

DA 18-0202

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 296N

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STATE OF MONTANA,

Plaintiff and Appellee,

v.

CRICKET ANN ORSBORN,

Defendant and Appellant.

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APPEAL FROM: District Court of the Nineteenth Judicial District,  
In and For the County of Lincoln, Cause No. DC 17-128  
Honorable Matthew J. Cuffe, 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, Tammy K Plubell, Assistant  
Attorney General, Helena, Montana

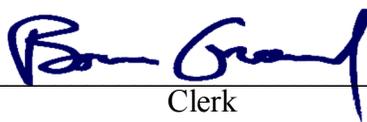
Marcia Boris, Fergus County Attorney, Jeffrey Zwang, Deputy County  
Attorney, Libby, Montana

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Submitted on Briefs: October 2, 2019

Decided: December 24, 2019

Filed:

  
Clerk

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Justice Jim Rice 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 Appellant Cricket Ann Orsborn (Orsborn) appeals the imposition of sentencing conditions by the Nineteenth Judicial District Court, Lincoln County, preventing her from possessing a medical marijuana card, pursuant to the Montana Medical Marijuana Act (MMA), § 50-46-307(5), MCA.

¶3 In October of 2017, the State charged Orsborn with one count of criminal possession of dangerous drugs with intent to distribute, a felony, and one count of criminal possession of dangerous drugs, a felony. On November 6, 2017, the District Court granted Orsborn's motion for release on her own recognizance, subject to six conditions, including that Orsborn submit to a drug patch monitoring program. A month later, the District Court revoked Orsborn's release because her drug patch results were positive for drug use on three occasions.

¶4 Orsborn subsequently pled guilty, pursuant to a plea agreement, to the charge of criminal possession of dangerous drugs, and the other charge was dismissed. The plea agreement recommended Orsborn be sentenced to the Department of Corrections for four years, all suspended, upon conditions that would be imposed at sentencing.

¶5 Orsborn’s Pre-Sentence Investigation (PSI) revealed she had an extensive criminal history, including a prior drug-related charge, and that she had been using methamphetamines on a regular basis since the age of 12. The PSI explained that Orsborn had a history of anxiety and depression, for which she took Hydroxyzine, Clonidine, and Zoloft; and that she had been diagnosed with Post Traumatic Stress Disorder (PTSD), for which she took Prazosin. Orsborn did not disclose to the officer who wrote the PSI that she took medical marijuana to address any condition. The PSI concluded that, although Orsborn was currently in drug treatment, she had a higher than average risk of reoffending. Therefore, the PSI recommended various conditions for Orsborn’s suspended sentence. Proposed condition 16, “imposed pursuant to statute,” provided “[t]he Defendant will surrender to the court any registry identification card issued under the Medical Marijuana Act.” Condition 25, a “special condition” that the PSI indicated “must have a nexus to the offense and/or the domains contained in the risk assessment between the condition and the Defendant or the Defendant’s crime,” provided that Orsborn “may not be a registered card holder and may not obtain or possess a registry identification card under the Medical Marijuana Act while in the custody or under the supervision of the Department of Corrections[.]”

¶6 At Orsborn’s sentencing hearing, her counsel raised the following objection to the PSI recommendations:

The other issue is the Defendant is currently a holder of a medical marijuana card due to some ailments that her physician believes that medical marijuana helps her with. We would ask the court to refrain from imposing what the

PSI recommends, which is basically a blanket prohibition keeping this defendant from ever accessing medical marijuana.

The State responded,

[I]t is clear under the Montana Medical Marijuana Act . . . that a person who is in the custody or under the supervision of the Department of Corrections is not eligible to hold a card under that Act. I think that we would, the State would request that the Defendant be required to comply with State law, including that law, and we would ask the Court to impose conditions number 16 and 25 in the [PSI] report which pertain to medical marijuana.

The District Court then allowed Orsborn's counsel to respond to the State's argument.

Orsborn offered no evidence that a physician had prescribed medical marijuana for Orsborn, nor did her counsel explain what medical conditions Orsborn suffered that necessitated medical marijuana as treatment.

