

DA 18-0304

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 167N

STATE OF MONTANA,

Plaintiff and Appellee,

v.

DAVID ALLEN PEIN,

Defendant and Appellant.

APPEAL FROM: District Court of the Tenth Judicial District,
In and For the County of Fergus, Cause No. DC-2016-66
Honorable Jon A. Oldenburg, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Chad Wright, Appellate Defender, Moses Okeyo, Assistant Appellate
Defender, Helena, Montana

For Appellee:

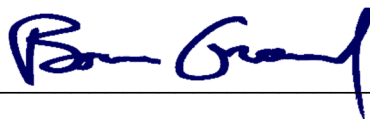
Timothy C. Fox, Montana Attorney General, J. Stuart Segrest,
Assistant Attorney General, Helena, Montana

Kent M. Sipe, Fergus County Attorney, Jean A. Adams, Deputy
County Attorney, Lewistown, Montana

Submitted on Briefs: June 19, 2019

Decided: July 23, 2019

Filed:



Justice James Jeremiah Shea delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Defendant David Allen Pein appeals from the judgment of the Tenth Judicial District Court, Fergus County, convicting him of criminal possession of dangerous drugs with intent to distribute, a felony in violation of § 45-9-103, MCA. We affirm.

¶3 In the fall of 2016, following reports that Pein was selling marijuana from his residence, Lewistown police set up an undercover operation and seized cash, scales, other drug paraphernalia, and 439 grams of marijuana from Pein's house. The State arrested Pein and charged him with: (1) criminal distribution of dangerous drugs on or near school property by accountability; (2) two counts of criminal distribution of dangerous drugs on or near school property; or, in the alternative, (3) criminal distribution of dangerous drugs; (4) criminal possession of dangerous drugs; (5) criminal possession of dangerous drug with intent to distribute; (6) criminal possession of drug paraphernalia; and (7) two counts of use or possession of property subject to criminal forfeiture.

¶4 On July 6, 2017, Pein pled guilty to criminal possession of dangerous drug with intent to distribute, and the State dismissed or otherwise resolved the other charges against him. As part of the plea agreement, Pein admitted he possessed 439 grams of marijuana and admitted the marijuana was not just for personal use. The plea agreement also reserved

Pein’s right to “argue at sentencing that he be allowed to possess a medical marijuana card while on probation.” Pein testified at the change of plea hearing that prior to the undercover operation, earlier in 2016 and in years past, he was a registered cardholder under the Medical Marijuana Act (MMA). Finally, the District Court ordered a Presentence Investigation (PSI) Report be completed prior to sentencing.

¶5 On March 22, 2018, the District Court held a sentencing hearing. The District Court considered arguments made in the parties’ sentencing briefs and received oral testimony. Pein alleged that he suffers from chronic back, neck, arm, and leg pain resulting from a severe rollover accident, a slip-and-fall incident, and a work-related accident. Pein alleged that marijuana use has helped to alleviate his debilitating medical symptoms without the side effects and addiction potential of traditional prescription opioids. Pein alleged he was initially prescribed prescription medication and has tried various homeopathic remedies as well, but only marijuana provides successful pain management. Pein alleged that his marijuana use to help with pain management has enabled Pein to perform most of his regular day-to-day activities and has allowed him to return to work. Pein acknowledged that when he was arrested in 2016, he did not have a valid medical marijuana card.

¶6 Pein argued that the District Court should “permit [him] access to medical marijuana” and should “strike” certain standard conditions from the PSI Report that would prohibit him from having or maintaining a medical marijuana card. Specifically, Pein requested that the District Court reject the Department of Corrections’ (DOC) proposed

probation conditions 9, 10, 17, and 34,¹ allow Pein to keep his marijuana registry card, and allow him to use medical marijuana as part of his treatment plan while under DOC supervision. Pein argued the restrictions of § 50-46-307(4), MCA,² were unconstitutional, as applied to him. Pein did not attach any medical records or other evidence to his brief and did not provide testimony besides his own.

¶7 The District Court concluded it did not have the ability to allow Pein to have a medical marijuana card, stating:

Frankly, you have some legitimate constitutional arguments, I just don't think this is the place that you need to make those. I feel bound by the condition of [§ 50-46-307(4), MCA]. I feel it leaves me really no discretion in this matter and therefore I [sic] given that statute I cannot allow you to have a medical marijuana card under the laws as they exist and as they exist

¹ The District Court rejected Pein's request, adopted the DOC recommendations in the Sentencing Order and Judgment, and renumbered the relevant conditions to be applied during the period of deferral and supervision as follows:

9. [Pein] must comply with all municipal, county, state, and federal laws and ordinances

10. [Pein] is prohibited from using or possessing alcoholic beverages and illegal drugs. [Pein] is required to submit to bodily fluid testing for drugs or alcohol on a random or routine basis

. . . .

