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RECAP: *Montana Cannabis Industry Association v. State*: What is the Scope of Rational Basis Review in Montana?

Luc Brodhead

No. DA 15-0055 Montana Supreme Court

Oral Argument: Wednesday, November 4, 2015 at 9:30 AM in the Courtroom of the Montana Supreme Court, Joseph P. Mazurek Justice Building, Helena, Montana.

II. STUART SEGREST FOR APPELLANT

The Court's questions for Mr. Segrest focused on his perception of the Montana Marijuana Act's (MMA) legislative purpose. Specifically, the Court was interested in the significance of federal illegality as a legitimate legislative purpose. The Court also delved into the question of whether the MMA was designed to provide legal access to medical treatment or merely provides limited legal protection from prosecution.

Justice Mike Wheat jumped in to question the significance of federal illegality as a legislative purpose given the federal government's current deference to state medical marijuana and recreational use laws. In response, Mr. Segrest reasserted the central argument from his briefs that rational basis inquiry is limited to those concerns the Legislature had at the time of passing the act, pointing out that the federal government's deference has increased since 2011, after the MMA's passage.

Furthermore, Mr. Segrest observed that, back in 2011, the federal government had given the Legislature reasons to be concerned about federal illegality, noting that, in 2009, the federal government had distributed the Ogden Memorandum, which gave federal prosecutors discretion to prosecute marijuana offenses if they found that a state did not sufficiently regulate access. He also pointed out that the federal government raided Montana medical marijuana providers while the Legislature was deliberating in 2011. He ultimately relied on *Gonzolas v. Raich*,¹ which held that the Controlled Substances Act remains supreme over conflicting state laws. However, Mr. Segrest did concede that under the current federal policy and the current form of the MMA, federal prosecutors would probably not pursue charges in Montana.

Justice Mckinnon questioned the legitimacy of federal illegality as justification for the commercial ban when the remainder of the MMA also violates federal law. Mr. Segrest responded that the commercial market, in particular, created tension with federal law, especially

¹ 545 U.S. 1, 29 (2005).

considering the exponential growth of commercial sales in Montana between 2009 and 2011. He noted that the Legislature was particularly concerned with the criminal liability of state employees for aiding and abetting in those commercial sales.

Justice Mckinnon then asked about Mr. Segrest's position on the actual legislative purpose of the MMA, something she viewed as the underlying disagreement between the parties. Mr. Segrest asserted that the legislative purpose was to create a limited affirmative defense to prosecution, not to make medical marijuana a legal form of medical treatment. To support this, he pointed to the record of the Legislature's concern with abuses arising from the prior medical marijuana law, indicating intent to curb abuses by creating a more limited degree of legality.

Justice Shea then pointing out that these kinds of abuses could also seemingly justify a commercial ban of dangerous prescription medication. To make his point, he asked Mr. Segrest whether such a restriction on prescription medication would satisfy rational basis. Mr. Segrest countered that prescription drugs would require a different type of analysis. He asserted that they are not illegal federally, that they are available via prescription (versus "certification" under the MMA), and that they are more regularly used than medical marijuana.

Justice Baker took the discussion in another direction by pointing out that when the provisions within the commercial ban are separately analyzed, they lack a strong rational basis. She observed that, assuming the Legislature was concerned with large-scale production, banning remuneration to providers lacks a rational basis because the three-patient limit for providers and other limitations in the MMA already achieve that purpose. Mr. Segrest responded with his position on the scope of rational basis review, asserting that to even ask about the necessity of both provisions is irrelevant to rational basis inquiry. He relied on *Rohlf's v. Klemenhagen*,² where the Court held that weighing the necessity of a law or evaluating the quality of the Legislature's justification for a law exceeds the scope of rational basis review.

II. JAMES GOETZ FOR APPELLEE

The justices initially focused their questions to Mr. Goetz on his perception of the legislative purpose of the MMA. They also touched specifically on the district court's treatment of the 25-patient physician review trigger and the probationer ban.

Before, these questions came up, Mr. Goetz opened by addressing the vitality of rational basis review in Montana and the burden shifting that must occur. He asserted that the party challenging

² 227 P.3d 42, 48 (Mont. 2009).

constitutionality has the burden of showing that the provision treats similarly situated persons differently; then, the government has the burden of showing a legitimate state objective and showing that the law rationally relates to that objective. He further argued that under *Cottrill v. Cottrill Sodding Service*,³ the state must meet a more restrictive standard of review than under federal law. He added that under *Brewer v. Ski-Lift*,⁴ the Court may also consider the overbreadth of a statute in determining whether it satisfies rational basis. In other words, he argues that the Court may consider whether the statute is the least restrictive means of achieving the stated purpose.

Justice Baker redirected Mr. Goetz back towards Legislature's purpose for passing the MMA, specifically whether it was to provide legal medical care or to merely give cardholders legal protection. Mr. Goetz argued that this was not a helpful distinction, and he characterized the actual legislative purpose of the act as allowing access to marijuana to those who require it. He added that a secondary purpose of the act was to curb the perceived abuses of the prior medical marijuana law.