¶7 At the conclusion of the hearing, the District Court accepted the recommended sentence and imposed the conditions preventing Orsborn from possessing a medical marijuana card, stating, "I have reviewed the plea agreement. I've reviewed your criminal history. I've reviewed the circumstances surrounding this," and found "all of the . . . terms of the supervisory release appropriate, reasonable, and related to [Orsborn][.]" Finally, the District Court concluded that the sentence, including the conditions, "provides for rehabilitation and is consistent with the plea agreement of the parties, the recommendations contained in the [PSI] and Montana law." Orsborn subsequently filed a motion to amend the District Court's judgment, requesting the court strike the medical marijuana conditions, but the District Court did not act on the motion prior to Orsborn's appeal.

¶8 Orsborn argues § 50-46-307(5), MCA, is unconstitutional because it is unrelated to her or her crime, and it deprives her of her rights to due process and to seek health. The State responds there is a sufficient nexus between Orsborn, her crime, and the conditions, and that Orsborn’s rights were not violated, given the record of the proceeding and this Court’s precedent.

¶9 This Court exercises plenary review of constitutional issues. The constitutionality of a statute is presumed unless it conflicts with the constitution, in judgment of the court, beyond a reasonable doubt. *Mont. Cannabis Indus. Ass’n v. State*, 2016 MT 44, ¶ 12, 382 Mont. 256, 368 P.3d 1131 (internal quotations and citations omitted). Additionally, “[w]hen a defendant challenges a sentencing condition on appeal, we review the condition under a dual standard of review. We review the legality of the condition de novo. If the challenged condition is legal, we then review the condition for an abuse of discretion.” *State v. Robertson*, 2015 MT 266, ¶ 7, 381 Mont. 75, 364 P.3d 580 (citing *State v. Stiles*, 2008 MT 390, ¶ 7, 347 Mont. 95, 197 P.3d 966).

¶10 The State argues Orsborn’s arguments about the constitutionality of the MMA prohibition constitute a facial, rather than as-applied, challenge, and, indeed, some of her arguments appear to be facial in nature (“Quite simply, Mont. Code Ann. § 50-46-307(4) prevents a probationer from obtaining a lawful medication. In so doing, it unconstitutionally infringes on a probationer’s right to individual privacy and the

inalienable right to seek health under Montana’s Constitution.”).<sup>1</sup> If the challenge is facial, Orsborn would first need to distinguish this case from this Court’s previous rejection of a facial challenge to the MMA prohibition in *Mont. Cannabis Indus. Ass’n*, which she has not done. *Mont. Cannabis Indus. Ass’n*, ¶¶ 68-73. Further, in order to mount a successful facial challenge to the constitutionality of the statute, a litigant must demonstrate that “no set of circumstances exists under which the challenged sections would be valid . . . .” *Mont. Cannabis Indus. Ass’n*, ¶ 14 (brackets and citations omitted). Here, where Orsborn continues to contend that she is not making a facial challenge, she has not carried this burden.

¶11 If we view Orsborn’s arguments as an as-applied challenge, she still does not meet her burden. First, she asserts the statute violates her right to seek health under Article II, Section 3, of the Montana Constitution. However, this Court has previously held that this right does not equate to a right to access medical marijuana. *Mont. Cannabis Indus. Ass’n v. State*, 2012 MT 201, ¶¶ 22-24, 366 Mont. 224, 286 P.3d 1161 (*MCI A I*) (internal quotations and citations omitted) (“[W]e conclude, in pursuing health, an individual does not have a fundamental affirmative right of access to a particular drug. A patient’s selection of a particular treatment, or at least a medication, is within the area of governmental interest in protecting public health, and regulation of that medication does not implicate a

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<sup>1</sup> The section of the MMA prohibiting probationers from becoming registered medical marijuana cardholders is currently located at § 50-46-307(5), MCA.

fundamental constitutional right.”). Therefore, the MMA prohibition does not violate Orsborn’s rights under Article II, Section 3.

¶12 Orsborn also argues the MMA prohibition is invalid as applied to her under language we used in *Mont. Cannabis Indus. Ass’n*: “[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 a claim that, as applied to that offender and to his or her sentence, § 50-46-307(4), MCA, is unconstitutional.” *Mont. Cannabis Indus. Ass’n*, ¶ 73. Orsborn contends the “required nexus is not satisfied” in her case, and therefore, the condition is not valid as applied to her.

