

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2004-363

JUNE TERM, 2005

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 2, Bennington Circuit
David J. Fenton	}	
	}	DOCKET NO. 990-8-01 BnCr

Trial Judge: David Suntag

In the above-entitled cause, the Clerk will enter:

Defendant appeals the district court=s revocation of his probation and imposition of the underlying three-to-six-month sentence for possession of marijuana. We reverse and remand the matter for another hearing.

In December 2004, defendant was convicted of driving while intoxicated (DWI), third offense, and possession of marijuana. He was sentenced to one to three years, all suspended except for three months, on the DWI charge, and three to six months, all suspended, on the marijuana charge. One of the conditions of his probation was that he not purchase, possess, or consume any regulated drug without a prescription. A probation violation complaint was filed in February 2004. Defendant admitted that he did not complete treatment as directed and that he possessed marijuana without a prescription. At the revocation hearing, defendant told the court that he needed marijuana to counter the pain resulting from a chronic medical condition. Defendant indicated that he would rather go to jail than deal with the pain that was relieved through the use of marijuana. Defense counsel suggested that defendant=s condition might be a covered condition under the recently enacted medical marijuana bill. See 18 V.S.A. " 4471-4474d. The court revoked probation with respect to the marijuana charge and imposed the underlying three-to-six-month sentence, but deferred execution of the sentence for approximately six weeks to give defendant the opportunity to comply with his probation condition by producing a valid prescription for the use of marijuana.

One month later, defendant filed a motion to reconsider and to stay execution of his sentence, stating that the medical marijuana bill did not appear to apply to his condition, and that he wanted to present further evidence regarding his chronic back pain. The court denied the motion, noting that defendant had been given an opportunity to provide a valid prescription, which he claimed he could obtain, and that any failure to provide the prescription had been contemplated by the order. Two weeks later, defendant filed a renewed motion to reconsider and to stay execution of the sentence, this time stating that although he would benefit from marijuana for his prescribed pain, his doctor could prescribe only the pain reliever Marinol. He also requested a hearing on the issue. The court again denied the motion, noting that defendant had failed to meet the condition imposed by the court=s order deferring his sentence.

On appeal, defendant argues that the district court abused its discretion by failing to reconsider its revocation order in light of (1) its misconception that a prescription for marijuana was possible under the recently enacted law, and (2) defendant=s proffer of a prescription for an alternative drug. Defendant also argues that the evidence does not support revocation under any of the grounds for revocation set forth in 28 V.S.A. ' 303(b), which provides that the court shall not revoke probation unless it finds either that (1) confinement is necessary to protect the community, (2) needed treatment can be most effectively provided through confinement, or (3) the seriousness of the violation would be unduly

depreciated if probation were not revoked.

At the revocation hearing, the court noted that defendant was taking care of his kids, doing well, and not violating any laws other than smoking marijuana, which he did to relieve his chronic pain. The court indicated that it would give defendant an opportunity to comply with the law by obtaining a prescription for marijuana. Defendant's second motion for reconsideration indicated that he had obtained a prescription for a potential alternative drug that might allow him to legally treat his condition without using marijuana. That drug, Marinol, apparently contains some of marijuana's active ingredients and is used to combat pain. While it would have been preferable for defendant to clearly affirm that with the Marinol prescription, he no longer had any need or intention to smoke marijuana, the intent of and information contained in the affidavit would seem to imply as much. Under the circumstances, we conclude that the district court abused its discretion by not holding another hearing to determine whether defendant would continue to use marijuana and whether his use of the Marinol prescription could satisfy the court's concerns. If that proved to be the case, it is difficult to see how revocation of probation could be justified under any of the criteria set forth in ' 303(b).

As for the State's argument that defendant failed to ask the district court to find that Marinol met the condition established by the court, we conclude that defendant's motion was sufficient to put the court on notice that it was being asked to reconsider the condition in light of the status of the medical Marijuana law and defendant's proffered prescription for Marinol. Further, we reject the State's argument that defendant failed to file a timely notice of appeal from the revocation order. A judgment is not final until the court makes a final disposition of the subject matter before it. Morissette v. Morissette, 143 Vt. 52, 58 (1983). Here, the court deferred execution of the sentence until August 17, 2004 to see if defendant could fulfill a condition for not imposing the sentence. Thus, defendant's August 20, 2004 notice of appeal was timely filed because there was no final judgment until the district court denied defendant's second motion for reconsideration on August 18, 2004.

Reversed and remanded.

BY THE COURT:

John A. Dooley, Associate Justice

Denise R. Johnson, Associate Justice

Marilyn S. Skoglund, Associate Justice