

<p>SUPREME COURT, STATE OF COLORADO</p> <p>2 East Fourteenth Avenue Denver, CO 80203</p>	<p>DATE FILED: April 17, 2019 9:58 PM FILING ID: BB6B971280589 CASE NUMBER: 2018SC84</p>
<p>On Certiorari to the District Court, El Paso County District Court Case Number 2017CV30785 County Court Case Number 2016T10770</p>	
<p>ALYSHA WALTON,</p> <p>Petitioner,</p> <p>v.</p> <p>THE PEOPLE OF THE STATE OF COLORADO,</p> <p>Respondent.</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p> <p>Case No.: 18SC84</p>
<p>DANIEL H. MAY, District Attorney ALEXANDRA STAUBACH, Deputy District Attorney TANYA A. KARIMI, Deputy District Attorney</p> <p>Office of the District Attorney Fourth Judicial District 105 East Vermijo Avenue, Suite 500 Colorado Springs, Colorado 80903 Telephone: (719) 520 6000 Fax: (719) 520 6185 e-mail: doylebaker@elpasoco.com Atty. Reg. #'s: #11379 (May) #50111 (Staubach) #41693 (Karimi)</p>	
<p>RESPONDENT'S ANSWER BRIEF</p>	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R.32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

It contains 2,549 words.

The brief complies with C.A.R. 28(b).

For each issue raised by the appellant, it contains, under a separate heading placed before the discussion of the issue, a statement of whether the appellee agrees with the appellant's statements concerning the standard of review and preservation for appeal, and if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

/s/ Tanya A. Karimi

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ISSUE ON WHICH CERTIORARI WAS GRANTED 1

Whether the district court erred in finding no abuse of discretion where the trial court imposed a prohibition against the use of medical marijuana on probation without basing that prohibition on any material evidence that the prohibition was necessary and appropriate to accomplish the goals of sentencing, thereby denying petitioner’s rights under the Colorado Constitution. 1

STATEMENT OF THE CASE..... 1

SUMMARY OF ARGUMENT 4

ARGUMENT 5

 The county court appropriately exercised its discretion under § 18-1.3-204(2)(a)(VIII)(B) when it required Defendant to refrain from any use of marijuana as a condition of her deferred judgment and sentence..... 5

 I. Preservation and Standard of Review..... 5

 II. The statute addressing the prohibition of medical marijuana use as a condition of probation has two components: whether the medical use is authorized and whether a prohibition against medical use is necessary and appropriate. 6

 III. The county court acted within its discretion by finding it had insufficient evidence to determine Defendant was authorized to use medical marijuana. ... 7

 IV. The county court acted within its discretion by finding that a prohibition on the use of marijuana in any form was necessary and appropriate, and material evidence in the record supports that determination. 10

CONCLUSION 12

TABLE OF AUTHORITIES

Cases

<u>Lopez v. People</u> , 113 P.3d 713 (Colo. 2005).....	9
<u>People v. Allman</u> , 2017 COA 108.	9
<u>People v. Brockelman</u> , 933 P.2d 1315 (Colo. 1997)	6
<u>People v. Padilla</u> , 907 P.2d 601 (Colo. 1995).....	9
<u>People v. Rice</u> , 2015 COA 168.....	6
<u>People v. Smith</u> , 2014 CO 10.....	6
See <u>People v. Forsythe</u> , 43 P.3d 652 (Colo. App. 2001)	6

Statutes

§ 18-1.3-102(2), C.R.S. 2018.....	6
§ 18-1.3-202, C.R.S. 2018	5
§ 18-1.3-204(2)(a)(VIII)(B), C.R.S. 2018	4, 7, 10
§ 18-1.3-204(2)(a)(VIII), C.R.S. 2018.....	7
§ 18-1.3-204, C.R.S. 2018	5
§ 18-1-102.5(1)(d), (e), C.R.S. 2018	12

Constitutional Provisions

Colo. Const. art. XVIII, § 14	7
-------------------------------------	---

Colo. Const. art. XVIII, § 14 (1)(a)(II).....8
Colo. Const. art. XVIII, § 14 (1)(b).8
Colo. Const. art. XVIII, § 14 (4)(a).8

ISSUE ON WHICH CERTIORARI WAS GRANTED

Whether the district court erred in finding no abuse of discretion where the trial court imposed a prohibition against the use of medical marijuana on probation without basing that prohibition on any material evidence that the prohibition was necessary and appropriate to accomplish the goals of sentencing, thereby denying petitioner's rights under the Colorado Constitution.

