

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellant*,

v.

BENJAMIN CARL JOHNSON; SCOTT WILLIAM PREDMORE; JOHN
LLOYD HOLDER; and RYAN JAMES SEATON, *Appellees*.

Nos. 1 CA-CR 13-0814, 1 CA-CR 13-0815, 1 CA-CR 13-0825,
1 CA-CR 13-0832 (Consolidated)
FILED 6-14-2016

Appeal from the Superior Court in Yavapai County
No. P1300CR201300102, P1300CR201300779, P1300CR201300884,
P1300CR201300885
The Honorable Cele Hancock, Judge

AFFIRMED IN PART, REVERSED IN PART AND REMANDED

COUNSEL

Yavapai County Attorney's Office, Prescott
By Dennis M. McGrane
Counsel for Appellant

Yavapai County Public Defender's Office, Prescott
By John Napper
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MEMORANDUM DECISION

Presiding Judge Peter B. Swann delivered the decision of the court, in which Judge Michael J. Brown and Judge Donn Kessler joined.

S W A N N, Judge:

¶1 These consolidated appeals require us to decide whether a trial court may strike a condition of probation from plea agreements regarding the use of medical marijuana, and then prevent the state from withdrawing from those plea agreements. This is no longer a matter of first impression. After our supreme court’s decision in *State ex rel. Polk v. Hancock* (“*Polk II*”), 237 Ariz. 125 (2015), the state cannot condition probation on refraining from possessing or using medical marijuana in compliance with the Arizona Medical Marijuana Act (“AMMA”). We hold that this rule applies even if a defendant does not currently have a medical marijuana card. Because the plea agreements at issue here authorized the state’s withdrawal, the trial court erred when it refused to permit the state to withdraw from the agreements once the condition was rejected. Therefore, we affirm the orders rejecting the term of probation prohibiting AMMA-compliant marijuana use, but reverse the orders denying the state’s request to withdraw from the plea agreements.

FACTS AND PROCEDURAL HISTORY

¶2 In December 2012, the Yavapai County Attorney’s Office adopted a policy that required all plea agreements to contain the following provision:

As a condition of any grant of probation in this matter, the Court shall include the following term of probation:

Defendant shall not buy, grow, possess, consume, or use marijuana in any form, whether or not Defendant has a medical marijuana card issued by the State of Arizona pursuant to A.R.S. § 36-2801, et seq. (or its equivalent under another state’s laws).

¶3 In response to this policy, the trial court adopted its own practice: it accepted plea agreements containing this provision, but then

rejected the specific provision as illegal and denied the state's motions to withdraw from the plea agreements.¹ The County challenged that practice via special action, and we accepted jurisdiction and granted relief. *State ex rel. Polk v. Hancock* ("Polk I"), 236 Ariz. 301 (App. 2014), *vacated*, *Polk II*, 237 Ariz. 125.

¶4 In *Polk I*, we did not address the marijuana condition's legality under the AMMA. Rather, we disapproved of the County's use of a blanket policy to include the marijuana condition in all plea agreements. 236 Ariz. at 307, ¶ 25. We also held that the trial judge erred by rejecting the marijuana provision automatically, "rather than engaging in an individualized analysis as to whether the condition was reasonable as to this defendant." *Id.* at ¶ 26.

¶5 The Arizona Supreme Court granted review of our decision, which led to its decision in *Polk II*, 237 Ariz. 125. Meanwhile, this appeal – consisting of four consolidated cases with nearly identical facts concerning the plea offers² – was stayed pending the supreme court's resolution of the case. This appeal differs from *Polk* factually in one aspect: the record does not establish that the appellants had cards allowing them to use medical marijuana under the AMMA.³ We conclude that the supreme court's opinion in *Polk II* controls these cases.

DISCUSSION

I. PROHIBITING AMMA-COMPLIANT MARIJUANA USE IS AN ILLEGAL CONDITION OF PROBATION.

¶6 In *Polk II*, our supreme court stated that although a defendant can generally waive statutory and constitutional rights as part of a plea

¹ The trial court reasoned that the provision violated separation of powers by interfering with the power granted to the judiciary by the legislature to make probation decisions. *State ex rel. Polk v. Hancock* ("Polk I"), 236 Ariz. 301, 305, ¶ 19 (App. 2014).

² Johnson, the named defendant in this case, pled guilty to one count of Aggravated DUI. His plea agreement contained the marijuana provision. At sentencing, the trial judge struck the provision from the plea agreement and then denied the state's motion to withdraw from the agreement.

³ Appellant Holder claimed in a presentence report to have had an AMMA card before his arrest, but no evidence in the record supports this.