Having heard, Mr. Goetz's perception of the legislative purpose, Justice Shea put it to the test by asking how the 25-patient review trigger was not rationally related to the objective of preventing certification abuses. Mr. Goetz pointed out that, while the provision was perhaps rationally related to curbing abuses, it also had a chilling effect on doctors' willingness to certify cardholders and thus limited the more central legislative purpose of providing access to marijuana.

Chief Justice McGrath then addressed Mr. Goetz's facial challenge to the probationer ban and asked whether probationer access would be better challenged on a case-by-case basis. Mr. Goetz clarified that he agrees that probationer access should be determined on a case-by-case basis, but he argued that the probationer ban precludes this type of determination because, on its face, it is a blanket ban. He argued that, pursuant to *State v. Ashby*,⁵ the ban should only apply when a reasonable nexus exists between restricting access to medical marijuana and the probationer's underlying offense. Thus, the ban should be struck down for being facially unconstitutional.

III. MR. SEGREST'S REBUTTAL

Mr. Segrest first addressed Mr. Goetz's contention that the Court may consider whether the provisions at issue are the least restrictive means for achieving the Legislature's purpose. Mr. Segrest argued that, under rational basis review, no court should inquire into a law's tailoring or breadth. He distinguished this case from *Brewer* by pointing out that

³ 744 P.2d 895 (Mont. 1987).

⁴ 762 P.2d 226 (Mont. 1988).

⁵ 179 P.3d 1164 (Mont. 2008).

the legislative interest in that case was much less compelling than it was here, meaning that the Court had more discretion to consider the law's breadth.

Mr. Segrest then addressed Mr. Goetz's characterization of the MMA's legislative purpose. He initially conceded that part of the law's purpose was to provide limited access to marijuana but emphasized that access does not equate to commercial access. Backing up from this, he argued that the central purpose of the act was to curb abuses of the prior law and to address federal illegality, reminding the Court that the federal government was particularly concerned with Montana's commercial market.

Justice Shea then asked what the rational basis for the commercial ban would be if the Court were to uphold the remainder of the MMA. In response, Mr. Segrest stuck to his guns and argued that, even if the other provisions address the same purpose as the commercial ban, it is not the Court's job to review the necessity of the provisions, even when they have the same effect.

IV. PREDICTIONS

As already indicated, the Court's primary interest in this argument was the legislative purpose behind the MMA. Justice McKinnon in particular described this as the critical underlying dispute between the parties and insisted that both lawyers state their positions on the subject. Mr. Segrest relied heavily on avoidance of federal illegality as justification for the act, but the justices consistently questioned and took apart that idea. By Mr. Segrest's rebuttal, he had made the important concession that access to marijuana was, in fact, part of the MMA's underlying purpose, albeit *limited* and *noncommercial* access.

Mr. Goetz took the predictable position that providing access to marijuana was the main purpose of the act, acknowledging that curbing abuses was also a legislative concern. The justices did not take much time unpacking and questioning Mr. Goetz's argument, but it was still not obvious whether that signaled approval or disapproval of his position.

In its questions, the Court revealed concern over the district court's invalidation of the 25-patient physician review trigger. Both Justice Shea and Baker suggested in their questioning of Mr. Goetz that the Legislature had a legitimate purpose in controlling the standard of care for certifying doctors and that the provision seemed rationally related to that objective. Importantly, Mr. Goetz never denied that point. He only could make the unconvincing argument that the provision was still contrary to the purpose of providing access to marijuana.

The Court revealed a degree of support for the district court's invalidation of the commercial ban and suggested that they may uphold

that decision at least in part. As already mentioned, multiple justices questioned the significance of federal illegality as a justification for the MMA, and the justices' doubt arose specifically in the context of the commercial ban. If the justices do doubt the significance of federal illegality, then the State loses ground on its principle argument that the commercial ban is justified by that concern.

Justice Shea attacked the rational basis of the commercial ban by repeatedly comparing it to a commercial ban on pharmaceutical drugs. His focus on this point potentially reveals a belief that the Legislature arbitrarily chose to ban the commercial sale of marijuana and could as easily justified a ban on the sale of prescription drugs.

Justice Shea also revealed his doubts about the rational basis of the commercial ban when viewed in the context of the remaining provisions. As mentioned above, Mr. Segrest responded with his central argument that such an inquiry goes to the necessity of the provision in light of the act's other provisions and thus exceeded the scope of rational basis review.

It is important to note that Justices Shea, McGrath, Wheat, and Baker asked questions seemingly contradictory Mr. Segrest's position on the scope of rational basis review. He relied throughout the argument on the principle of a limited and deferential form of rational basis review. He asserted that rational basis does not depend on a provision's necessity in light of other provisions or in light of its current circumstances, nor does it depend on the provision's overbreadth in addressing the Legislature's objective.

However, the justices persisted in asking questions that implicated those exact concerns. Justice Wheat questioned the significance of avoiding federal illegality when the federal government has increasingly deferred to state law since 2011. Justice Baker and Justice Shea questioned the rational basis of the commercial ban by considering its necessity in light of other provisions. Justice Shea also questioned the Legislature's reasoning for the commercial ban by comparing it to a commercial ban on prescription drugs. All of these lines of questioning point towards a less deferential version of rational basis review than what the State has argued. That does not mean conclusively that the Court will permanently invalidate the commercial ban, but it suggests that they may be willing to review it in a manner consistent with the district court's approach.