

**IN THE SUPREME COURT OF
THE STATE OF NEVADA**

JACK PAUL BANKA,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

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

District Ct. No.: **C333254**

**APPELLANT'S BANKA'S REPLY TO THE STATE'S OPPOSITION TO
MOTION FOR BAIL PENDING APPEAL**

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COMES NOW Appellant JACK BANKA (“Banka”), through his attorney
MICHAEL D. PARIENTE, ESQUIRE, with JOHN G. WATKINS, ESQUIRE, Of
Counsel, and replies to the State’s Opposition.

This Reply is based on the attached Points and Authorities, Petitioners
Appendix, Banka’s Opening Brief and Appellant’s Appendix.

DATED this 17th day of March, 2020.



Michael D. Pariente, Esquire
Attorney for Appellant Banka
John Glenn Watkins, Esquire

I.

POINTS AND AUTHORITIES

A.

**APPELLANT BANKA REQUESTS THAT THIS COURT SET A
REASONABLE BAIL PENDING HIS APPEAL TO THE NEVADA
SUPREME COURT PURSUANT TO NRS 177.145, NRS 178.488, NRS
178.4853, IN RE AUSTIN¹, LANE V. STATE², AND BERGNA V. STATE.³**

As noted in Banka’s Motion for Bail before this Court, the district court did
not find that Banka’s appeal was frivolous, did not find that Banka was a flight risk

1. 98 Nev. 458, 652 P.2d 1174 (1982).

2. 86 Nev. 798, 477 P.2d 873 (1970).

3. 120 Nev. 869, 102 P.3d 540 (2004).

and did not find that Banka was a danger to the community. The district court's findings were not made in a vacuum. There was extensive briefing by the parties and oral argument. The district court's findings are entitled to respect by this Court.

We encourage the district courts to set forth such findings either in a written order or on the record. The judge who presided over the trial and has heard the evidence presented at trial is in a unique position to evaluate the factors relevant to a request for bail pending appeal, and this court **will give great respect to the trial judge's assessment of those factors based upon his or her knowledge of the evidence, the legal issues, and the applicant.**

*Bergna*⁴, 120 Nev. at 877.⁵ (emphasis added.)

The State's argument in opposition to Banka's request for reasonable bail in this Court conflicts with the district court's findings that Banka is not a flight risk or a danger to the community. The State does not argue that Banka's appeal is frivolous here because it is not.

Banka's issues on appeal are meritorious. The State's Amended Information fails to charge a public offense. There is no statute making the commingling of NRS 484C.110 (misdemeanor) and NRS 484C.430 (felony) a crime. Without such a statute, there is no public offense. *See*, Appellant's Amended Opening Brief, (AAOB) ps. 9-20. *See also*, *Gordon v. State*⁶ where this Court recognized that the

4. *Bergna v. State*, 120 Nev. 869, 102 P.3d 549 (2004).

5. It would appear that this Court's deference to the district court's findings applies as well when the conviction was obtained by a plea instead of a jury finding.

6. 121 Nev. 504, 117 P.3d 214 (2005)

1 “location” element of a NRS 484.3795 [re-codified as NRS 484C.430] violation is
2 “on or off the highways” and not “highway or premises to which the public has
3 access,” the misdemeanor elements. *Id.*, 121 Nev. at 508.

4
5 The record shows that Banka did not enter his *Alford* plea knowingly,
6 intelligently and voluntarily. Banka did not understand the elements of the offense
7 under NRS 484C.430 or the consequences of his plea. AAOB, ps. 20-32. The State
8 never argued in district court or in this Court that Banka’s issues on appeal are
9 frivolous. Again, this Court noted, “. . . the nature and quality of alleged legal errors
10 at trial may raise serious concerns respecting the validity of a conviction and may
11 weigh heavily in favor granting an application for bail pending appeal.” *Bergna*,
12 120 Nev. at 874.

13
14 At the hearing on the bail motion, the State represented to the district court
15 that the 86 year old male driver had incurred five (5) broken ribs to influence the
16 court to deny bail. This representation was false. PA 6. Additionally, the district
17 court was of the belief that Banka faced two (2) counts of felony DUI. This was
18 also not true. PA 6-7. The district court must have obtained this information from
19 the State.

20
21 The State’s delay argument is not a reason to deny Banka’s bail request for
22 several reasons. First, the delay that is relevant applies to the filing of the appeal.
23
24 NRS 178.488(1) states “[b]ail may be allowed pending appeal or certiorari unless it
25 appears **that the appeal is** frivolous or **taken for delay.**” (emphasis added.)
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Neither the district court found or the State has argued, below or before this Court, that Banka's appeal was "taken for delay." Second, the delay complained of by the State was attributed to Banka's prior attorney. Banka's current counsel has acted judiciously at all times.

The pre-sentence investigation (PSI) neglected to mention that the two police officers who investigated the accident had contrary opinions as to the direction of travel of the two vehicles involved. One officer opined that Banka was traveling southbound and the other officer formed his opinion that Banka was traveling northbound. These contradictory opinions renders a proximate cause determination questionable. Equally important, there was no accident reconstruction of the incident. The State was aware of these contradictions and allowed Banka to plead under *Alford*. The State at the bail hearing admitted to the contradictions. AA 9.. The State's attempt to "get around" the contradictions argued that the two (2) separate police reports was nothing more than conjecture or a scrivener's error. AA 9.

The State's comparison of Banka's DUI to the first degree murder conviction in *Bergna* is disingenuous. Although serious, Banka's DUI is not an act of violence. The Legislature's special confinement provisions for persons like Banka makes the point. NRS 484C.430(1) states in relevant part: "A person so imprisoned must, in so far as practicable, be segregated from offenders whose crimes were violent and, in so far as practicable be assigned to an institution or facility of minimum

security.”

Even though bail is not constitutionally required, it is statutorily allowed. Bail should be favored after conviction to protect and secure the Appellant’s valuable constitutional and statutory rights. A defendant who is ordered to prison when he has a legitimate appeal pending loses his rights even if his appeal is granted. Punishment is premature in those cases. Banka is not a flight risk or danger to the community and his Appeal is meritorious.

CONCLUSION

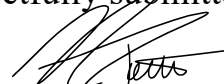
After extensive briefing by the parties and hearing oral argument, the district court did not find that Banka’s appeal was frivolous, did not find that Banka was a flight risk and did not find that Banka was a danger to the community. Pursuant to *Bergna, supra*, this Court will “give great respect” to the district court’s findings. *Id.*, 120 Nev. at 877.

The only reason for the district court’s denial of Banka’s bail motion was the belief that the bail motion, not the appeal, was made for delay. This reason makes no sense as Banka was in custody. Additionally, the court’s reason is not a legal reason to deny Banka’s bail request. *See again*, NRS 178.488(1) (the denial must be based on the appeal being “taken for delay”, not the bail motion.)

1 Banka has meritorious issues on appeal which were summarily set forth in
2 his bail motion. But, *also see*, Appellant's Amended Opening Brief at ps. 9-20; ps.
3 20-32.
4

5 Banka respectfully requests that this Court set a reasonable bail pending appeal.
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7 Respectfully submitted,

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9 _____
10 Michael D. Pariente, Esquire
11 Attorney for Appellant Banka
12 John Glenn Watkins, Esquire
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CERTIFICATE OF SERVICE

I, Christopher Barden, hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on March 17th, 2020. Electronic Service of the foregoing Reply to the State's Opposition to Motion for Bail Pending Appeal 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