IN THE SUPREME COURT OF THE STATE OF NEVADA

NICHOLAS CHARLES LANZALACA,

Appellant,

vs.

Case No. 83780

THE STATE OF NEVADA,

Respondent.

FAST TRACK RESPONSE

1. **Name of party filing this fast track response:** The State of Nevada.

2. **Name, law firm, address, and telephone number of attorney submitting this fast track response:** Deputy District Attorney, Justin M. Barainca Office of the Elko County District Attorney, 540 Court Street, Second Floor, Elko, NV 89801, (775) 738-3101.

3. **Name, law firm, address, and telephone number of appellate counsel, if different from trial counsel:** N/A.

4. **Proceedings raising same issues:** Counsel is not aware of any other proceedings pending before this court that raise the same issues other than that raised in the fast track statement.

5. **Procedural history:** Respondent is satisfied with the procedural history set forth in the fast track statement.

6. **Statement of facts:** Respondent is satisfied with some of the factual recitation in the fast track statement, with following additions or corrections: The plea agreement provided the following terms:

> At the time of sentencing in this case, the State of Nevada shall not oppose Mr. Lanzalaca being placed on probation in the event that this matter is adjudicated as a category E felony. In all other regards, the parties shall be free to argue at the time of sentencing in this case.

(JA, 8).

During the arraignment, the district court asked defense counsel to recite the terms in the plea agreement. (JA, 13). Defense counsel recited the exact language described above on the record as to the terms of the agreement, in addition to other provisions. (JA, 28). The court asked Lanzalaca if that was his understanding of the agreement, to which Lanzalaca replied in the affirmative. (JA 28-29). The State also acknowledge the terms of the plea agreement. (JA, 29). NRS 176.211 was not discussed during the entirety of the arraignment. (JA 16-42.

Lanzalaca's presentence investigation report ("PSI") showed that Lanzalaca had suffered ten previous misdemeanor convictions. (JA, 48). Lanzalaca also had numerous active warrants out of Utah. (JA, 48).

At sentencing, defense counsel specifically recommended gross misdemeanor treatment instead of the category E felony. (JA, 49-51). As with the arraignment, NRS 176.211 was not discussed during any part of the proceeding. (JA, 43-63). Further, after sentence was pronounced, defense counsel was afforded an opportunity to raise any objections or additions and did not do so. (JA, 58).

7. **Issues on appeal:**

1. Whether the district court exceeded its jurisdiction by adjudicating the crime as a category E felony.

2. Whether the district court erred by sentencing Lanzalaca to a felony.

3. Whether the State violated the plea agreement by recommending felony treatment.

8. **Legal argument:**

I. THE DISTRICT COURT DID NOT EXCEED ITS JURISDICTION BY ADJUDICATING THE MATTER AS A CATEGORY E FELONY.

The starting point for determining legislative intent is the statute's plain meaning; when a statute is clear on its face, a court cannot go beyond the statute in determining legislative intent. Cabrera v. State, 454 P.3d, 722, 724 (Nev. 2019)

(internal quotation marks omitted). NRS 176.211(1) provides in relevant part, "the court may not defer judgment pursuant to this subsection if the defendant has entered into a plea agreement with a prosecuting attorney unless the plea agreement allows a deferral." Further, upon the consent of the defendant, the court shall defer judgment for any defendant who has entered a guilty plea, guilty but mentally ill, or nolo contendere to a violation of paragraph (1) of subsection 2 of NRS 453.336. NRS 176.211(3)(a)(1).

NRS 176.211 is clear on its face and subsection 3 does not include pleas for attempts. If the legislature wanted that option, it would have included attempted possession of a controlled substance in the language. Thus, subsection 3 of NRS 176.211 does not apply to Lanzalaca. Lanzalaca's claim is meritless. Further, Lanzalaca waived this argument because it was not raised in the trial court, and the issue goes to the court's discretion, not jurisdiction. *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 623 P.2d. 981 (1981) ("a point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal").

Thus, this Court should affirm the judgment of conviction.

II. THE DISTRICT COURT DID NOT ERR BY ADJUDICATING THE MATTER AS A FELONY BECAUSE NOTHING IN THE PLEA AGREEMENT REQUIRED SUCH A DISPOSITION.

In his second argument, Lanzalaca contends that the plea agreement required the district judge to grant diversion. First, as noted above, Lanzalaca pleaded to an attempt, not the completed offense described under NRS 176.211.

Second, district courts are afforded wide discretion in sentencing decision's, so long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence. *Chavez v. State*, 125 Nev. 328, 348, 213 P.3d 476, 490 (2009). The district court is free to impose whatever sentence it deems appropriate. See *Smith v. State*, 2019 Nev. Unpub. LEXIS 442 (2019) (affirming the denial of habeas relief where trial counsel did not raise futile objections to a sentence that exceeded the State's recommendations).

