

NO. 27357

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v.  
MALLORY D. VINCENT, Defendant-Appellant

EMERSON  
STATE OF HAWAII  
APPELLATE COURTS

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FILED

APPEAL FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT  
(Cr. No. 04-1-433)

SUMMARY DISPOSITION ORDER

(By: Watanabe, Presiding J., Fujise, and Leonard, JJ.)

Defendant-Appellant Mallory D. Vincent (Vincent) appeals from the judgment entered by the Circuit Court of the Third Circuit<sup>1</sup> (circuit court) on April 27, 2005, convicting and sentencing him for: (1) commercial promotion of marijuana in the first degree, a violation of Hawaii Revised Statutes (HRS) § 712-1249.4(1) (1993); and (2) acquiring a firearm without a permit, a violation of HRS § 134-2(a) (Supp. 2003). In sentencing Vincent to serve concurrent terms of probation of ten years and one year, the circuit court imposed various conditions, including special conditions prohibiting Vincent from possessing marijuana, being in any vicinity where marijuana is being used, and requiring Vincent to undergo substance-abuse assessment, substance-abuse treatment (if required), and periodic urinalysis (special conditions).

On appeal, Vincent contends that the circuit court abused its discretion in imposing the special conditions because: (1) he was legally authorized to possess marijuana for medical use; (2) he obtained a substance-abuse assessment prior to sentencing that showed he did not have a substance-abuse problem requiring treatment; (3) the evidence presented to the circuit court showed that his cultivation and possession of marijuana were not for commercial purposes; and (4) the circuit court wrongly concluded that his medical-marijuana usage would result in his commission of the same or similar crime. Vincent also

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<sup>1</sup> The Honorable Greg K. Nakamura presided.

argues that in imposing the probation condition that prohibited him from using medical marijuana, the circuit court applied the wrong "no reasonable alternative method of treatment" standard and unreasonably interfered with the physician-patient relationship by denying him his physician's legitimately prescribed course of treatment.

We affirm.

A.

Under the medical-marijuana statute, a "qualifying patient[,]" defined in HRS § 329-121 (Supp. 2007) as "a person who has been diagnosed by a physician as having a debilitating medical condition[,]"<sup>2</sup> is permitted to keep an "adequate supply"<sup>3</sup>

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<sup>2</sup> Pursuant to HRS § 329-121, "[d]ebilitating medical condition" means:

- (1) Cancer, glaucoma, positive status for human immunodeficiency virus, acquired immune deficiency syndrome, or the treatment of these conditions;
- (2) A chronic or debilitating disease or medical condition or its treatment that produces one or more of the following:
  - (A) Cachexia or wasting syndrome;
  - (B) Severe pain;
  - (C) Severe nausea;
  - (D) Seizures, including those characteristic of epilepsy; or
  - (E) Severe and persistent muscle spasms, including those characteristic of multiple sclerosis or Crohn's disease; or
- (3) Any other medical condition approved by the department of health pursuant to administrative rules in response to a request from a physician or potentially qualifying patient.

<sup>3</sup> "Adequate supply" is defined in HRS § 329-121 as

an amount of marijuana jointly possessed between the qualifying patient and the primary caregiver that is not more than is reasonably necessary to assure the uninterrupted availability of marijuana for the purpose of alleviating the symptoms or effects of a qualifying patient's debilitating medical condition; provided that an "adequate supply" shall not exceed three mature marijuana plants, four immature marijuana plants, and one ounce of usable marijuana per each mature plant.

of marijuana for personal consumption under certain conditions. HRS § 329-122(a) (Supp. 2007) specifically states:

**Medical use of marijuana; conditions of use.**

(a) Notwithstanding any law to the contrary, the medical use of marijuana by a qualifying patient shall be permitted only if:

- (1) The qualifying patient has been diagnosed by a physician as having a debilitating medical condition;
- (2) The qualifying patient's physician has certified in writing that, in the physician's professional opinion, the potential benefits of the medical use of marijuana would likely outweigh the health risks for the particular qualifying patient; and
- (3) The amount of marijuana does not exceed an adequate supply.

