ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY

STATE OF ARIZONA ex rel. POLK v. HON. CELÉ HANCOCK
(JENNIFER LEE FERRELL, Real Party in Interest)
CV-14-0084-PR

PARTIES:

Petitioner/Cross-Respondent:	State of Arizona
Respondent/Cross-Petitioner:	Real party in interest Jennifer Lee Ferrell
Amicus Curiae:	Arizona Attorneys for Criminal Justice

FACTS:

In October 2012, law enforcement arrived at an accident scene in Yavapai County to find Jennifer Lee Ferrell's vehicle in a ditch alongside the road. She was passed out or asleep across the front seat. An investigating officer smelled odors of alcohol and marijuana. Both were found in the vehicle, along with two marijuana pipes. The officer's field tests showed driver impairment.

Ferrell was arrested after a small struggle and later indicted for aggravated assault, resisting arrest, possession of marijuana, possession of drug paraphernalia, DUI, and consumption or possession of liquor while in a motor vehicle. Her BAC test results were .237. Attempts to draw blood for testing for the presence of marijuana were unsuccessful, so no drug testing was done. The prosecution filed notices of prior offenses for punishment enhancement.

In May 2013, the parties entered into a plea agreement, which included a "marijuana provision" required by Yavapai County Attorney Sheila Polk to be included in each plea agreement offered by her office. That provision states: "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." In exchange for a plea to DUI, attempted aggravated assault on a police officer, and resisting arrest, Polk agreed to dismiss the remaining charges and the allegations of priors against Ferrell.

The trial judge found a factual basis and accepted the plea, but prior to sentencing, Ferrell challenged the "marijuana provision." By that time the trial judge was aware that the County Attorney had begun inserting the same probation condition in all Yavapai County plea agreements. After briefing and argument, the trial judge struck the probation provision from the agreement on the ground that it illegally bound the court regarding imposition of a specific term of probation. The trial judge also denied the prosecutor's motion to withdraw the plea. *See* Criminal Rule 17.5 ("The court, in its discretion, may allow withdrawal of a plea of guilty or no contest when necessary to correct a manifest injustice.").

On October 25, 2013, County Attorney Polk sent an email to the trial judge and others entitled "Plea Agreements and my position on the ban on marijuana provision" that summarized the basis for her directive. In that email, she instructed her staff not to allow any further changes of plea in Judge Hancock's court, but to ask for conferences in other divisions "in hopes that the new division will be agreeable to that stipulated term of probation." Polk then filed a special action petition, and sentencing was stayed.

The court of appeals accepted special action jurisdiction to decide this matter of first impression and statewide importance, and because the State had no equally plain, speedy, or adequate remedy by appeal.

It first identified the arguments advanced by the parties. Polk argued that: (1) the trial judge erred in finding the parties could not negotiate and reach a plea agreement that included this special probation provision, and, (2) after striking the provision, the trial judge erred by denying a motion to withdraw the plea agreement. Ferrell argued that: (1) the prohibition of the lawful use of medical marijuana is against public policy and contrary to the aims of probation; (2) the prohibition is contrary to the enactment of the Arizona Medical Marijuana Act (the AMMA) as a valid exercise of the state's police power, *see* Attorney General Opinion I12-001; and (3) the trial court properly fulfilled its role by striking the illegal probation condition while keeping the balance of the plea agreement in effect.

The court of appeals also noted that the trial court had viewed the probation provision as an illegal stipulation pursuant to *State v. Rutherford*, 154 Ariz. 486, 489, 744, P.2d 13, 16 (App. 1987), A.R.S. § 13-901 (2010) (probation statutes), and the Rules of Criminal Procedure, as well as an unconstitutional violation of the separation of powers doctrine.

Examining the bases for the parties' competing assertions, the appellate court discussed the nature of plea agreements, that is, a defendant has no constitutional right to a plea agreement, but if the State makes an offer it may include the conditions and terms it deems appropriate, even harsh or coercive ones, so long as the defendant is free to accept or reject the offer. Plea negotiations are governed by Criminal Rule 17.4. Under subsection (a), the parties may negotiate any and all aspects of the case. Under subsection (d), the trial court determines whether to accept or reject the negotiated plea. The court of appeals reasoned:

> The prosecutor has a duty to make an individualized determination of what is reasonably beneficial to the public good given the nature of the specific defendant and crimes and trial judges are required to give "individualized consideration" to plea agreements presented to them. *See e.g., Espinoza [v. Martin],* 182 Ariz. [145,] 148, 894 P.2d [688,] 691 (each trial judge must "consider the particular circumstances of the case" and weigh the merits of each individual plea); *State v. City Court of Tucson,* 150 Ariz. 99, 101–02, 722 P.2d 267, 269–70 (1986) (each prosecutor is obligated to "exercise his or her professional judgment on a case by case basis"). If they do not, they err.