16. [Pein] will surrender to the court any registry identification card issued under the Medical Marijuana Act. . . .

. . . .

32. [Pein] may not be a registered cardholder and may not obtain or possess a registry identification card under the Medical Marijuana Act while in custody or under the supervision of the Department of Corrections or a youth court. [Section 50-46-307(4), MCA.]

² Section 50-46-307, MCA, contains varying effective dates. For purposes of this Opinion, § 50-46-307, MCA (2017), is the version referred to throughout.

for your sentencing[,] Mr. Pein. . . . The [District] Court will impose the standard conditions 1-12. I know that counsel has challenged those conditions, at least 9 and 10, that deal with medical marijuana. But as stated I think the state of the law in Montana right now as enacted by the [L]egislature with which I'm charged to enforce does not allow me to allow you to have a medical marijuana card. And I would state as well that the [District] Court really has been provided no medical records, no medical testimony other than Mr. Pein's statements regarding this.

¶8 After concluding that § 50-46-307(4), MCA, limited its discretion in this matter, the District Court sentenced Pein to a five-year deferred sentence for the charge of criminal possession of dangerous drugs with intent to distribute, fined him \$1,430—thirty-five percent of the street value of the marijuana seized during the search of Pein's house—and imposed other surcharges, restitution, and a public defender fee. The District Court pronounced the conditions of his probation, adopting the DOC recommended conditions, including the prohibition on medical marijuana use for probationers.

¶9 This Court exercises plenary review of constitutional issues. *Mont. Cannabis Indus. Ass'n v. State*, 2016 MT 44, ¶ 12, 382 Mont. 256, 368 P.3d 1131. A statute is presumed to be constitutional ““unless it conflicts with the constitution, in the judgement of the court, beyond a reasonable doubt.”” *Mont. Cannabis Indus. Ass'n*, ¶ 12 (quoting *Powell v. State Comp. Ins. Fund*, 2000 MT 321, ¶ 13, 302 Mont. 518, 15 P.3d 877). The party challenging the constitutionality of a statute bears the burden of proof, and any doubts must be resolved in favor of the statute. *Mont. Cannabis Indus. Ass'n*, ¶ 12 (citations omitted).

¶10 For probation conditions imposed on sentences involving less than one year of incarceration, we employ a two-step review. *State v. Ashby*, 2008 MT 83, ¶¶ 8-9, 342 Mont. 187, 179 P.3d 1164 (citing *State v. Herd*, 2004 MT 85, ¶¶ 18-23, 320 Mont. 490, 87 P.3d 1017). First, we review challenges to probation conditions for legality, then, if the challenged condition is legal, we review the reasonableness of a condition for an abuse of discretion. *State v. Robertson*, 2015 MT 266, ¶ 7, 381 Mont. 75, 364 P.3d 580; *Ashby*, ¶¶ 8-9.

¶11 As-applied constitutional challenges “allege that a particular application of a statute is unconstitutional and depends on the facts of a particular case.” *City of Missoula v. Mt. Water Co.*, 2018 MT 139, ¶ 25, 391 Mont. 422, 419 P.3d 685 (citing *Citizens for a Better Flathead v. Bd. of Cnty. Comm’rs*, 2016 MT 325, ¶ 45, 385 Mont. 505, 386 P.3d 567). When a court holds a statute is unconstitutional as applied to a particular set of facts, the statute may still be enforceable under different circumstances. *City of Missoula*, ¶ 25.

¶12 When a district court defers imposition of a sentence, it may impose reasonable restrictions or conditions it considers necessary for offender rehabilitation or for the protection of the victim or society. *Ashby*, ¶ 13 (citations omitted); *Mont. Cannabis Indus. Ass’n*, ¶ 73; *Herd*, ¶ 13; § 46-18-202(1), MCA. In other words, probation restrictions are constitutional where there is a nexus to the offender and the offense. *See Ashby*, ¶ 15. Whether a sentencing condition or restriction bears the requisite “nexus” to the offender or to the underlying offense is a question of compliance with sentencing statutes. *Mont. Cannabis Indus. Ass’n*, ¶ 73 (citing *Ashby*, ¶¶ 13-15).

