

IN THE SUPREME COURT OF THE STATE OF NEVADA

JACK PAUL BANKA,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

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Elizabeth A. Brown
Clerk of Supreme Court

CASE NO: 80181

RESPONSE TO EMERGENCY MOTION UNDER NRAP 27(e)

Comes Now the State of Nevada, by Steven B. Wolfson, Clark County District Attorney, through his Chief Deputy, TALEEN PANDUKHT, and files this Response to Emergency Motion Under NRAP (e). This opposition is filed pursuant to NRAP Rules 8(e) and 27 and is based on the following memorandum, declaration of counsel and all papers and pleadings on file herein.

Dated this 25th day of March, 2020.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ Taleen Pandukht*

TALEEN PANDUKHT
Chief Deputy District Attorney
Nevada Bar #005734
Office of the Clark County District Attorney

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
RESPONSE TO EMERGENCY MOTION UNDER NRAP 27(e)**

STATEMENT OF THE CASE

On January 11, 2017, the State filed a criminal complaint in Henderson Justice Court charging Jack Paul Banka (“Appellant”) with one (1) count of DRIVING AND/OR BEING IN ACTUAL PHYSICAL CONTROL OF A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF AN INTOXICATING LIQUOR OR ALCOHOL RESULTING IN SUBSTANTIAL BODILY HARM; and two (2) counts of LEAVING THE SCENE OF AN ACCIDENT. Appellant’s Appendix (“AA”) at 003-004.

Between February 21, 2017, the initial arraignment, and June 28, 2018, when the preliminary hearing was conducted, the case was continued numerous times for Appellant to prepare and consider offers of resolution. On June 28, 2018, Appellant was bound up to district court following his preliminary hearing.

On July 6, 2018, the State filed an Information charging Jack Paul Banka (“Appellant”) with DRIVING UNDER THE INFLUENCE RESULTING IN SUBSTANTIAL BODILY HARM (Category B Felony – NRS 484C.110, 484C.430, 484C.150 – NOC 53906). AA005-006.

On June 24, 2019, Appellant entered into a Guilty Plea Agreement with the State wherein he pled guilty pursuant to North Carolina v. Alford, 400 U.S. 25 (1970) to one (1) count of DRIVING AND/OR BEING IN ACTUAL PHYSICAL

CONTROL OF A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF AN INTOXICATING LIQUOR OR ALCOHOL RESULTING IN SUBSTANTIAL BODILY HARM (Category B Felony – NRS 484C.110, 484C.430 – NOC 53906). AA025.

On June 21, 2019, Appellant filed an emergency Writ of Mandamus and Emergency Motion to Stay Trial with the Nevada Supreme Court. On June 21, 2019, the State filed its Opposition. The Supreme Court denied the Writ and Motion. AA023.

On October 23, 2019, at the time of sentencing, Appellant's counsel asked to file a Motion to Arrest Judgment in Open Court. The sentencing date was continued to provide time to Defendant to file the motion electronically. On November 6, 2019, the State filed its Opposition. On November 12, 2019, Appellant filed his Reply.

On November 15, 2019, Appellant filed a subsequent Motion to Withdraw Plea.

On November 18, 2019, the Court denied Appellant's Motion to Arrest Judgment and declined to consider Appellant's Motion to Withdraw Plea. AA049.

On November 19, 2019, Appellant filed an Amended Motion to Withdraw Previously Entered Plea of Guilty. On November 25, 2019, the State filed its

Opposition. On December 2, 2019, Appellant filed his Reply. On December 4, 2019, the district Court denied Appellant's Motion. AA52.

On December 4, 2019, Appellant was sentenced to a minimum of forty-eight (48) and maximum of one hundred and twenty (120) months in the Nevada Department of Corrections. AA096

On December 4, 2019, Appellant filed a Notice of Appeal. AA106.

On December 4, 2019, Appellant filed a Motion for Bond Pending Appeal. On December 6, 2019, the State filed its Opposition. On December 9, 2019, Appellant filed his Reply. On December 11, 2019, Appellant attempted to argue matters not in the pleadings. The district court continued the matter for supplemental briefing.