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agreement, he or she cannot do so in contravention of public policy. 237 Ariz. at 146-47, ¶ 9. And “[b]y adopting AMMA, voters established as public policy that qualified patients cannot be penalized or denied any privilege as a consequence of their AMMA-compliant marijuana possession or use. This policy would be severely compromised if the state and a defendant could bargain away the defendant’s ability to lawfully use medical marijuana.” *Id.* Therefore, the court held that “[t]he Marijuana Condition, as applied to AMMA-compliant use, is an illegal term [of probation], and the trial court correctly rejected it.” *Id.* at 146, ¶ 11.

¶7 If the appellants do not have valid medical marijuana cards under the AMMA, they cannot now engage in AMMA-compliant use.⁴ While the use of marijuana outside the AMMA is still illegal in Arizona, the state cannot require them to waive their prospective right to lawful use of marijuana in compliance with the AMMA. Accordingly, because prohibiting AMMA-compliant marijuana use is an illegal term of probation, the trial court correctly rejected it here.⁵

II. THE TRIAL COURT ERRED BY DENYING THE STATE’S MOTION TO WITHDRAW FROM THE PLEA AGREEMENTS.

¶8 Ariz. R. Crim. P. 17.4, which governs plea agreements and negotiations, allows the state and the defendant to reach an agreement regarding any aspect of the case, including sentencing stipulations and conditions of probation. Ariz. R. Crim. P. 17.4(a). And either party may revoke its agreement before acceptance by the court. Ariz. R. Crim. P. 17.4(b). The court, however, maintains discretion to reject a plea agreement and any proposed sentencing stipulation or condition of probation contained therein. Ariz. R. Crim. P. 17.4(d); *see State v. Lee*, 191 Ariz. 542, 544, ¶ 7 (1998) (“[T]he trial court ultimately has authority to approve or reject a bargain in the interests of justice. Such a decision falls within the judge’s sound discretion, and wide latitude is permitted in this regard.”). And “[u]nlike the defendant, the state generally cannot withdraw from an

⁴ In fact, appellant Johnson claims not to use marijuana at all.

⁵ The state argues that the AMMA is preempted by federal law. However, we reject this argument in light of the supreme court’s recent decision in *Reed-Kaliher v. Hoggatt*, 237 Ariz. 119, 122, 124-25, ¶¶ 10, 20-24 (2015) (finding that AMMA-compliant marijuana use is not preempted by federal law and holding that the state cannot condition a plea agreement on refraining from AMMA-compliant marijuana use).

agreement [once it has been accepted] if the court rejects a provision regarding the sentence or the term and conditions of probation because jeopardy has attached, and proceeding to trial would place the defendant in double jeopardy in violation of the state and federal constitutions.” *Polk II*, 237 Ariz. at 130, ¶ 15. “If the defendant waives double jeopardy protection, however, then the state can withdraw from the plea agreement.” *Id.*

¶9 In *Polk II* and in the cases consolidated here, the plea agreements provide:

If, after accepting this Plea Agreement, the Court concludes that any of its provisions regarding the sentence or the term and conditions of probation are inappropriate, it can reject the plea, giving the State and Defendant each an opportunity to withdraw from the Plea Agreement. In the event this Plea Agreement is withdrawn, all original charges will be automatically reinstated.

237 Ariz. at 130, ¶ 17.

¶10 The trial court concluded that the AMMA condition was inappropriate, and the supreme court has held that similar language in an agreement “authorized the State to withdraw from the agreement if the trial court rejected the agreed-upon sentence or the term or conditions of probation. [The defendant effectively waived her double jeopardy rights] by agreeing that the State could withdraw if the trial court rejected any probation condition and by acknowledging that the original charges would then be reinstated.” *Id.* at 131, ¶ 21.

¶11 In *Polk II*, the supreme court held that the state could not withdraw from the plea solely based on the court’s refusal to require the defendant to refrain from AMMA-compliant marijuana use. *Id.* at 131, ¶ 22. However, because the condition the court rejected also required the defendant to abstain from recreational marijuana use, the court held that the state was entitled to withdraw from the plea agreement. *Id.* at 131, ¶ 23. The condition at issue in these appeals is the same as that in *Polk*. Therefore, the trial court erred when it denied the state’s requests to withdraw from the plea agreements at issue.

CONCLUSION

¶12 For the foregoing reasons, we affirm the trial court’s order rejecting the prohibition of AMMA-compliant use of marijuana as a

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condition of probation, even for a defendant who does not have an AMMA card. But in light of the supreme court's conclusion that these plea agreements constituted a waiver of double jeopardy protection, we reverse the court's order denying the state's request to withdraw, and remand for resentencing.



Ruth A. Willingham · Clerk of the Court
FILED : AA