Received 4/26/2024 11:30:25 AM Commonwealth Court of Pennsylvania

Filed 4/26/2024 11:30:00 AM Commonwealth Court of Pennsylvania
283 MD 2023

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Damon Monyer and the Pennsylvania Cannabis Coalition, **Petitioners,** **v.** **23rd Judicial District, Berks County,** **Respondent.**	**No. 283 MD 2023** **Original Jurisdiction**

PETITIONERS' REPLY BRIEF IN SUPPORT OF APPLICATION FOR SUMMARY RELIEF

Sara Rose (PA ID No. 204936)
Stephen Loney, Jr. (PA ID No. 202535)
Andrew Christy (PA ID No. 322053)
Richard Ting (PA ID No. 200438)
AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA
P.O. Box 60173
Philadelphia, PA 19102
215-592-1513 x138
srose@aclupa.org
sloney@aclupa.or
achristy@aclupa.org
rting@aclupa.org

Counsel for Petitioners

William Roark (PA ID No. 203699)
HAMBURG, RUBIN, MULLIN, MAXWELL & LUPIN
1684 S. BROAD STREET
SUITE 230
P.O. BOX 1479
Lansdale PA 19446-0773
215-661-0400
wroark@hrmml.com

ARGUMENT

In its Answer and Brief in Opposition to Petitioners' Application for Summary Judgment, Respondent 23rd Judicial District repeatedly tries to shift the Court's attention from the real issue in this case: that the Policy violates the Medical Marijuana Act's immunity provision by denying patients the benefits of treatment court solely due to lawful medical marijuana use. Notably, the Judicial District does not defend the merits of its Policy's "medical necessity" requirement. Instead it pretends it does not exist. The Judicial District likewise ignores relevant precedent and the record in contending that Petitioners do not have standing in order to distract the Court from its unlawful Policy. But there is no escaping the fact that the Policy suffers from the same flaws as the one struck down by the Pennsylvania Supreme Court in *Gass v. 52nd Judicial District*.

1. The undisputed facts demonstrate that the Policy requires patients to prove "medical necessity" to use medical marijuana in treatment court.

The record shows that the Policy restricts medical marijuana use by patients in the Judicial District's treatment courts by requiring them to obtain a letter from a medical provider detailing that medical marijuana is a "medical necessity" to treat their serious medical provision. Although the Judicial District repeatedly denies that such a letter is required, it admits that its treatment court supervisor—the person who wrote the Policy—testified that a letter ***is*** required. Resp. Answer to Pet. App. ¶¶ 63-64. All of the other evidence also establishes that patients must

submit a letter from a treating physician detailing "medical necessity." *Id.* ¶ 63, 86; Pet. App. ¶ 63-66. The only support the Judicial District offers for its claim that such a letter is not a prerequisite is the Policy's use of the word "should" rather than "shall" and its assertion that "[w]hether the letter is sufficient for the treatment court judge is ultimately the final decision of the treatment court judge." *Id.* ¶ 64. That is insufficient to establish a genuine issue for trial. *See Marks v. Tasman*, 589 A.2d 205, 206 (Pa. 1991). None of the Judicial District's witnesses have endorsed that reading of the Policy, and it has provided no examples of a treatment court judge ***ever*** allowing a patient to use medical marijuana in treatment court without providing such a letter. In fact, it admits that a treatment court judge denied a patient's request to use medical marijuana because the patient had not provided a letter that met the court's requirements. Resp. Answer to Pet. App. ¶ 83, 86.