2014 WL 623701 *3 ¶ 17 (hereafter "Op.").

The appellate court then considered the nature of probation and the separation of powers.

It recognized that the legislature has authorized both the granting and revoking of probation through enactment of A.R.S. § 13-901, and that the Arizona Supreme Court has promulgated rules regulating probation and probation revocation. "While the statutory authority to make probation decisions 'is solidly within the scope of the judiciary's authority,' *State v. Lyons*, 167 Ariz. 15, 16, 804 P.2d 744, 745 (1990), the trial judge does not have unlimited power or discretion in probation proceedings. *See Green v. Superior Court*, 132 Ariz. 468, 471, 647 P.2d 166, 169 (1982)." Op. at ¶ 18. The court said the trial judge here asserted that Polk's blanket anti-marijuana provision violated the separation of powers doctrine by interfering with the statutory power granted to the judiciary by the legislature.

In discussing separation of powers, the court of appeals identified the parties' competing positions on blanket provisions in plea agreements. Polk contended that she may include the marijuana use prohibition in each and every plea agreement made in Yavapai County. Ferrell argued that the provision is never acceptable because Arizona has adopted the AMMA. The trial court's ruling indicated a belief that including a marijuana prohibition would undercut the court's statutory authority regarding imposition and modification of probation.

The appellate court found none of the positions convincing. It found that the blanket policy of putting the marijuana prohibition in all plea agreements: (1) does not "satisfy the prosecutor's duty to make an individualized determination of what is reasonably beneficial to the public good given the nature of the specific defendant and crimes," Op. at ¶ 25, and (2) prevents the trial judge from performing a duty to review each plea agreement to see if the ends of justice and the protection of the public are being served. The appellate court expressly disapproved of Polk's blanket policy; however, it found that the trial court erred by failing to conduct an individualized analysis of Ferrell's situation to determine if the probation condition was justified for the protection of the public. Then, without addressing the AMMA arguments, the court held:

> [T]he trial judge must view the marijuana provision on an individualized, case-by-case, basis rather than making a blanket determination that such a term is never appropriate for any defendant. While such a term will not be appropriate in all cases, in this driving under the influence (DUI) case there is a rational relationship between the marijuana provision and the charges brought against real-party-in-interest Jennifer Ferrell (defendant). Therefore, the trial judge's striking of the stipulated term of probation is reversed.

Op. at ¶ 2.

In a special concurrence, Judge Downie agreed with the majority's analysis, but she voiced a concern that the language of the blanket anti-marijuana provision still improperly purports to bind the court to the agreement. Ferrell's agreement provides in pertinent part: "As a condition of any grant of probation in this matter, *the Court shall include the following term of probation:* [the blanket marijuana provision]." Op. at ¶ 28 (Downie, J., specially concurring) (Judge Downie's emphasis). Other provisions describe the points of agreement as between the parties. Judge Downie would have the condition similarly worded as an agreement between the parties for appropriate cases. She also stated that affirming the decision to strike the anti-marijuana provision from Ferrell's agreement would elevate form over substance, as Ferrell clearly agreed to the probationary term by signing the plea agreement.

ISSUES:

A. In the State's (Polk's) Petition for Review

"Does the law permit an elected County Attorney to implement blanket provisions guiding the terms of the plea offers made by her deputies?"

An additional issue presented to, but not decided by the court of appeals, is:

"Must a trial court allow the State to withdraw from an accepted plea agreement when the trial court determines a stipulated term therein is unacceptable?"

B. In Real Party in Interest Ferrell's Cross-Petition for Review

"1. Did the Court of Appeals err when it allowed the Yavapai County Attorney to encroach on the Superior Court's jurisdiction over probationers?

"2. Did the Court of Appeals err when it held, contrary to the AMMA, that a probationer can be prevented from using marijuana for medical purposes?

"3. Did the Court of Appeals err when it failed to strike a blanket provision in all plea agreements that directly conflicts with the AMMA, thereby violating the Separation of Powers Clause of the Arizona Constitution?"

DEFINITIONS: The AMMA provides in relevant part at A.R.S. § 36-2811:

> A. There is a presumption that a qualifying patient . . . is engaged in the medical use of marijuana pursuant to this chapter.
>
> 1. The presumption exists if the qualifying patient or designated caregiver:
>
> (a) Is in possession of a registry identification card.
>
> (b) Is in possession of an amount of marijuana that does not exceed the allowable amount of marijuana.
>
> . . .
>
> B. A registered qualifying patient . . . is not subject to arrest, prosecution or penalty in any manner, or denial of any right or privilege, including any civil penalty or disciplinary action by a court or occupational or professional licensing board or bureau:
>
> 1. For the registered qualifying patient's medical use of marijuana pursuant to this chapter, if the registered qualifying patient does not possess more than the allowable amount of marijuana.
>
> . . .