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### Summary of Bergna v. State, 120 Nev. Adv. Rep. 92

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***Bergna v. State*, 120 Nev. Adv. Rep. 92 (December 20, 2004)<sup>1</sup>**

**CRIMINAL LAW - APPEALS**

**Summary**

Peter Matthew Bergna, Appellant, was charged with murder and tried before a jury, with the first trial ending in a mistrial after the jury could not agree on a verdict. Prior to the second trial, Bergna posted bail and, with conditions attached, was released from custody. The second jury returned a guilty verdict of first-degree murder and Bergna was sentenced to life in prison.

Bergna filed an appeal, and then filed a motion to request bail pending his appeal with the district court. After a hearing, the district denied Bergna's motion. Subsequently, Bergna filed an instant motion for bail pending appeal with the Nevada Supreme Court. The State opposed the motion, arguing that, pursuant to NRS 178.484(4), Nevada courts do not have jurisdiction to grant bail as a matter of law when there is proof and the presumption is great that a defendant has committed murder in the first degree. Additionally, it argued a defendant does not have a constitutionally protected right to bail pending an appeal.<sup>2</sup>

The court did not agree with the State's interpretation of NRS 178.484(4) that the legislature did not intend courts to have jurisdiction over the release of a defendant pending appeal of a first-degree murder conviction. The *Bergna* Court looked first to the plain meaning of the language to interpret legislative intent and determined that chapter 178 of the Nevada Revised Statutes clearer referred to the court's discretion in these matters. In addition, NRS 178.4785(1) contemplates an application for bail pending appeal could be granted, and NRS 178.4871<sup>3</sup> and 178.4873<sup>4</sup> contemplate bail pending an appeal where a defendant is pursuing a writ of habeas corpus. All of these sections demonstrate the legislation's intent to allow the court discretion in determining a post-conviction release on bail pending appeal.

The lower court did not enumerate its reasons for denial of the bail pending appeal request. The court ultimately determined that Bergna did not meet his burden of proof that he did not pose a flight risk should he be released on bail based on the revised standards the court adopted.

**Issue and Disposition**

**Issue**

Does NRS 178.484(4) mandate that, under any circumstance, a defendant convicted of first-degree murder is statutorily precluded from receiving bail pending an appeal?

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<sup>1</sup> Kristen T. Gallagher

<sup>2</sup> In re Austin, 86 Nev. 798, 801, 477 P.2d 873, 875 (1970).

<sup>3</sup> Governing post-conviction petitioner for habeas corpus: Limitations on release.

<sup>4</sup> Governing post-conviction petitioner for habeas corpus: Release pending appeal.

## **Disposition**

No. The Nevada legislature did not intend to deprive the courts the ability to release a defendant convicted of first-degree murder on bail pending appeal.

## **Commentary**

### **State of the Law Before *Bergna v. State***

Two cases set forth the standards and procedures governing bail pending appeal, *Lane v. State*,<sup>5</sup> and *In re Austin*.<sup>6</sup> In *Austin*, the court announced the general rule for review of applications for bail pending appeal:

When presented with an application [for bail pending appeal], neither the court nor any of its justices should conduct a separate fact-finding proceeding. Seldom will the trial transcript or record be available to the court or its members to aid in passing on such a bail application here. Accordingly, we must make our independent judgment on a review of the reasons relied upon by the lower court.<sup>7</sup>

In *Lane*, the court summarized the *Austin* rule in that it requires a district court to “set forth its reasons for denying bail” so that the supreme court can resolve a subsequent motion for bail pending appeal.<sup>8</sup> Both cases provided guidance on the relevant factors that a district court should consider, instructing that bail pending appeal can be denied if there is a flight risk or danger to the community, or if the appeal was filed for frivolous or delay tactics.<sup>9</sup>

### **Effect of *Bergna v. State* on Current Law**

The *Bergna* Court concluded that the procedures outlined in *Lane* and *Austin* are no longer warranted because of the realities of present day appellate practice, and overruled the portion of those holdings that suggested a bail matter would be remanded to the district court when it failed to make specific findings as to its decision. Today, much of the record of the proceedings below is available to counsel and the court soon after an appeal is filed. Also, the burden of compiling the record has shifted from the court clerk to counsel.<sup>10</sup> As a result, the court does not need to be as concerned with the availability of the court record in reviewing applications for bail pending appeal.

The court held the burden is now shifted to the applicant to provide the court with the part of the record in the lower court that is essential to the court’s understanding of the application. However, the court can still remand when the record and circumstances require such

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<sup>5</sup> 98 Nev. 458, 652 P.2d 1174 (1982).

