" reason is established, the court should not be allowed to ignore it. To hold otherwise is to render NRS 176.165 a nullity, rendering the "fair and just" standard to the whim of the Court.

38. 131 Nev. 598, 354 P.3d 1277 (2015).

39. 130 Nev. 185, 87 P.3d 533 (2004).

40. 85 Nev. 381, 455 P.2d 923 (1969).

41. The use of an abuse of discretion standard for legal error is problematical at first glance. "Discretion" implies that there is no legal impediment to being exercised. But,

whether to allow the withdrawal of the plea before sentencing favors that the motion be granted in most circumstances. *See, Stevenson, citing Kadwell v. United States*[42], stating " . . . the withdrawal of a guilty plea before sentence is imposed . . . should be freely allowed." *Stevenson*, 131 Nev. at 603.

A plea of guilty or *nolo contendere* requires that the defendant understands the elements of the offense and the consequences of the plea. *Boykin v. Alabama*, *infra*.; *McCarthy v. United States*, *infra*.; *State v. Freeze*, *infra*.; *Love v. State*, *infra*., and *Higby v. State*, *infra*.

Appellant Banka did not understand the elements of the offense:

The United States Constitution is implicated when a court accepts a defendant's plea of guilty or *nolo contendere*. *Boykin v. Alabama*.[43] The Court in *Higby v. Sheriff*[44] acknowledged that "[t]he defendant [must] understand[ ] the nature of the charge itself, i.e. the 'elements' of the crime to which he is pleading guilty." *Id*., 86

---

a court's discretionary authority does not authorize a decision which is contrary to law. For example, a court cannot ignore that a plea is constitutionally infirm. However, since this Court has held that a decision contrary to law is an abuse of discretion, the use of abuse of discretion standard appears to reach the correct result. *See, State v. Dist. Ct. (Armstrong),* 127 Nev. 927, 267 P.3d 77 (2011) ("A manifest abuse of discretion is ('[a] clearly erroneous interpretation of the law or a clearly erroneous application of a law or rule'" *Id*., 127 Nev. at 932.

42. 315 F.2d 667, 670 (9th Cir. 1963).

43. 395 U.S. 238 (1969).

44. 86 Nev. 774, 476 P.2d 959 (1970).

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

Nev. at 781. In *Love v. State*,[45] the Court stated, "[t]he record must reveal, *inter alia*, that the accused entered his or her plea with an understanding of the charge and **the elements of the offense**." *Id*., 99 Nev. at 148. (cites omitted.) (emphasis added.) A plea cannot be voluntary and knowing ". . . unless the defendant possesses an understanding of the law in relation to the facts." *McCarthy v. United States*[46], 394 U.S. at 466. Knowledge of the facts without an understanding of the correct elements of the offense falls way short of a "knowingly, intelligently and voluntarily" entered plea.

Boykin explained, "[w]hat is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing this matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequences." 395 U.S. at 243-244. *See also State v. Freeze*.[47] ("A colloquy is a constitutional mandate to ensure that a court has sufficient information to conclude that a defendant understands the consequences of a plea **as well as the nature of the offenses**.") 116 Nev. at 1105. (emphasis added.)

The Second Amended Information does not set forth the correct elements of a NRS 484C.430 violation. The State, without legal authority, substituted the

45. 99 Nev. 147 659 P.2d 876 (1983).

46. 394 U.S. 459 (1969)

47. 116 Nev. 1097, 13 P.3d 442 (2000).

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

elements of "on a highway or on premises to which the public has access" from NRS 484C.110 (misdemeanor) for the element "on or off the highways" in NRS 484C.430 (felony).[48] Banka, at the time he entered his plea, did not know that "on or off the highways" was an element of NRS 484C.430. This fact is uncontroverted.

The prosecutors, prior defense counsel, or the district court never mentioned, addressed or discussed the inclusion of the wrong elements set forth in the Second Amended Information. No one told or informed Banka that the correct element of a NRS 484C.430 violation was "on or off the highways" and not "on a highway or on premises to which the public has access." The State's commingling of two separate and distinct crimes not only fails to charge a legal offense, but also fails to inform Banka of the correct elements of NRS 484C.430. Banka cannot be said or held to have understood the "charge", i.e. the elements filed against him when the elements alleged are not the elements of NRS 484C.430. **The record shows that the district court never discussed the substance of any of the elements alleged in the Second Amended Information during the plea**. AA 74-103. Therefore, the district court could not possibly know or have a basis to believe that Banka understood each element of NRS 484C.430 at the time he entered his plea. *See again, Freeze*. (The court has the duty "to ensure that [it] has sufficient information

48. The improper commingling issue is addressed in Argument A, *supra*.

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

to conclude that a defendant understands the consequences of a plea as well as the nature of the offenses.") 116 Nev. at 1105.

