

IN THE SUPREME COURT OF THE STATE OF NEVADA

NICHOLAS CHARLES LANZALACA,) CASE NO. 83780

Appellant,)

v.)

THE STATE OF NEVADA,)

Respondent.)

Electronically Filed
Dec 23 2021 10:36 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

FAST TRACK STATEMENT

1. Name of party filing this fast track statement:

The name of the party filing this fast track statement is Nicholas Charles Lanzalaca.

2. Name, law firm, address, and telephone number of attorney submitting this fast track statement:

The attorney filing this fast track statement is Benjamin C. Gaumond of the Ben Gaumond Law Firm, PLLC. His address is 495 Idaho Street, Suite 209, Elko, Nevada 89801. His telephone number is (775)388-4875.

///

1 **3. Name, law firm, address, and telephone number of**
2 **appellate counsel if different from trial counsel:**

3 Appellate counsel and trial counsel are the same.

4 **4. Judicial district, county, and district court docket number**
5 **of lower court proceedings:**

6
7 This is an appeal from the Fourth Judicial District Court, in and
8 for the County of Elko, State of Nevada, Department 3. The docket
9 number in the lower court is DC-CR-21-202.
10

11 **5. Name of judge issuing decision, judgment, or order**
12 **appealed from:**

13 The Honorable District Court Judge Mason Simons issued the
14 Judgment of Conviction in this case.
15

16 **6. Length of trial. If this action proceeded to trial in the**
17 **district court, how many days did the trial last?**

18
19 This case did not proceed to trial.

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21 ///

1 **7. Conviction(s) appealed from:**

2 Nicholas Charles Lanzalaca was convicted of Attempted
3 Possession of a Controlled Substance, a category E felony as defined by
4 NRS 453.336 and NRS 193.330.
5

6 **8. Sentence for each count:**

7
8 Nicholas Charles Lanzalaca was sentenced to twelve to thirty (12-
9 30) months of imprisonment in the Nevada Department of Corrections
10 and that sentence was suspended with probation for eighteen (18)
11 months.
12

13 **9. Date district court announced decision, sentence, or order**
14 **appealed from:**

15
16 The district court announced the sentence on October 8, 2021.
17

18 **10. Date of entry of written judgment or order appealed from:**

19
20 The district court entered the judgment of conviction on October
21 11, 2021.
22

23 ///

1 **11. If this appeal is from an order granting or denying a**
2 **petition for a writ of habeas corpus, indicate the date**
3 **written notice of entry of judgment or order was served by**
4 **the court:**

5 This appeal does not involve a petition for a writ of habeas corpus.

6 **12. If the time for filing the notice of appeal was tolled by a**
7 **post-judgment motion.**

8 There is no post-judgment motion that would toll the time for
9
10 filing the notice of appeal.

11 **13. Date notice of appeal filed:**

12 The notice of appeal was filed on November 8, 2021.

13
14 **14. Specify statute or rule governing the time limit for filing**
15 **the notice of appeal, e.g., NRAP 4(b), NRS 34.560, NRS**
16 **34.575, NRS 177.015, or other:**

17 The rule governing the time limit for filing the notice of appeal for
18 this case is NRAP 4(b)(1)(A).

19 **15. Specify statute, rule or other authority which grants this**
20 **court jurisdiction to review the judgment or order**
21 **appealed from:**

22 This court has jurisdiction under NRS 177.015(3).
23
24
25

1 **16. Specify the nature of disposition below, e.g., judgment**
2 **after bench trial, judgment after jury verdict, judgment**
3 **upon guilty plea, etc.:**

4 This is an appeal from the judgment of conviction upon a plea of
5 guilty.

6
7 **17. Pending and prior proceedings in this court. List the case**
8 **name and docket number of all appeals or original**
9 **proceedings presently or previously pending before this**
10 **court which are related to this appeal (e.g., separate**
11 **appeals by co-defendants, appeal after post-conviction**
12 **proceedings):**

13 Counsel is not aware of any other proceedings pending before this
14 court which are related to this appeal.

15 **18. Pending and prior proceedings in other courts. List the**
16 **case name, number and court of all pending and prior**
17 **proceedings in other courts which are related to this**
18 **appeal (e.g., habeas corpus proceedings in state or federal**
19 **court, bifurcated proceedings against co-defendants):**

20 Counsel is not aware of any proceedings in other courts which are
21 related to this appeal.

22 ///

23 ///

1 **19. Proceedings raising same issues. List the case name and**
2 **docket number of all appeals or original proceedings**
3 **presently pending before this court, of which you are**
4 **aware, which raise the same issues you intend to raise in**
5 **this appeal:**

6 In Martin v. State, Nevada Supreme Court Case Number 83665,
7 the issue of mandatory probation as articulated in NRS 176.211 is
8 currently being litigated. Admittedly, that case involves a conviction for
9 Possession of a Controlled Substance – unlike the instant case.