STATEMENT OF THE CASE

A summons and complaint charged the Defendant-Petitioner, Alysha Walton, ("Defendant") with driving under the influence and speeding. R. CF, p. 1. Defendant pleaded guilty to driving under the influence and agreed to serve a deferred judgment and sentence ("deferred sentence"). R. CF, pp. 25–27; 41–44; Tr. (02/23/17), p. 3, l. 17 to p. 4, l. 38. The deferred sentence agreement allowed the county court to determine the length of the deferred sentence, the amount of education/therapy to impose, the amount of any fine to impose, and whether a prohibition against possession or use of medical marijuana was necessary and appropriate. R. CF, pp. 25–26, 43.

Defense counsel asked to set a hearing regarding Defendant's use of medical marijuana while on the deferred sentence. R. Tr. (02/02/17), p. 3, ll. 20–21. The county court responded to the request by asking Defendant's counsel if a doctor

would be available for the hearing, and counsel responded she would be speaking to a doctor and needed two weeks. R. Tr. (02/02/17), p. 4, ll. 2–5. Two weeks later the county court held a hearing and Defendant’s counsel informed the county court a medical professional was not willing to appear in person or by telephone. R. Tr. (02/23/17), p. 3, ll. 5–12. The county court stated it required a medical professional. R. Tr. (02/23/17), p. 3, ll. 9–10.

Before addressing the medical marijuana issue, the county court reviewed the plea agreement and the recommendations of the alcohol evaluation Defendant completed with probation. R. Tr. (02/23/17), p. 3, ll. 17–24; p. 4, ll. 39–40; CF, pp. 39–40. The alcohol evaluation used by the county court noted Defendant may not have been forthcoming about her past and present drug and/or alcohol use, and her scores indicated an unwillingness to change her drug and/or alcohol use. R. CF, p. 40. The evaluation stated Defendant reported experimenting with marijuana since the age of 17 and using medical marijuana since the age of 18. R. CF, p. 39. The report did not specify what medical condition the medical marijuana treated. Id.

The county court accepted Defendant’s guilty plea and placed Defendant on a 12-month unsupervised deferred sentence with the requirements she commit no new offenses, complete Level II Education, submit to monitored sobriety, consume

no alcoholic beverages, consume no illegal drugs, and consume no marijuana in any form. R. Tr. (02/23/17), p. 5, l. 63 to p. 6, l. 80.

Defendant's counsel argued against the medical marijuana prohibition. R. Tr. (02/23/17), p. 6, ll. 85–86. Defendant provided proof of a medical marijuana card and physician's certification, and argued she should not be required to provide more evidence in order for the county court to make a finding. R. Tr. (2/23/17), p. 6, l. 95 to p. 7, l. 110; Sealed Documents ("Seal"), p. 1–3. The county court found it had no information about Defendant's medical situation and nothing on which to base any kind of authority for medical marijuana use. R. Tr. (02/23/17), p. 7, ll. 111–113. The county court also found that without countervailing evidence from Defendant it is not appropriate for people in substance abuse treatment classes to be under the influence of either alcohol or drugs. R. Tr. (02/23/17), p. 7, ll. 113–119.

Defendant appealed the sentence and probation condition prohibiting marijuana use. R. CF, pp. 49–51. On December 21, 2017, the district court issued an order finding the county court did not abuse its discretion in prohibiting Defendant from using medical marijuana as a condition of probation. See ICCES docket for El Paso county case 17CV3078, filing on 12/21/17. The district court found that the county court, addressing the threshold issue of whether Defendant

was authorized to use medical marijuana, acted within its discretion in requiring more proof as to the basis and existence of Defendant's medical marijuana registration. Id.

Defendant filed a petition seeking certiorari review of the district court's order affirming the county court sentence, and this court granted that petition in an order issued October 15, 2018.

SUMMARY OF ARGUMENT

A trial court has broad discretion in fashioning a sentence, imposing probation conditions, and weighing evidence regarding the imposition of sentencing and probation conditions. This discretion applies when imposing a probation condition prohibiting the use of medical marijuana. Section 18-1.3-204(2)(a)(VIII)(B), C.R.S. governs probation conditions restricting the use of medical marijuana. It has two components: a threshold determination of whether a person is authorized to use medical marijuana and a determination, based on material evidence, that a prohibition is necessary and appropriate to achieve the goals of sentencing. Here, the county court required testimony from a physician to determine if Defendant had a physician diagnosed debilitating condition that satisfied the Constitutional requirements authorizing medical marijuana use. Because a sentencing court's broad discretion includes discretion in weighing

evidence reasonably related to a probation condition, the county court did not abuse its discretion in requiring Defendant to provide more proof as to the basis and existence of Defendant's medical marijuana registration. Further, the county court determined it was not appropriate for Defendant to be using marijuana in any form during her deferred sentence, and Defendant's alcohol evaluation provided material evidence supporting that determination.