(Emphases added.) Therefore, unless the foregoing requirements are met, a qualifying patient is not permitted to use marijuana for medical purposes.

At a hearing held on May 11, 2005 regarding the special-probation condition prohibiting Vincent's use of medical marijuana, the circuit court received into evidence, over the State's hearsay objection, a letter from Dr. James Berg (Dr. Berg), which stated as follows:

I evaluated [Vincent] on December 22, 2004. At that time, I determined that he qualified for his medical marijuana certificate. [Vincent] has had surgery on both of his knees in the past, and remains with chronic, severe debilitating knee pain bilaterally. He also has debilitating low back and hip pain. He prefers to minimize his use of narcotic pain medications and prefers to use medical marijuana, which is his legal right by the State of Hawaii. His current medical marijuana certificate is issued from January, 2005 through January 31, 2006.

(Emphasis added.) Vincent's counsel, after making an offer of proof that Vincent was self-employed and had no medical insurance or drug coverage, argued that the circuit court was not authorized to prohibit Vincent's medical use of marijuana.

The letter from Dr. Berg that Vincent relies on for permission to use medical marijuana does not strictly comply with the specific requirements of HRS § 329-122(a). Although Dr. Berg states in the letter that Vincent had knee surgery "and remains with chronic, severe debilitating knee pain bilaterally" and "also has debilitating low back and hip pain[,] " Dr. Berg did not

certify in writing that in his professional opinion, "the potential benefits of the medical use of marijuana [by Vincent] would likely outweigh the health risks for [Vincent.]" Instead, Dr. Berg stated that Vincent "prefers to minimize his use of narcotic pain medications and prefers to use medical marijuana, which is his legal right by the State of Hawaii." Therefore, Vincent did not meet the statutory conditions for medical use of marijuana and we need not decide whether the circuit court abused its discretion in imposing the special conditions of probation that Vincent complains of on appeal.

B.

We observe, moreover, that although the medical-use-of-marijuana law, codified at HRS chapter 329, part IX, allows a qualifying patient to "assert the medical use of marijuana as an affirmative defense to any prosecution involving marijuana use under [part IX of HRS chapter 329] or [HRS] chapter 712,"<sup>4</sup> it does not prohibit a court from imposing conditions prohibiting marijuana use on a person sentenced for a drug offense. Additionally, probation has historically been regarded as "a matter of grace or privilege and not a matter of right." State v. Bernades, 71 Haw. 485, 489, 795 P.2d 842, 846 (1990).

C.

Vincent argues that the special conditions imposed on him by the circuit court were unreasonable because the evidence showed that the marijuana cultivated and possessed by him was for personal and medical use by him and his wife, Peggy G. Nielsen, and not for commercial purposes. The record belies Vincent's argument.

Vincent pleaded guilty to and was convicted on Count I for commercial promotion of marijuana in the first degree. In its "Amended Findings of Fact, Conclusions of Law Regarding the Imposition of the Condition of Prohibition Against the Use of Marijuana" entered on May 13, 2005, the circuit court found that Count I arose out of the seizure from Vincent's residence of 329

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<sup>4</sup> HRS chapter 712 describes penal offenses against public health and morals, including offenses related to prostitution, obscenity, gambling, drugs and intoxicating compounds, and nuisance.

marijuana plants, six inches in height; 54 marijuana plants, one inch in height; 117 marijuana cuttings with rooting systems; 20 marijuana plants, two to three feet in height; and 4.06 pounds of dried processed marijuana. Vincent has not challenged the circuit court's finding on appeal, and under HRS §§ 329-122(a)(3) and 329-121, a person who qualifies to use marijuana for medical purposes is not allowed to have more than "three mature plants, four immature plants, and one ounce of usable marijuana per each mature plant."

Affirmed.

DATED: Honolulu, Hawai'i, January 20, 2009.

On the briefs:

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