Banka signed a Guilty Plea Agreement (GPA) AA 25-36. There is nothing in the GPA informing Banka that "on or off the highways" is the element which he must defend. Exhibit 1 of the GPA (AA 32-34), the Second Amended Information, alleges "on a highway or on premises to which the public has access," the element of NRS 484C.110 (misdemeanor)

Banka was required to execute an "Admonishment of Rights" form which was attached as Exhibit 2 in the GPA. AA 35-36. The Admonishment states that Banka was being charged with a NRS 484.379 (now NRS 484C.110) violation. **There is no mention of NRS 484C.430.** The felony set forth in NRS 484.379 (now NRS 484C.110) is for enhancement of penalties for a misdemeanor with two or more prior DUI convictions. Banka had never been arrested prior to the instant case, thus Banka has no priors. Also, the Admonishment lists the period of incarceration as one to six (6) years, not two (2) to twenty (20) years. The Admonishment applies only to a NRS 484.379 (now NRS 484C.110) violation and with enhancements for prior DUI convictions. The Admonishment conflicts with NRS 484C.430 and was never addressed or corrected. "A court has an obligation to determine that a defendant understands the nature of the offense and consequences at the time of the entry of the plea. . . [w]here the court does not canvas the defendant on these [conflicting] issues at the time of the plea. . . then a material

mistake in the agreement. . . . " requires the plea to be vacated. *Hudson*, 117 at 400. Two prosecutors, Banka's prior counsel, and the district court never recognized the error or conflict.

The allegation of ". . . under the influence . . . to any degree, however slight . . . ." in the Second Amended Information is misleading and not the law. Banka understood that the "however slight language" required the prosecution to prove that only slight impairment was needed for a conviction. AA 118-120. The legislature in 2015 defined "under the influence" without any "however slight" or similar language. *See*, NRS 484C.105.

Appellant Banka did not understand the consequence of his plea:

It is constitutionally required that a plea of guilty be knowingly, intelligently and voluntarily entered. *See again, Boykin v. Alabama*. A guilty plea is knowing and voluntary only if the defendant "has a full understanding of both the nature of the charges and the *direct consequences* arising from the plea." *Rubio v. State*[49], 124 Nev. at 1038. (italics original). *See also, Hudson v. Warden*.[50] ("A court has an obligation to determine that a defendant understands the nature of the offense and the consequences at the time of the entry of plea.") *Id*., 117 Nev. at 400. The district

49. 124 Nev. 1032, 194 P.3d 1224 (2008).

50. 117 Nev 387, 22 P.3d 1154 (2001).

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

court's information given to Banka regarding the monetary penalty he faced was contrary to the law.

A conviction of NRS 484C.430 requires "a fine of not less than $2,000 nor more than $5,000." The Banka GPA indicated that the district court may but is not required to impose a fine. The district court in correcting the language of the GPA led Banka erroneously to believe that he could receive much less than $2,000.

> THE COURT: -- the sentence that I impose? And also I have to fine you. It's a requirement. I have to fine you up to – actually, it says may here. I thought it was mandatory.
>
> MR. GILES: It's mandatory, Your Honor. It is—
>
> THE COURT: A mandatory fine of up to five thousand?
>
> MR. GILES: Yes.
>
> THE COURT: Okay. So—and it says I may also be fined,

AA 40.

> but you understand that it's a mandatory fine?
>
> THE DEFENDANT: Yes.
>
> THE COURT: I could – because of the language of up to five thousand, **I could do something much less than that obviously**, but I have to fine him – impose a fine. Okay.

AA 41. (emphasis added.)

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

The district court's information was contrary to law. Banka was never told that he must be fined at least $2,000. Therefore, Banka did not understand the consequences of his plea.

Appellant Banka's prior defense counsel did not file any motions on behalf of his client: THIS IS INEFFECTIVE ASSISTANCE OF COUNSEL.

Ineffective assistance of counsel is a "fair and just" reason to allow a defendant to withdraw his plea. *See again, Stevenson*. Banka's prior counsel did not file any motions on behalf on his client. Rarely is this approach warranted or helpful to the defendant. Banka's prior counsel should have filed, at a minimum, the following motions.

1. A motion *in limine* pursuant to *State v. Dist. Ct. (Armstrong)*, 127 Nev. 927, 267 P.3d 777 (2011).
2. A motion to suppress the blood test for a violation of the implied consent law.
3. A motion to suppress the Preliminary Breath Test (PBT) pursuant to *State v. Sample* 134 Nev. 169, 414 P.3d 814 (2018).

As to the impairment and *per se* theories, there is insufficient data to allow the State to do a scientifically reliable retrograde extrapolation. *See, Armstrong, supra*. There is only one blood draw which was obtained over one (1) hour after the accident. It is also imperative for a valid retrograde extrapolation calculation to know how much alcohol was consumed and when the first and last drink occurred. The police

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

did not ask these questions. Therefore, an *Armstrong* motion *in limine* should have been filed.

Additionally, there is evidence that Banka could have consumed alcohol immediately after the accident as there was an open alcoholic beverage in his vehicle - another reason why an *Armstrong* motion should have been filed.

The "two hour" theory is equally defensible. A motion to suppress the evidentiary BAC reading is appropriate because the officer did not give Banka the choice of submitting to a breath test in lieu of blood. See, NRS 484C.160(5)(a) (". . . the person may refuse to submit to a blood test if means are reasonably available to perform a breath test."); NRS 484C.240(2) (unless the officer substantially complies with the implied consent law, which he did not do, the evidentiary test reading is inadmissible.) A motion to suppress should have been filed.