ARGUMENT

The county court appropriately exercised its discretion under § 18-1.3-204(2)(a)(VIII)(B) when it required Defendant to refrain from any use of marijuana as a condition of her deferred judgment and sentence.

I. Preservation and Standard of Review.

The People agree that Defendant preserved this issue by argument at the February 23, 2017 hearing. R. Tr. (02/23/17), p. 6, l. 92 to p. 8, l. 127.

The People agree that both abuse of discretion and de novo review apply to Defendant's arguments. See Appellant's Opening Brief, p. 13. Under the probation statutes, a trial court has broad discretion to impose conditions of probation. See §§ 18-1.3-202 and -204, C.R.S. 2018; People v. Smith, 2014 CO

10, ¶¶ 9–10. Generally, a court may grant probation¹ subject to such conditions as, in its discretion, it deems reasonably necessary to ensure that the defendant will lead a law-abiding life and to assist the defendant in doing so. See People v. Forsythe, 43 P.3d 652, 654 (Colo. App. 2001). A trial court abuses its discretion when a probation condition is not reasonably related to a defendant’s conviction. See People v. Brockelman, 933 P.2d 1315, 1318–19 (Colo. 1997). Whether a sentencing court interprets a sentencing statute correctly is a question of statutory interpretation and is reviewed de novo. See People v. Rice, 2015 COA 168, ¶ 10.

II. The statute addressing the prohibition of medical marijuana use as a condition of probation has two components: whether the medical use is authorized and whether a prohibition against medical use is necessary and appropriate.

A court, as a condition of probation, may require a defendant to refrain from excessive use of drugs including marijuana; except, the court shall not prohibit the use of medical marijuana, as authorized in section 14 of article XVIII of the

¹ The conditions imposed in a deferred sentence stipulation are similar in all respects to conditions permitted as part of probation. See § 18-1.3-102(2), C.R.S. 2018. Consequently, case law and statutes addressing the imposition of probation conditions will be used in analyzing the imposition of Defendant’s deferred sentence conditions.

Colorado Constitution, unless “the court determines, based on any material evidence, that a prohibition against the possession or use of medical marijuana is necessary and appropriate to accomplish the goals of sentencing.” § 18-1.3-204(2)(a)(VIII)(B), C.R.S. 2018. This statute has two components that enable the use of medical marijuana while on probation. First, as a threshold matter, the use of medical marijuana must be authorized in section 14 of article XVIII of the Colorado Constitution. See § 18-1.3-204(2)(a)(VIII), C.R.S. 2018. Second, if a person is an authorized medical marijuana user, the court may not require a defendant to refrain from medical marijuana use unless it determines, based on material evidence, that a prohibition is necessary and appropriate. See § 18-1.3-204(2)(a)(VIII)(B), C.R.S. 2018. The county court in prohibiting Defendant from using marijuana in any form while on her deferred sentence made findings applying both statutory components, and therefore acted within its sentencing discretion.

III. The county court acted within its discretion by finding it had insufficient evidence to determine Defendant was authorized to use medical marijuana.

The county court found Defendant was not authorized to use medical marijuana. R. Tr. (02/23/17), p. 7, ll. 111–113. It based this finding on

Defendant's failure to provide testimony from a physician regarding the existence and basis of Defendant's authorized medical marijuana use.

Under the Colorado Constitution "a patient may engage in the medical use of marijuana." Colo. Const. art. XVIII, § 14 (4)(a). The medical use of marijuana "may be authorized only after a diagnosis of the patient's debilitating medical condition by a physician." Colo. Const. art. XVIII, § 14 (1)(b). A debilitating medical condition means a chronic or debilitating condition, including persistent muscle spasms, when a physician gives the professional opinion that such a condition may reasonably be alleviated by the medical use of marijuana. See Colo. Const. art. XVIII, § 14 (1)(a)(II). Applying these definitions in the Constitution, the county court's requirement of physician testimony was reasonably related to a determination of whether a defendant has a physician diagnosed debilitating medical condition.