¶13 The MMA provides legal protections to individuals with debilitating medical conditions, including severe chronic pain that significantly interferes with daily activities as documented by the patient’s treating physician. *See* § 50-46-301(2)(b)-(d), MCA. In passing the MMA, the Montana Legislature sought to “resolve prior abuses and to avoid entanglement with federal law while continuing to ‘provide legal protections’ to qualified persons who engage in the medical use of marijuana” *Mont. Cannabis Indus. Ass’n*, ¶ 29 (quoting § 50-46-301(2)(a)-(c), MCA). A legitimate state objective is served by the “careful regulation of access to an otherwise illegal substance for limited use by persons for whom there is little or no other effective alternative” *Mont. Cannabis Indus. Ass’n*, ¶ 29.

¶14 However, the MMA contains limitations controlling access to and use of medical marijuana. For example, a person “may not be a registered [medical marijuana] cardholder if the individual is in the custody of or under the supervision of the [DOC] or a youth court.” Section 50-46-307(4), MCA. We recently analyzed and addressed the constitutionality of § 50-46-307(4), MCA, and concluded that the statute is facially valid and constitutional, but, in limited instances, an offender may bring an as-applied challenge to probation conditions restricting access to medical marijuana. *Mont. Cannabis Indus. Ass’n*, ¶¶ 71-73 (“[i]f, in a particular case, a district court imposes a sentence prohibiting medical marijuana use but the required nexus is not satisfied, an offender may be able to bring as a claim that, as applied to that offender and to his or her sentence, § 50-46-307(4), MCA, is unconstitutional. . . .”).

¶15 Here, Pein argues that § 50-46-307(4), MCA, is unconstitutional as applied to him. Pein argues the District Court misapplied § 50-46-307(4), MCA, by not exercising its discretion in the present case, and this misapplication infringed on his right to individual privacy and his inalienable right to proper health care under Montana’s Constitution, Article II, Sections 3 and 10. Pein argues an ill patient’s decision to ingest medication (including medical marijuana) is an act of personal autonomy and one that ensures an individual his core dignity. Pein urges this Court to remand for a hearing for the District Court to examine whether to allow Pein access to medical marijuana given his present need for treatment.

¶16 The State counters that this Court need not address the constitutionality of § 50-46-307(4), MCA, as applied to Pein because a separate statute, § 50-46-330(1)(a), MCA, which requires that the Montana Department of Health and Social Services “shall revoke and may not reissue” a medical marijuana card to an individual who “is convicted of a drug offense,” prohibits Pein from obtaining a medical marijuana card. Regardless, the State argues that probation restrictions as applied to Pein are constitutional because there was clearly a nexus—an offender-specific reason to impose the prohibition based on Pein’s conduct. Accordingly, the State argues this Court should deny Pein’s constitutional challenge to § 50-46-307(4), MCA. We agree.

¶17 While it is true the Montana Constitution, Article II, Sections 10 and 3 broadly guarantee an individual the rights to seek health and to make medical judgments affecting his bodily integrity and health in partnership with his healthcare provider free from government interference, *Armstrong v. State*, 1999 MT 261, ¶¶ 14, 72, 296 Mont. 361,

989 P.2d 364, those rights are not unfettered. We have already concluded that § 50-46-307(4), MCA, is facially constitutional. *Mont. Cannabis Indus. Ass'n*, ¶¶ 71-73. We reiterate that § 50-46-307(4), MCA, may be challenged by an offender on a case-by-case basis where the required nexus between the offender and the offense is not satisfied. *Mont. Cannabis Indus. Ass'n*, ¶ 73.

¶18 However, here there is a clear nexus to the offender and to the offense such that the probation restrictions are constitutional. *See Ashby*, ¶ 15. Pein was convicted of criminal possession of dangerous drugs with intent to distribute. Prohibiting marijuana possession by someone convicted of illegally possessing marijuana satisfies the nexus. *See Ashby*, ¶ 15. Further, despite all of the scholarly research Pein included regarding the health benefits of medical marijuana, he failed to present evidence, aside from his own testimony and allegations, regarding his need for a medical marijuana card. Accordingly, the probation conditions imposed by the District Court prohibiting Pein from obtaining or accessing medical marijuana were legal and reasonable. *See Ashby*, ¶¶ 8-9, 13, 15. The District Court did not abuse its discretion. *See Robertson*, ¶ 7; *Ashby*, ¶¶ 8-9, 15.

¶19 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. In the opinion of the Court, the case presents a question controlled by settled law or by the clear application of applicable standards of review. We affirm.

/S/ JAMES JEREMIAH SHEA

We Concur:

/S/ MIKE McGRATH

/S/ BETH BAKER

/S/ LAURIE McKINNON

/S/ INGRID GUSTAFSON