10 **20. Procedural history. Briefly describe the procedural history**
11 **of the case (provide citations for every assertion of fact to**
12 **the appendix, if any, or to the rough draft transcript):**

13 The criminal information was filed in the Fourth Judicial District
14 Court on July 9, 2021 wherein Mr. Lanzalaca was charged with
15 Possession of a Schedule I or II Controlled Substance as defined by NRS
16 453.336. *Joint Appendix 1.* An amended criminal information was filed
17 pursuant to plea negotiations wherein Mr. Lanzalaca was charged with
18 Attempted Possession of a Schedule I or II Controlled Substance, a
19 category E felony or gross misdemeanor as defined by NRS 453.336 and
20 NRS 193.330. *Joint Appendix 4.*

1 The guilty plea agreement was filed on August 5, 2021. *Joint*
2 *Appendix 7.* The arraignment was held on August 6, 2021. *Joint*
3 *Appendix 16.* The guilty plea was accepted in open court. *Joint*
4 *Appendix 36.* The sentencing was held on October 8, 2021. *Joint*
5 *Appendix 43.*

7 The judgment of conviction was filed on October 11, 2021. *Joint*
8 *Appendix 64.* The notice of appeal was filed on November 8, 2021.
9 *Joint Appendix 68.*

11 **21. Statement of facts. Briefly set forth the facts material to**
12 **the issues on appeal:**

13 In the guilty plea agreement, the parties agreed that Mr.
14 Lanzalaca would plead guilty to Attempted Possession of a Controlled
15 Substance. *Joint Appendix 7.* As part of that resolution, the parties
16 agreed that in “accordance with NRS 176.211, if this case is adjudicated
17 as a category E felony, for a first or second offense of NRS 453.336, the
18 court shall defer judgment upon my consent.” *Joint Appendix 8.*
19 Deputy Elko County District Attorney Justin M. Barainca signed this
20 plea agreement on behalf of the State of Nevada. *Joint Appendix 14.*

1 The Presentence Investigation Report was prepared on September
2 8, 2021. *Presentence Investigation Report 1*.¹ In the offense synopsis, it
3 is indicated that the quantity of methamphetamine involved in this case
4 was one point six (1.6) grams. *Presentence Investigation Report 7*. Mr.
5 Lanzaalaca had zero (0) felony convictions on his record at the time of
6 this report. *Presentence Investigation Report 2-6*.

7
8 At the time of sentencing in this matter, Deputy Elko County
9 District Attorney Mercedes Martinez represented the State of Nevada.
10 *Joint Appendix 44*. Ms. Martinez requested treatment of Mr.
11 Lanzaalaca's matter as a felony. *Joint Appendix 47*.

12
13 Defense counsel for Mr. Lanzaalaca highlighted the fact that 1.6
14 grams of the controlled substance did not warrant felony treatment.
15 *Joint Appendix 49*. Mr. Lanzaalaca had zero (0) felony convictions on his
16 record. *Joint Appendix 50*.

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22 ¹ An order directing the Elko County Clerk's Office to release this
23 Presentence Investigation Report was entered on December 9, 2021.

1 **22. Issues on appeal. State concisely the principal issue(s) in**
2 **this appeal:**

- 3 1) Did the district court exceed its jurisdiction when it sentenced
4 Nicholas Charles Lanzalaca as a convicted felon when NRS
5 176.211 required diversion for a first offense under NRS 453.336?
6
7 2) In the alternative, did the district court commit plain error in
8 sentencing Nicholas Charles Lanzalaca to a felony conviction
9 when the plea agreement stated that he was to receive mandatory
10 diversion for a first offense under NRS 453.336?
11
12 3) Is a remand to district court necessary to allow a re-sentencing
13 contingent on the State violating the plea agreement during this
14 appeal?
15