Although the Judicial District repeatedly points to a declaration by a treatment court participant, J.S., to support its allegation that "Petitioners' witness admitted to using medical marijuana without the Court's approval of his submitted letter and he did not receive sanctions for use," the declaration says no such thing. *Id.* ¶¶ 51, 59, 63, 71 (citing Petitioners' Exhibit 36). As is set forth in J.S.'s declaration, she stopped using medical marijuana to enter treatment court and

never resumed.[1] *See* Pet. Ex. 36, Decl. of J.S. at ¶ 8 ("Since I started DUI Treatment Court in January 2023, I have not used medical marijuana."); s*ee also* Exhibit 58, Brown Depo., 28:3-29:4 (probation officer confirming J.S. stopped using medical marijuana when she entered treatment court). Indeed, there is no record evidence of ***any*** patient being allowed to use medical marijuana in treatment court without risk of sanctions unless they first submitted a letter from a treating medical provider that satisfied the "medical necessity" requirement.

The Judicial District's repeated denial of Petitioners' allegations regarding the operation of the Policy—in the face of its own witnesses' contrary testimony—would be comical if it did not have such serious consequences for the affected patients. *See* Resp. Answer to Pet. App. ¶¶ 63-68. It also begs the question of why the Policy exists if, as the Judicial District claims, it has absolutely no bearing on whether patients will be allowed to use medical marijuana in treatment court. That

[1] The Judicial District may have instead intended to reference Petitioner's Exhibit 35, the declaration of R.P. R.P. stopped using medical marijuana to be admitted to treatment court but resumed using it after he obtained a letter from his medical provider. Because the treatment court judge did not consider that letter sufficient under the Policy, she threatened him with sanctions unless he stopped using medical marijuana or submitted a letter that met the court's requirements. *See* Pet. Ex. 35, Decl. of R.P. at ¶ 23. Accordingly, even if the Judicial District intended to cite to R.P.'s declaration, rather than that of J.S., R.P.'s declaration does not support its baseless assertion that patients who have not submitted letters have been able to use medical marijuana in treatment court without the threat of sanctions.

the Policy requires patients to submit a medical provider's letter detailing "medical necessity" is beyond legitimate dispute.

2. *Petitioners have standing to seek a declaration that the Policy is unlawful and an injunction against future harm.*

Although the Judicial District fixates on Mr. Monyer's past applications to treatment courts, it does not dispute that Mr. Monyer is a medical marijuana patient who is statutorily eligible for treatment court and can reapply for admission. Resp. Answer to Pet. App. ¶¶ 26, 43, 103. Whether the Judicial District denied Mr. Monyer's applications for its treatment courts for any reason other than medical marijuana use is a disputed issue of fact,[2] but it is not material because, under the Policy, a treatment court judge *could* deny Mr. Monyer admission in the future solely on the basis of his lawful medical marijuana use. That he may ultimately be denied admission to treatment court on some other basis does not deprive Mr. Monyer of standing to challenge the facial validity of the Policy. *See Yocum v. Commonwealth Pennsylvania Gaming Control Bd.*, 161 A.3d 228, 236-37 (Pa.

[2] The reasons proffered by the Judicial District for the denial of Mr. Monyer's first Veterans Treatment Court application are belied by the record. The Judicial District admits that the treatment court team's alleged concerns that Mr. Monyer was reluctant to participate in groups or take medication were based entirely on information conveyed to them by Gelu Negrea. Resp. Answer to Pet. App.. ¶¶ 110-116. It also admits that "Mr. Negrea ***did not*** tell the treatment court team that Mr. Monyer did not want to do group therapy" or that "Mr. Monyer would not take medications." *Id.* ¶¶ 117-118 (emphasis added).

2017) (attorney employed by Gaming Control Board had standing to seek declaratory and injunctive relief in facial challenge to post-employment restrictions even though she had neither sought nor been offered employment subject to restrictions at issue).