The record shows the county court has a standing policy that in considering the use of medical marijuana during probation it requires the appearance of a medical professional to help determine if there is appropriate authority for the use of medical marijuana. R. Tr. (02/02/17), p. 3, l. 20 to p. 4, l. 5. The record also shows Defendant's counsel knew of the policy because she asked for a two-week continuance in order to contact a doctor. *Id.* The county court's policy and

statements in the record reflect a desire to receive evidence to determine the authenticity of representations that a defendant is authorized to use medical marijuana.

The broad discretion courts have in crafting appropriate conditions of probation is part of the broad discretion courts have in fashioning a particular sentence. See Lopez v. People, 113 P.3d 713, 720 (Colo. 2005). At sentencing, this discretion applies not only in fashioning a sentence but in weighing evidence and factors supporting that sentence. See People v. Padilla, 907 P.2d 601, 609 (Colo. 1995). This broad discretion is limited only by statutory restrictions. See People v. Allman, 2017 COA 108, ¶ 37. Section 18-1.3-204 (2)(a)(VIII) and section 14 article XVII of the Constitution do not restrict the type, let alone weight, of evidence a court may consider in determining if medical marijuana use is authorized. The county court, tasked with making a factual determination and weighing evidence related to that fact acted within its discretion in requiring testimony from a physician, rather than relying on a representation by Defendant or unauthenticated copies of a medical marijuana card and physician certification. Aware of the county court's requirement for testimony, Defendant failed to gain the presence of a physician at the sentencing hearing.

Defendant argues the county court's requirement for physician testimony puts an impermissible burden on Defendant to present evidence. This argument neglects the county court's discretion to weigh evidence and consider the reliability of the evidence before it. And by alerting Defendant that the county court required a physician's presence, Defendant had the opportunity to meet the county court's expressed, discretionary requirements.

Because the threshold determination regarding medical marijuana use required a determination that Defendant was authorized to use marijuana, the county court had discretion to receive and weigh evidence regarding this factor, and the county court did not abuse its discretion in finding that Defendant failed to provide evidence she was authorized to use medical marijuana.

IV. The county court acted within its discretion by finding that a prohibition on the use of marijuana in any form was necessary and appropriate, and material evidence in the record supports that determination.

Once a court addresses the threshold question of whether a defendant is authorized to use medical marijuana, section 18-1.3-204(2)(a)(VIII)(B), C.R.S. 2018 allows a court, as a condition of probation, to require a Defendant to refrain from excessive use of alcohol and drugs including marijuana if "the court determines, based on any material evidence, that a prohibition against the

possession or use of medical marijuana is necessary and appropriate to accomplish the goals of sentencing.” In addition to finding there was insufficient evidence to show Defendant was authorized to use medical marijuana, the county court also found that “generally speaking it’s not appropriate for people in DUI classes to be under the influence of either alcohol or drugs.” R. Tr. (02/23/17), p. 7, ll. 117–119. Although the county court stated this finding in general terms, the context of Defendant’s entire sentence shows this finding applied to Defendant, and there is material evidence in the record supporting this finding’s application to Defendant.

The county court, in imposing sentence, reviewed and relied on an alcohol evaluation describing a history of alcohol and marijuana use. R. CF, pp. 39–40. That evaluation also concluded Defendant was not forthcoming about her past and present drug and/or alcohol use, and that she showed a lack of motivation to change her drug and/or alcohol use. R. CF, p. 40. The alcohol evaluation describes a history of daily medical marijuana use, but does not describe any medical condition that the drug use is addressing. R. CF, pp. 39–40. The alcohol evaluation, its emphasis on treatment and its concern that Defendant minimized her alcohol and drug use and was unwilling to change, supports the county court’s finding that it was not appropriate for Defendant to be using marijuana. The context of the Defendant’s entire sentence, that it was for the crime of driving

under the influence and was a deferred sentence with the goal of treatment and rehabilitation, supports the county court's finding that it was not appropriate for Defendant to be using marijuana. The county court's finding also speaks to the sentencing goals of promoting rehabilitation and imposing a level of supervision that reduces the potential an offender will engage in criminal conduct after completing her sentence. See § 18-1-102.5(1)(d), (e), C.R.S. 2018.

The county court's use of the alcohol evaluation in imposing sentence shows its determination that it was not appropriate for Defendant to use marijuana while on the deferred sentence was based on material evidence.

CONCLUSION

For the reasons stated above, the People request the Court affirm the order of the district court and affirm the sentence imposed by the county court.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been mailed by United States Postal Service mail or delivered (as indicated) to:

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