16 **23. Legal argument, including authorities:**

17 **1) The district court exceeded its jurisdiction when it**
18 **adjudicated Mr. Lanzalaca to be a convicted felon.**
19

20 Under NRS 176.211(1)-(3):

21 1. Except as otherwise provided in this subsection, upon a plea of
22 guilty, guilty but mentally ill or nolo contendere, but before a
23 judgment of guilt, the court may, without entering a judgment of
24 guilt and with the consent of the defendant, defer judgment on the
25

1 case to a specified future date and set forth specific terms and
2 conditions for the defendant. The duration of the deferral period
3 must not exceed the applicable period set forth in subsection 1 of
4 NRS 176A.500 or the extension of the period pursuant to subsection
5 2 of NRS 176A.500. The court may not defer judgment pursuant to
6 this subsection if the defendant has entered into a plea agreement
7 with a prosecuting attorney unless the plea agreement allows the
8 deferral.

9 2. The terms and conditions set forth for the defendant during the
10 deferral period may include, without limitation, the:

- 11 (a) Payment of restitution;
- 12 (b) Payment of court costs;
- 13 (c) Payment of an assessment in lieu of any fine authorized by law
14 for the offense;
- 15 (d) Payment of any other assessment or cost authorized by law;
- 16 (e) Completion of a term of community service;
- 17 (f) Placement on probation pursuant to NRS 176A.500 and the
18 ordering of any conditions which can be imposed for probation
19 pursuant to NRS 176A.400; or
- 20 (g) Completion of a specialty court program.

21 3. The court:

22 (a) Upon the consent of the defendant:

23 (1) **Shall** defer judgment for any defendant who has entered a plea
24 of guilty, guilty but mentally ill or nolo contendere to a violation of
25 paragraph (a) of subsection 2 of NRS 453.336; or

(2) May defer judgment for any defendant who is placed in a
specialty court program. The court may extend any deferral period
for not more than 12 months to allow for the completion of a
specialty court program.

(b) Shall not defer judgment for any defendant who has been
convicted of a violent or sexual offense as defined in NRS 202.876, a
crime against a child as defined in NRS 179D.0357 or a violation of
NRS 200.508.

(Emphasis added.)

1 NRS 453.336(2)(a), likewise, requires diversion on a first offense of
2 violating NRS 453.336:

3 For a first or second offense, if the controlled substance is listed in
4 schedule I or II and the quantity possessed is less than 14 grams, or
5 if the controlled substance is listed in schedule III, IV or V and the
6 quantity possessed is less than 28 grams, is guilty of possession of a
7 controlled substance and shall be punished for a category E felony
8 as provided in NRS 193.130. In accordance with NRS 176.211, the
9 court **shall** defer judgment upon the consent of the person.

10 (Emphasis added.)

11 Based on NRS 176.211 **and** NRS 453.336(2)(a), the district court
12 did not have jurisdiction to adjudicate Mr. Lanzalaca as a felon.

13 However, the defense anticipates the argument that because Mr.
14 Lanzalaca pled to Attempted Possession of a Controlled Substance
15 rather than Possession of a Controlled Substance, NRS 176.211 and
16 NRS 453.336(2)(a) do not apply to the instant case. The defense would
17 disagree with that contention.
18

19 The general rule in this jurisdiction is that statutes should be
20 interpreted so as to avoid “absurd results.” Nunnery v. State, 127 Nev.
21 749, 763, 263 P.3d 235, 245 (2011), citing State v. Kopp, 118 Nev. 199,
22 204, 43 P.3d 340, 343 (2002).
23

1 If this Court follows the State's expected argument that Mr.
2 Lanzalaca could be adjudicated a convicted felon because the State did
3 not have to affirmatively recommend diversion under the terms of the
4 plea agreement, there would be an absurd result. The State obviously
5 is not prepared to argue that Mr. Lanzalaca would be ineligible for
6 diversion if he went to jury trial and lost on the charge of Possession of
7 a Controlled Substance. However, the State is expected to argue that
8 Mr. Lanzalaca could expect a **harsher** result by negotiating with the
9 State for a **lesser** charge. What could be more absurd than that?
10
11