<sup>6</sup> 86 Nev. 798, 477 P.2d 873 (1990).

<sup>7</sup> *Id.* at 802, 477 P.2d at 876.

<sup>8</sup> *Lane*, 98 Nev. at 459, 652 P.2d at 1174.

<sup>9</sup> *Id.* at 459-60, 652 P.2d at 1174-75.

<sup>10</sup> See NRAP 10(b); see also NRAP 3(c) (setting forth the rules of procedure for fast track criminal appeals).

a remand. Therefore, the court does not have to remand for further proceedings when there is an adequate record before it. The factors set forth in *Lane* and *Austin* continue to be applicable when a court reviews the application for bail pending appeal.

## **Other Jurisdictions**

### **California**

California appears to have a similar procedure to Nevada in that the lower court need not specifically enumerate the reasons for denial of bail pending appeal. Historically, the California Supreme Court held that trial courts should render a brief statement of reasons in support of an order denying bail on appeal.<sup>11</sup> The statement did not have to include conventional findings of fact and need only include enough specificity that will later, if needed, provide for a meaningful review. The California court required the lower court's statement for two independent reasons, in addition to the preservation of information of review. First, the lower court's statement will prevent a careless decision without the full thought it should require. Second, a written statement will assist in preserving the public's confidence in how courts make decisions.<sup>12</sup> *Podesto's* requirement of a statement of reasons was implemented to guarantee the lower court weighs the relevant considerations, and that it recognizes and specifically states the grounds for denial of bail so a defendant has the opportunity for a meaningful appellate review.<sup>13</sup> The question of what constitutes an adequate statement of reasons must therefore be resolved by determining whether the statement furthers these desirable ends.<sup>14</sup>

However, in *People v. Edwards*,<sup>15</sup> the California court indicated that in cases where there is a record on appeal that affords a reviewing court an adequate basis for determining the merits of a claim it declined to impose an express requirement that they state reasons for a denial of a recommendation of a grant of probation, although indicating it is still a preferred practice.

### **Washington**

In Washington, the right to bail pending appeal is explicitly denied to defendants that have been convicted in capital cases where the proof of guilt is clear.<sup>16</sup> Wash. Rev. Code § 10.73.040, provides:

In all criminal actions, except capital cases in which the proof of guilt is clear or the presumption great, upon an appeal being taken from a judgment of conviction, the court in which the judgment was rendered, or a judge thereof, must, by an order entered in the journal or filed with the clerk, fix and determine the amount of bail to be required of an appellant.

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<sup>11</sup> In re *Podesto*, 15 Cal.3d 921, 938, 544 P.2d 1297 (1976).

<sup>12</sup> *Id.* at 937, 544 P.2d at 1307.

<sup>13</sup> In re *Pipinos*, 33 Cal. 3d 189, 198, 654 P.2d 1257, 1264 (1982).

<sup>14</sup> *Id.*

<sup>15</sup> 18 Cal. 3d 796, 805, 557 P.2d 995, 1002 (1976).

<sup>16</sup> *State v. Haga*, 81 Wn.2d 704 (Wash. 1972).

## **Unanswered Questions**

The court held that Bergna did not prove his heavy burden that his release would not pose a danger to the community or risk of flight. Bergna could not overcome the quality and strength of evidence presented at trial that he planned and committed a violent murder.<sup>17</sup> The court did not discuss the specifics of the evidence against Bergna, so it is difficult to determine what exactly the evidence demonstrated. It seems that if a jury conviction is handed down against a defendant, it is unknown under what circumstances he can demonstrate the evidence is not of quality and strength to prevent his release on bail pending appeal. Absent an error that is so great it could jeopardize the conviction, it seems unlikely a defendant will have the tools to demonstrate his burden if it was not done during a criminal trial.

It is unknown what affect the procedural history had on the outcome of this case. Bergna's first trial resulted in a mistrial and then the second trial returned the first-degree murder verdict. Between the two trials, Bergna was released on bail pending the retrial. The court did not mention any issues with his release during that time so Bergna complied with his conditional release. Some would interpret that to mean that he was confident in what the outcome of the second trial would be, so he had no reason to flee. Others would argue the defendant's current flight risk cannot be inferred from the defendant's behavior. Regardless, it does not appear that the court considered Bergna's prior history in that he did not flee when released on bail.

## **Conclusion**

Defendants have the burden of establishing the absence of a flight risk or danger to the community when requesting bail pending appeal. This is a high burden to overcome and one that should be contemplated by counsel in preparation of the case.

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<sup>17</sup> The court also indicated Bergna did not allege or establish any trial errors that would call into question the conviction's validity.