The Judicial District has also admitted that PCC is a trade association whose members include three of the four medical marijuana dispensaries in Berks County. Resp. Answer to Pet. App. ¶¶ 32, 136. All that PCC must show to establish standing is that the Policy inhibits patients from lawfully using and thus purchasing medical marijuana from its member dispensaries. *See Allegheny Reprod. Health Ctr. v. Pa. Dep't of Human Servs.*, 309 A.3d 808, 838 (Pa. 2024) (abortion providers have standing to challenge Medical Assistance coverage exclusion for abortions, where providers incur additional expenses to treat Medical Assistance patients subject to the coverage exclusion); *Wm. Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269, 289-91 (Pa. 1975) (plurality opinion) (parking garage operators have standing to challenge tax imposed on their patrons, since tax would result in reduced patronage). It has done that. The record shows that multiple patients have stopped using and stopped purchasing medical marijuana from PCC member dispensaries because of the Policy, which has caused both financial and professional harm to PCC's members. *See* Ex. 5, Buettner Decl., at ¶ 16; Ex. 50, PCC Interrogatory Responses at 1, 5; Ex. 36, J.S. Decl., at ¶¶ 25-

26; Ex. 19, Medical Letters Stipulation at 1; Ex. 58, Brown Depo., 28:3-29:4; Ex. 35, R.P. Decl., at ¶¶ 7, 11, 26; Ex. 59, R.P. Treatment Court Notes; Ex. 16, Winslow Dep., 23:9-24; Ex. 38, G.S. Decl., ¶¶ 43-44, 48, 50; Ex. 15, *Commonwealth v. G.S.*, CP-06-CR-2852-2021, Notes of Testimony (March 16, 2023); Ex. 60, P.M. Decl., at ¶¶ 10-14, 18-20. It is reasonable to predict that the Policy will continue to inhibit patients' purchases in the future if it is not enjoined. The Judicial District has admitted that it has no reason to dispute that PCC members "lose[] money if individuals are not allowed to use medical marijuana while they are in treatment court." Ex. 51, March 13, 2024 Telephone Conference Transcript at 8:17-20. And the Judicial District has provided no specific facts to deny PCC's averment that the Policy will reduce its members' revenue. *See, e.g.*, *Tasman*, 589 A.2d at 206. Accordingly, the only question before the Court is whether the Policy violates the MMA.

The Judicial District's Brief in Opposition avoids any discussion of that central issue other than to argue that the MMA's protections for treatment court participants are "irrelevant" to the question of whether Mr. Monyer and PCC "have… been harmed." Resp. Opp. Br. at 10-11. But the relevant question is not whether the Petitioners have been harmed by the Policy, though they have; it is whether they will suffer ***future*** harm if the Policy is not enjoined. This Court cannot enjoin past conduct. But it can prohibit the Judicial District from enforcing

its unlawful Policy against Mr. Monyer and future treatment court applicants and participants. That would be an effective remedy for Mr. Monyer, who will be able to submit a new application for treatment court in which his medical marijuana use will not be a consideration. It will also be an effective remedy for PCC, as patients will be able to purchase medical marijuana from its members without fear that they will be refused admission to treatment court or sanctioned for lawfully using medical marijuana.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court enter summary relief in their favor, permanently enjoin the Judicial District from enforcing its Policy on the use of medical marijuana in treatment courts, and declare that the Policy is unlawful.

Dated: April 26, 2024

Respectfully submitted,

/s/ Sara Rose

Sara Rose (PA ID No. 204936)
Stephen Loney, Jr. (PA ID No. 202353)
Andrew Christy (PA ID No. 322053)
Richard Ting (PA ID No. 200438)
AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA
P.O. Box 60173
Philadelphia, PA 19102
215-592-1513 x138
srose@aclupa.org
sloney@aclupa.org
achristy@aclupa.org
rting@aclupa.org

/s/ William Roark

William Roark (PA ID No. 203699)
HAMBURG, RUBIN, MULLIN, MAXWELL & LUPIN
1684 S. BROAD STREET
SUITE 230
P.O. BOX 1479
Lansdale PA 19446-0773
215-661-0400
wroark@hrmml.com

Counsel for Petitioners

CERTIFICATES OF COMPLIANCE

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

I hereby certify, pursuant to Pa.R.A.P. 2135, that this brief does not exceed 7,000 words.

/s/ *Sara Rose*
Sara Rose