12 As such, this Court should reverse Mr. Lanzalaca's sentence and
13 remand this matter for a re-sentencing hearing wherein NRS
14 176.211(1) and NRS 453.336(2)(a) are followed. Specifically, this Court
15 should remand this case with the instruction that Mr. Lanzalaca's
16 judgment be deferred.
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1 **2) In the alternative, this Court should reverse the**
2 **conviction of Nicholas Charles Lanzalaca under a plain**
3 **error standard because the plea agreement ensured that**
4 **he would receive drug diversion if the matter were treated**
5 **as a felony.**
6

7 This Court has held that “a guilty plea is presumptively valid, and
8 the defendant has the burden of establishing that the plea was not
9 entered knowingly and intelligently.” Hubbard v. State, 110 Nev. 671,
10 675, 877 P.2d 519, 521 (1994), citing Bryant v. State, 102 Nev. 268, 272,
11 721 P.2d 364, 368 (1986).
12
13

14 A plain error analysis applies when there was no objection lodged
15 to the sentencing decision. See NRS 178.602; see also Mendoza-Lobos v.
16 State, 125 Nev. 634, 643, 218 P.3d 501, 507-08 (2009); Puckett v. United
17 States, 556 U.S. 129, 129 S. Ct. 1423, 1428-29, 173 L. Ed. 2d 266
18 (2009).²
19
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22 ² The defense would submit that no objection was ultimately necessary
23 when the district court exceeded its jurisdiction. Colwell v. State, 118
24
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1 Mr. Lanzalaca, in no uncertain terms, was notified that a first
2 offense under NRS 453.336 would be subject to diversion if the matter
3 is treated as a felony. Judge Simons elected to adjudicate this matter
4 as a felony but went a step further in bypassing diversion. That
5 constitutes reversible error.
6

7 Was the guilty plea in this case knowingly and intelligently
8 entered? How could it have been when the district court sentenced Mr.
9 Lanzalaca in a manner wholly inconsistent with the terms of the plea
10 agreement?
11

12 The State could try to argue on this appeal that the issue of
13 diversion that was mentioned in the plea agreement would only apply
14 to an actual Possession case rather than an Attempted Possession
15 matter such as the instant case. That would be unpersuasive. Could
16
17

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19 Nev. 807, 812, 59 P.3d 463, 467 (2002), citing Swan v. Swan, 106 Nev.
20 464, 469, 796 P.2d 221, 224 (1990) (“subject-matter jurisdiction is not
21 waivable, and a court’s lack of such jurisdiction can be raised for the
22 first time on appeal.”)
23
24
25

1 the State possibly say that such language was surplusage? If so, that is
2 absurd.

3 Accordingly, this Court should reverse Mr. Lanza's conviction.

4 **3) A remand back to district court with a re-sentencing is**
5 **necessary if the State of Nevada violates the plea**
6 **agreement during the course of this appeal.**

7
8 "When a State enters into a plea agreement, it 'is held to 'the most
9 meticulous standards of both promise and performance'" with respect to
10 both the terms and spirit of the plea bargain." Sparks v. State, 121
11 Nev. 107, 110, 110 P.3d 486, 487 (2005), quoting Van Buskirk v. State,
12 102 Nev. 241, 243, 720 P.2d 1215, 1216 (1986) (quoting Kluttz v.
13 Warden, 99 Nev. 681, 683-84, 669 P.2d 244, 245 (1983)).

14
15 This Court has cited United States Supreme Court precedent
16 when discussing the issue of a prosecuting authority breaching a plea
17 agreement:
18
19

20 [The sentencing judge] stated that the prosecutor's
21 recommendation did not influence him and we have no reason to
22 doubt that. Nevertheless, we conclude that the interests of justice
23 and appropriate recognition of the duties of the prosecution in
24 relation to promises made in the negotiation of pleas of guilty will be

1 best served by remanding the case to the state courts for further
2 consideration [of the appropriate relief for the breach-specific
3 performance or withdrawal of the plea].

4 Echeverria v. State, 119 Nev. 41, 43-44, 62 P.3d 743, 745 (2003),
5 quoting Santobello v. New York, 404 U.S. 257, 262-63, 30 L. Ed. 2d 427,
6 433, 92 S. Ct. 495, 499 (1971).