Contrary to the contentions of Lanzalaca, there was nothing in the agreement about diversion under NRS 176.211 for the charge to which Lanzalaca pled. There was no mention of NRS 176.211 in either the plea canvas or sentencing, thus Lanzalaca's argument that he was notified regarding diversion "in no uncertain terms" is belied by the record.

Additionally, the ability to sentence Lanzalaca on a felony offense was well within the district court's discretion. The sentence was also appropriate because of the active warrants for Lanzalaca's arrest at the time of sentencing and the numerous misdemeanor convictions that Lanzalaca suffered prior to the

instant matter. The district court's only limitation was the conviction for the category E felony required the district court to impose probation. NRS 193.130(2)(e). The district court correctly imposed probation, thus it did not err by the imposition of the sentence.

Accordingly, this Court should affirm the judgment of conviction.

III. THE STATE DID NOT VIOLATE THE PLEA AGREEMENT BY RECOMMENDING THAT THE COURT ENTER A FELONY CONVICTION.

In his final argument, Lanzalaca contends that this matter should be remanded for another sentencing hearing. Specifically, Lanzalaca argues that the State violated the plea agreement by recommending that Lanzalaca be sentenced to suffer a felony conviction without regard for NRS 176.211. In support of his argument, Lanzalaca again points to the language of the plea agreement regarding NRS 176.211.

Lanzalaca blatantly and frivolously mischaracterizes the facts and the agreement in his argument. Nowhere in the plea agreement was there a provision that the State shall recommend that the court defer judgment under NRS 176.211. Rather, the plea agreement states the exact opposite: "In all other regards, the parties shall be free to argue at the time of sentencing in this case." (JA, 8).

The State's obligations in the plea agreement were clear: the State would not oppose that Lanzalaca be placed on probation if Lanzalaca was to be convicted of the felony. The parties were otherwise free to argue, meaning the State was free to argue against any diversionary treatment, had such a request been made by Lanzalaca. Further, as noted above, the provision that Lanzalaca claims required a recommendation of diversion did not apply to the instant matter because Lanzalaca did not plead and was not sentenced to a first offense violation of NRS 453.336, but rather an attempt.

9. **Preservation of issues:**

Since this appeal challenges the district court's discretionary decision, and not its jurisdiction, Lanzalaca failed to adequately preserve this issue for appeal, thus this matter should be subject to plain error review. NRS 178.062.

10. **Court of Appeals assignment statement pursuant to NRAP 17:** This case involves a direct appeal from a Judgment of Conviction (upon jury verdict) that does not involve a conviction for any offense that is a category A or category B felony. See NRAP 17(b)(1). As such, it appears this case will be presumptively assigned to the Court of Appeals. The State does not contend that the Supreme Court should retain this appeal, despite Appellant's argument that this is an issue of first impression.

VERIFICATION

I hereby certify that this fast track response 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). This fast track response has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007, in size 14 point Times New Roman font.

I further certify that this fast track response complies with the type-volume limitations of NRAP 3C(h)(2) because it contains 1,354 words.

I recognize that pursuant to NRAP 3C I am responsible for filing a timely fast track response and that the Supreme Court of Nevada may sanction an attorney for failing to file a timely fast track response, or for failing to cooperate fully with appellate counsel during the course of an appeal. I therefore certify that the information provided in this Fast Track Response is true and complete to the best of my knowledge, information and belief.

DATED this 11th day of January, 2022.

TYLER J. INGRAM
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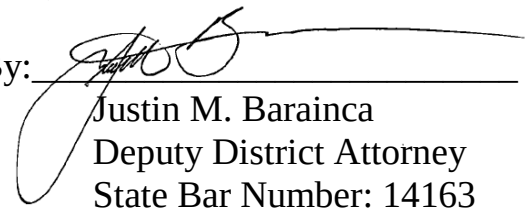
By: 

Justin M. Barainca
Deputy District Attorney
State Bar Number: 14163

CERTIFICATE OF COMPLIANCE

I hereby certify that this fast track response 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). This fast track response has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007, in size 14 point Times New Roman font.

I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the fast track response exempted by NRAP32(a)(7)(C), it contains 1,354 words.

Finally, I further certify that I have read this fast track response, 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 response regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying response is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 11th day of December, 2021.

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By: _____
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CERTIFICATE OF SERVICE

I certify that this document was filed electronically with the Nevada Supreme Court on the 12th day of December, 2021. Electronic Service of the Fast Track Response shall be made in accordance with the Master Service List as follows:

Honorable Aaron D. Ford
Nevada Attorney General

And

Benjamin Gaumond
Attorney for Appellant

ERIKA WEBER
CASEWORKER

DA#: AP-21-02863