¶13 This Court defined the nexus required for sentencing conditions in *State v. Ashby*, 2008 MT 83, ¶ 15, 342 Mont. 187, 179 P.3d 1164, as follows: “In imposing conditions of sentence, a sentencing judge may impose a particular condition of probation so long as the condition has a nexus to either the offense for which the offender is being sentenced, or to the offender himself or herself.” Additionally, we explained that, “[b]y way of example, if a defendant has a history or pattern of alcohol or drug abuse but this pattern was unrelated to the offense for which he is being sentenced, the sentencing court may nonetheless consider this defendant’s history with alcohol and drugs, and impose an alcohol or drug-related probation condition that the court in its discretion determines will assist in this particular defendant’s alcohol or drug rehabilitation.” *Ashby*, ¶ 15. Here, Orsborn has not established by evidence or argument how the conditions prohibiting her from using medical marijuana are unrelated to her crime or to her individually. Indeed, the District Court

appears to have had ample evidence from which to conclude the conditions had a nexus to both Orsborn and her crime. Orsborn was being sentenced for a drug-related crime, criminal possession of dangerous drugs. Her conditional release had been revoked by the District Court due to positive drug patch test results. The PSI revealed Orsborn had a long-standing history of drug abuse, as she had been regularly using methamphetamines since the age of 12, and that Orsborn had prior drug-related charges. Finally, the PSI discussed, as did the District Court, that Orsborn was currently undergoing drug treatment and that it was important for her to continue with that treatment. Although Orsborn's addiction was to methamphetamines, and not to marijuana, this alone did not make marijuana use unrelated to Orsborn or her crimes. Examining the totality of the evidence before the District Court, it was apparent Orsborn struggled with drug addiction and that refraining from drug use was essential to her recovery. Therefore, because there is substantial evidence in the record indicating a nexus between the conditions and Orsborn and her crime, the District Court did not abuse its discretion by imposing the conditions.

¶14 Finally, Orsborn argues she was denied due process. However, Orsborn's counsel was able to present a lengthy argument at the sentencing hearing, as was granted leave file a post-sentencing motion and brief, addressing why the conditions should not apply to Orsborn. Further, Orsborn's contention that the District Court imposed the conditions only because it concluded it lacked discretion to do otherwise is not supported by the record. At the sentencing hearing, Orsborn's counsel argued that the conditions should not be imposed on Orsborn, and the State countered that the MMA reflects that Orsborn is not eligible to

hold a medical marijuana card. The District Court then gave Orsborn's counsel an opportunity to reply to the State's contention. Finally, the District Court imposed the sentence, stating,

*I have reviewed the plea agreement. I've reviewed your criminal history. I've reviewed the circumstances surrounding this. I agree with the plea agreement. I agree with the recommendations from your attorney, and from the County Attorney, and from the [PSI]. I think a four-year commitment to the Department of Corrections with all four of those suspended, with you following the supervisory conditions that are outlined in the PSI, are appropriate. . . . I do think, at least for the purposes of today's sentencing, all of the supervisory conditions for release, including the prohibition against a medical marijuana card, I am going to impose today. [(Emphasis added.)]*

The District Court further concluded,

I find all of the other . . . terms of the supervisory release appropriate, reasonable, and related to you, and I am making those an integral part of the Judgment. I think that this sentence that the parties have come to and that [the PSI] agrees with is appropriate under your circumstances. It gives you the opportunity to both, to a certain degree, pay your debt to society, to make recompense, but still give[s] you the opportunity for appropriate rehabilitation and I do take note of your efforts to do that thus far.

The District Court did not state that its only reason for imposing the medical marijuana conditions was the MMA prohibition. Rather, it was the State who argued that the MMA prohibited Orsborn from using medical marijuana. The transcript indicates that the District Court imposed the conditions after considering all of the evidence and arguments before it, from the parties and the PSI, and that the District Court believed the conditions were necessary for Orsborn's case—regardless of any statutory requirement. That the District Court did not find Orsborn's argument persuasive, particularly considering that she

provided little evidentiary support for her claim that she needed medical marijuana, does not mean the District Court did not consider Orsborn's individual circumstances.

¶15 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. This appeal presents no constitutional issues, no issues of first impression, and does not establish new precedent or modify existing precedent. 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.

¶16 Affirmed.

/S/ JIM RICE

We concur:

/S/ MIKE McGRATH  
/S/ LAURIE McKINNON  
/S/ JAMES JEREMIAH SHEA  
/S/ DIRK M. SANDEFUR