7
8 This court went further and declared “that the State’s violation of
9 a plea agreement “requires reversal.”” Id. at 44, 745, quoting Citti v.
10 State, 107 Nev. 89, 91, 807 P.2d 724, 726 (1991) (quoting Van Buskirk
11 v. State, 102 Nev. 241, 243, 720 P.2d 1215, 1216 (1986)); see also Kluttz
12 v. Warden, 99 Nev. 681, 684, 669 P.2d 244, 246 (1983); Riley v. Warden,
13 89 Nev. 510, 513-14, 515 P.2d 1269, 1271 (1973). Harmless-error
14 analysis is inapplicable in the event that a prosecutor breaches a plea
15 agreement. Id.

16
17
18 When an appellate court determines that a prosecutor has
19 breached a plea agreement and that specific performance is the proper
20 remedy, a re-sentencing must be ordered before a different sentencing
21 judge. Id. See, e.g., Citti, 107 Nev. at 94, 807 P.2d at 727; Wolf v. State,

1 106 Nev. 426, 428, 794 P.2d 721, 723 (1990); Van Buskirk, 102 Nev. at
2 244, 720 P.2d at 1217; Kluttz, 99 Nev. at 684, 669 P.2d at 246; Riley, 89
3 Nev. at 514, 515 P.2d at 1271.

4 The State of Nevada is held to a high standard when it comes to
5 plea negotiations and its obligation to comply with plea agreements. If
6 the State is going to repudiate a material part of the plea agreement
7 (i.e., the requirement for diversion if the court treats this matter as a
8 felony), Mr. Lanzalaca asks that this matter be remanded for a new
9 sentencing hearing before a different judge.

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11
12 **24. Preservation of issues. State concisely how each**
13 **numerated issue on appeal was preserved during trial. If the**
14 **issue was not preserved, explain why this court should review**
15 **the issue:**

16 Pertaining to the issue of the lack of jurisdiction of the district
17 court to sentence Mr. Lanzalaca as a convicted felon, that does not
18 require preservation.

19
20 As for the matter of the plain error of the district court in
21 sentencing Mr. Lanzalaca, this Court allows for review on the plain
22 error standard even without a preservation of error – although a
23

1 reversal on jurisdictional grounds makes this lack of preservation issue
2 moot.

3 Finally, as to the issue of a potential breach of the plea agreement
4 that could arise on this appeal, this Court has ruled that a harmless-
5 error analysis does not apply to a breach of a plea agreement. Hence,
6 error preservation is not required.
7

8
9 **25. Issues of first impression or of public interest. Does this**
10 **appeal present a substantial legal issue of first impression**
11 **in this jurisdiction or one affecting an important public**
12 **interest: If so, explain:**

13 This appeal presents an issue of first impression insofar as there
14 is no appellate ruling from this jurisdiction as to the mandatory
15 diversion provisions of NRS 176.211 and NRS 453.336(2)(a).
16

17 **26. Routing statement pursuant to NRAP 17:**

18 This case involves a direct appeal from a judgment of conviction
19 based upon a plea of guilty. Under NRAP 17(b)(1), this case is
20 presumptively assigned to the Court of Appeals.
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However, under NRAP 17(a)(11), this Court retains and decides matters of first impression.

Based on this case presenting an issue of first impression, Mr. Lanza asks that this Court retain this appeal.

VERIFICATION

1. I hereby certify that this fast track statement 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 fast track statement has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in size 14 Century Schoolbook font.

2. I further certify that this fast track statement complies with the page- or type-volume limitations of NRAP 3C(h)(2) because it is either:

[x] Proportionately spaced, has a typeface of 14 points or more,
and contains 3,480 words; or

[] Monospaced, has 10/5 or fewer characters per inch, and contains ____ words or ____ lines of text; or

[] Does not exceed 16 pages.

1 3. Finally, I recognize that pursuant to NRAP 3C, I am responsible
2 for filing a timely fast track statement and that the Supreme Court of
3 Nevada may sanction an attorney for failing to file a timely fast track
4 statement, or failing to raise material issues or arguments in the fast
5 track statement, or failing to cooperate fully with appellate counsel
6 during the course of an appeal.
7

8 4. I therefore certify that the information provided in this fast track
9 statement is true and complete to the best of my knowledge,
10 information and belief.
11

12 DATED this 23rd day of December, 2021.
13

14 BEN GAUMOND LAW FIRM, PLLC
15

16
17 By: 

18 BENJAMIN C. GAUMOND, ESQ.
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DATED this 23rd day of December, 2021.

Benjamin C. Gaumond, Owner
Ben Gaumond Law Firm, PLLC