On January 6, 2020, Appellant filed a Supplemental Points and Authorities. On January 27, 2020, the State filed its Opposition. On January 30, 2020, Appellant filed his Reply. On February 24, 2020, the district court denied Appellant Motion for Bond Pending Appeal. Bail Appendix ("BA") at 20.

On March 9, 2020, Appellant filed a Motion for Bail Pending Appeal. On March 13, 2020, the State filed its Opposition. On March 17, 2020, Appellant filed his Reply to the State's Opposition.

On March 23, 2020, Appellant filed an Emergency Motion Under NRAP 27(e).

STATEMENT OF FACTS

On December 21, 2016, Appellant was driving his vehicle in Henderson, Nevada. PSI at 4. While driving, Appellant made a left turn into oncoming traffic. Id. at 5. While making the turn, Appellant struck another drivers vehicle. This accident cause one of the passengers of the other vehicle to suffer from a fractured sternum. Id. at 5. Appellant fled the scene but was pursued by a witness. Id. at 4. Appellant's vehicle eventually stopped working. Id. Appellant got out of his vehicle and began running from the location. Id.

Officers responding to the scene eventually found Appellant approximately 1,500 feet from his vehicle. Id. Appellant appeared intoxicated. Id. Appellant further failed a field sobriety test. Id. Officers then gave Appellant a preliminary breath test which revealed that Appellant had a Blood Alcohol Content (BAC) of .146. Id. Officers also found an alcoholic beverage in Appellant's vehicle. Id. at 5.

ARGUMENT

Appellant filed an Emergency Motion requesting his release due to (1) the spread of Covid-19; and (2) the fact that Appellant purportedly suffers from high blood pressure.

NRAP 27(e) allows for the filing of an emergency motion to avoid irreparable harm to the movant. NRAP 27(e)(3) further states:

A motion filed under this subdivision shall be accompanied by a certificate of the movant or the movant's counsel, if

any, entitled “NRAP 27(e) Certificate,” that contains the following information:

(A) The telephone numbers and office addresses of the attorneys for the parties and the telephone numbers and addresses for any pro se parties;

(B) Facts showing the existence and nature of the claimed emergency; and

(C) When and how counsel for the other parties and any pro se parties were notified and whether they have been served with the motion; or, if not notified and served, why that was not done.

As an initial point, the State notes that Appellant has not attached a NRAP 27(e) certificate to the instant motion. As such, this filing is procedurally deficient pursuant to the NRAP.

The State would also note that the instant Motion reads as an additional briefing regarding Appellant’s Motion for Bail Pending Appeal. In fact, this Motion in essence is asking the Court to consider an additional factor (the spread of Covid-19) in ruling on Appellant’s Motion. First, such an additional briefing is inappropriate where Appellant has already filed his Motion, as well as his Reply to the State’s Opposition to said Motion. In fact, it is unclear why Appellant did not raise this issue in either his Motion for Bail Pending Appeal, or his Reply to the State’s Opposition to said Motion. Appellant’s Motion was filed on March 9, 2020, and his Reply was filed on March 17, 2020. The Covid-19 outbreak has been

documented as having spread to Clark County as early as March 5, 2020.¹ Given Appellant's history of delaying proceedings in district court, the State has misgivings about the timing and form of this argument.

Second, the factors this Court considers in deciding whether to release a defendant on bail pending appeal were thoroughly articulated in Bergna v. State, 120 Nev. 869, 872, 102 P.3d 549, 551 (2004). These considerations address whether the appeal is frivolous or taken for delay, and whether the applicant's release may pose a risk of flight or danger to the community. Id. As these factors shows, bail is not set because it would be more advantageous for the defendant, it is set when it would not be a detriment to the community or legal system. While the State is sympathetic to the ongoing issues caused by Covid-19, the fact remains that Appellant is a flight risk, a danger to this community, and has filed this appeal in an attempt to delay his lawfully imposed sentence. See Respondent's Opposition to Motion for Bail Pending Appeal. As such, the Bergna factors do not support releasing Appellant on bail.