The police officer obtained the PBT without a warrant. Banka denies that he gave consent for the PBT. Additionally, Banka was told by the police officer that if he refuses to submit to the PBT, then his driver's license would be revoked for one (1) year. Banka's submittal to the PBT is not consent but rather was coerced. Eliminating the PBT creates a legitimate challenge to the officer's probable cause. A motion to suppress pursuant to *Sample* should have been filed.

At a minimum, the filing of these motions may have "opened-up" negotiations to a probationable offense. Prior counsel should have at least tried.

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

The district court ignored Banka's claim of "ineffective assistance of counsel."

CONCLUSION

Banka's issue in Argument A, *supra*, challenges the legality of the Clark County District Attorney's "legislating" his own felony DUI offense to charge some defendants but not all, by commingling NRS 484C.110 (misdemeanor) and NRS 484C.430 (felony), without legal authority, substituting the misdemeanor elements "on a highway or on premises to which the public has access" for the felony element "on or off the highways" There is no statute making the commingling of NRS 484C.110 and NRS 484C.430 a public offense. Without such a statute, there is no crime. NRS 193.050(1). Therefore, the Second Amended Information filed against Banka fails to charge a legal offense and fails to confer subject matter jurisdiction on the district court.

Banka's issue in Argument B, supra, challenges the district court's denial of his request to withdraw the guilty (*Alford*) plea. The plea was constitutionally infirm. The location "elements" alleged in the Second Amended Information are not part of a NRS 484C.430 violation. The correct element should have been "on or off the highways." Banka had no knowledge of the correct location "element," thus he could not have understood the correct elements of a 484C.430 offense.

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

There is no evidence that Banka understood any of the elements. The District Judge never canvassed Banka on any element.

Banka believed that the language "however slight" alleged in the charging document meant that all the State had to prove was slight impairment. The trial judge never addressed the "however slight" language.

The Admonishment of Rights indicated that Banka was charged under NRS 484.379 [now NRS 484C.110]. There is no mention of NRS 484C.430 in the Admonishment of Rights. This misleading conflict was never addressed by the court below.

Banka was given erroneous information regarding the amount of the fine which the court could impose. Banka was led to believe that the fine could be as low as $1 up to $5,000. Yet, the law required at least a minimum fine of at least $2,000. Therefore, it cannot be held that Banka understood the consequences of his plea.

Banka made a claim of ineffective assistance of counsel, Thomas Boley, Esq. However, the district court ignored the claim.

Banka had arguable issues which would have merited the filing of several motions which never happened. The court below ignored this issue as well.

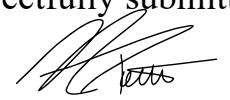
Banka had presented several "fair and just" reasons to be allowed to withdraw his plea. Banka's request to withdraw his plea was made before

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

sentencing, thus the district court was required to use a relaxed standard to review Banka's request. It appears that this requirement was ignored by the lower court.

For each of the aforementioned reasons, the district court abused her discretion in denying Banka's request to withdraw his previously entered guilty (*Alford*) plea. *See* a copy of the Banka's declaration in support of his Motion to Withdraw his plea of guilty which was presented to the court below. AA 118-120.

Respectfully submitted,

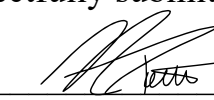


Michael D. Pariente, Esquire
Attorney for Appellant Banka
John Glenn Watkins, Esquire
(On the Brief)

VERIFICATION

Under penalty of perjury, the undersigned declares that in the foregoing Opening Brief and knows the contents thereof; that Opening Brief is true of the undersigned's own knowledge, except as to those matters stated on information and belief, and as to such matters the undersigned believes them to be true.

Respectfully submitted,



Michael D. Pariente, Esquire
Attorney for Appellant Banka
John Glenn Watkins, Esquire
(On the Brief)

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

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 2016 with Times Roman 14 font style

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:

[] Proportionally spaced, has a typeface of 14 points or more, and contains 8,649 words; or

[] Monospaced, has 10.5 or fewer characters per inch, and contains ----- words or ----- lines of text, or

[] Does not exceed 51 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

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

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 it 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 Rule of Appellant Procedure.

Dated this 9th day of March, 2020.

Michael D. Pariente, Esquire
Attorney for Appellant Banka
John Glenn Watkins, Esquire
(On the Brief)

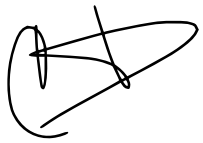
PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

CERTIFICATE OF SERVICE

I, Christopher Barden, hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on March 9, 2020. Electronic Service of the foregoing Appellant's Opening Brief and the Appellant's Appendix (One (1) Volume) shall be made in accordance with the Master Service List as follows:

STEVEN WOLFSON,
DISTRICT ATTORNEY
STEVEN OWENS,
CHIEF DEPUTY DISTRICT ATTORNEY



Christopher Barden,
an employee of
Michael D. Pariente, Esquire