IN THE IOWA DISTRICT COURT FOR BLACK HAWK COUNTY

STATE OF IOWA,

Plaintiff,

vs.

ALLEN DOUGLAS HELMERS,

Defendant.

CLERK

NO. FECR047575

ORDER

No oral argument having been requested, the State's motion to reconsider was considered by the Court on August 13, 1997. Defendant's alleged probation violation is not that he possessed or was trafficking in marijuana, which are criminal offenses, but that he was using marijuana without a prescription, which is not a criminal offense although it is contrary to one of the terms of Defendant's probation. Defendant's treating and consulting physicians have previously testified that they would give him a prescription but for threats of prosecution under federal law.

Nonetheless, the Court would have revoked or modified defendant's probation if the assistant county attorney had introduced any medical testimony at all that, given defendant's allergy to morphine, the chronic pain associated with his fibromyalgia and other ailments could be effectively managed without marijuana were he to be placed in treatment for his drug dependency. The Court would also have revoked or modified defendant's probation if the Iowa Code did not provide that marijuana can be prescribed for medicinal purposes as long as its use is in compliance with any rules adopted by the state board of pharmacy examiners.

Because there was no medical testimony to support the contention that defendant's chronic pain can be managed without the use of marijuana and because the assistant county attorney previously admitted that marijuana can be prescribed for medicinal purposes under Iowa law, the Court ruled that defendant would continue on supervised probation until the conflict between federal law, which does not permit the prescription of marijuana for medicinal purposes, and Iowa law, which does, is resolved.

Now, for the first time, the assistant county attorney claims that marijuana should be treated solely as a Schedule I nonprescription drug under Iowa law because of actions or inactions

allegedly taken or not taken by the state board of pharmacy examiners.

This motion could be summarily denied simply because the factual allegations are not supported by affidavit as contemplated by Rule of Civil Procedure 116 and because motions to reconsider are permitted so that Courts may enlarge or modify findings based on evidence already in the record. They are not vehicles for parties to retry issues based on new facts. The assistant county attorney has had two opportunities to offer testimony in support of these new allegations. He merely failed to take advantage of those opportunities. See In Re Marriage of Bolick, 539 N.W.2d 357, 361 (Iowa 1995). In any event, the Court is no more able to rely on unproven claims concerning the action or inaction of the board of pharmacy examiners than on the unproven claim that there is an alternative course of effective pain management for defendant.

Having said that much, the State's motion to reconsider would fail even if its allegations were supported by evidence already in the record. In 1970, Congress enacted the Controlled Substances Act (CSA), a comprehensive statute designed to rationalize federal control of dangerous drugs. In drafting the CSA, congress placed marijuana in Schedule I, the classification that provides for the most severe controls and penalties. The act provides that the Attorney General may, by rule, add a substance to a schedule, transfer it between schedules, or decontrol it by removal from the schedules. The act further provides that rescheduling proceedings may be initiated by the Attorney General on his or her own motion, at the request of the Secretary ~~of Health, Education and Welfare~~, or on petition of any interested party. The Attorney General has delegated the authority to reschedule drugs to the administrator of the Drug Enforcement Administration. Under federal law, marijuana has always been a Schedule I drug. Schedule I and Schedule II drugs differ because Schedule I drugs have no currently accepted medical use in treatment in the United States while Schedule II drugs have a currently accepted medical use in treatment in the United States. See 21 U.S.C. 811, 812; Nat. Organization for Reform, Etc. v Drug Enforcement, 559 F.2d 735, 737-738 (1977); Alliance for Cannabis Therapeutics v DEA, 15 F.3d 1131, 1133, (D.C.Cir. 1994).

Around 1971, Iowa adopted the Uniform Controlled Substances Act, which is now Iowa Code Chapter 124. Until about 1980, marijuana was a Schedule I controlled substance. However, by

amendments to the 1981 Code of Iowa, the general assembly created an exception for marijuana when used for medicinal purposes pursuant to rules of the board of pharmacy examiners and added it to Schedule II. See Section 204.204(4)j (The Code 1979); Sections 204.204(4)j, 204.204(6) and 204.206(8) (The Code 1981); and Sections 124.204(4)m, 124.204(7) and 124.206(7)a (The Code 1997). Sections 124.201(1) and 124.201(2) (The Code 1997) require the board of pharmacy examiners to recommend any deletions from or revisions in the schedules of substances which the board deems necessary or advisable to the general assembly.

What all of this means is that, if the board of pharmacy examiners really concludes marijuana to have no medicinal value, as alleged by the assistant county attorney, the board has an unqualified duty to recommend that the general assembly delete it from Schedule II and revise Schedule I so that it is not excluded even when utilized for medicinal purposes. See Sections 124.203, 124.205, (The Code 1997).

The assistant county attorney's motion also includes a claim that marijuana cannot be prescribed in Iowa because the board of pharmacy examiners has failed to adopt any rules to regulate its use for medicinal purposes. The first flaw in this argument is that it depends on the novel proposition that a state agency, such as the board of pharmacy examiners, can do an end run around the general assembly and the governor and amend the Code of Iowa by its own action or inaction. The Court does not share this view and doubts that it is widely held. The second flaw in this argument is that nothing prevents the board from adopting any rules it deems appropriate. If there are no marijuana specific rules, it may be assumed that the board sees no need to regulate the medicinal use of marijuana any more than any other Schedule II controlled substance. The board has adopted rules governing the prescription of Schedule II substances in 657 I.A.C. 10.11 and 657 I.A.C. 10.13(1)-(6). The assistant county attorney's reliance on 657 I.A.C. 10.5(1) is misplaced because that rule applies only to applications to the board pursuant to 657 I.A.C. 10.5 by persons who want the board to recommend that the general assembly revise the schedules to except listed substances or add new substances.

In short, the board of pharmacy examiners has two options under Iowa's Uniform Controlled Substances Act. If the board agrees that marijuana has currently accepted medical use, it can and should adopt any rules necessary to regulate that use. If the

board finds that marijuana has no currently accepted medical use, it can and is required to recommend to the general assembly that it be deleted from Schedule II and that the exceptions to its use for medicinal purposes be deleted from Schedule I. If the general assembly adopts the board's recommendation by amending Schedules I and II and the Governor approves those amendments, marijuana will once again be solely a Schedule I controlled substance under Iowa law with no exception for medicinal uses.

Just as soon as that happens, it will be appropriate to review defendant's probation as the Court's order of July 14 provided.

IT IS THEREFORE ORDERED that the assistant county attorney's motion for reconsideration is denied.

August 13, 1997.

JON FISTER, JUDGE
FIRST JUDICIAL DISTRICT

cc: counsel

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