In addition, while there have been indications that jails are encouraging law enforcement entities to issue citations without bringing low level offenders into

¹ Southern Nevada Health District Announces Positive Case of COVID-19 in a Clark County Resident, *Southern Nevada Health District*, <https://www.southernnevadahealthdistrict.org/news-release/southern-nevada-health-district-announces-positive-case-of-covid-19-in-a-clark-county-resident/>

custody², the State would note that Appellant is not similarly situated to these individuals. First, Appellant is not a low-level offender. He has been convicted of a felony. Second, Appellant has already been adjudicated guilty and had his sentence imposed. While his conviction is not final given that this Court has not ruled on his appeal, it is disingenuous to argue he is similarly situated to those individuals some jails are suggesting not be detained.

Appellant's cited authority is also unpersuasive. Appellant cites to Davis v. Ayala, 135 S. Ct. 2187, 2209 (2015) (Kennedy, J., concurring) and United States v. Mateo, 299 F. Supp. 2d 201, 212 (S.D.N.Y. 2004) for the proposition that the Court should consider "the 'total harm and benefits to prisoner and society.'" However, Kennedy's concurring opinion in Davis had nothing to do with bail, but rather whether the Court should one day consider requiring an alternative to solitary confinement. Further, this discussion was, by Kennedy's own admission, of "no direct bearing on the precise legal questions presented in this case." Id. at 2208. A citation to such a concurrence is therefore disingenuous. In Mateo, the Court granted a sentencing downward departure based on the defendant's pre-sentencing incarceration conditions. Mateo, 299 F. Supp. 2d at 207-212. However, the defendant in Mateo suffered sexual abuse at the hands of prison guards and was

² Cite and Release, Not Jail, For Some Over COVID-19 Concerns, *The Union*, <https://www.theunion.com/news/cite-and-release-not-jail-for-some-over-covid-19-concerns/>

denied medical treatment while going through labor before delivering childbirth. Id. As such, this case not only does not consider bail, but it is preposterous to argue that Appellant is similarly situated to the “uniquely extraordinary” circumstances in Mateo. Id. at 212.

Finally, the State notes that Appellant attaches no medical records or other support evidencing his purported high blood pressure. Likewise, Appellant fails to provide support for his claim that high blood pressure constitutes a serious underlying health condition that directly contributes to death from Covid-19 other than a series of internet articles. To the best of the State’s knowledge, while untreated hypertension can result in complications, individuals who control their blood-pressure with medication do not suffer the same risks.³ Once again, Appellant has failed to show, or even allege, that his blood pressure places him in such a category. The State would further note that a federal court denied a similar motion by Michael Cohen as recently as March 24, 2020. United States of America v. Michael Cohen, 18cr602-WHP, Memorandum & Order, (S.D.N.Y. Mar. 24, 2020).⁴ This denial of Cohen’s Motion for Modification of Sentence came despite

³ COVID-19: Three Million Australians Advised Not to Stop High Blood Pressure Medications, *Heart Foundation*, <https://www.heartfoundation.org.au/news/covid-19-three-million-australians-advised-not-to-stop-high-blood-pressure-medications>; Coronavirus and High Blood Pressure: What’s the Link?, *WebMD*, <https://www.webmd.com/lung/coronavirus-high-blood-pressure#2>

⁴ A link to this Order is contained in the link provided in footnote 5.

Cohen purporting to have been previously hospitalized twice for pre-existing pulmonary issues.⁵

CONCLUSION

For the foregoing reasons, the instant Emergency Motion Under NRAP 27(e) should be denied should be denied.

Dated this 25th day of March, 2020.

Respectfully submitted,

STEVEN B. WOLFSON

Clark County District Attorney

BY */s/ Taleen Pandukht*

TALEEN PANDUKHT

Chief Deputy District Attorney

Nevada Bar #005734

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⁵ Judge Rejects Michael Cohen's Coronavirus-Linked Plea For Release From Prison, *CNN*, <https://www.cnn.com/2020/03/24/politics/michael-cohen-coronavirus-prison/index.html>

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 25th day of March, 2020. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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Nevada Attorney General

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