

**State of Michigan
In the Supreme Court**

The People of the State of Michigan

Plaintiff-Appellee,

MSC No. 167895

COA No. 366148

v.

Montcalm County Circuit Court

Danielle Hess

Case No. 22-029309-AR

Defendant-Appellant.

**Danielle Hess's
Reply Brief**

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Arguments

I. Revoking probation or imposing a probation sanction because of a person’s MRTMA-compliant use of marijuana is a “penalty in any manner” and the denial of “any other right or privilege” within the meaning of Section 5.

A court’s finding that a person violated probation and its subsequent imposition of either a sanction or revocation and resentencing are inextricably linked. Without a probation violation, it is illegal for a court to sanction or resentence a probationer.¹ MCL 771.4(2); MCL 771.4b; MCR 6.445(G). The “granting of probation is a matter of grace,” but it is not without due-process protections once it is granted. MCL 771.4(1).

This means that the *probation violation* is the triggering event, not the underlying conviction, when a person is sanctioned or resentedenced. A court that sentences a person to probation has concluded probation is a sentence proportionate to the offense and the offender. *People v Steanhouse*, 500 Mich 453, 475 (2017). Once the court imposes a probation sentence, it cannot modify that sentence without finding that the sentence was legally invalid or that there was a violation. MCR 6.429(A); MCR 6.445(G).

Before a court sanctions or resentsences a person on probation, it must find that some new misconduct occurred after sentencing: a violation of probation. The court’s finding a violation occurred cannot be based on anything other than new misconduct alleged in a charged probation violation notice. MCL 771.4(4); see *People v McNeil*, 104 Mich App 24, 31 (1981); *People v Elbert*, 21 Mich App 677, 681 (1970).

¹ Unless the person on probation specifically requests their probation be revoked. MCL 771.4(2) (allowing revocation “upon request”).

When a court finds a violation, then, that charged misconduct is the reason the penalty of a sanction or resentencing is imposed and, sometimes, the privilege of probation is revoked. MCL 333.27955(1).

The plain language of MRTMA prohibits a court from basing those consequences on the MRTMA-compliant use or possession of marijuana. MCL 333.27954; MCL 333.27955(1). The prosecution proposes that probation violations don't fall within the protections of Section 5, because a probation violation "is not a crime and does not result in a criminal conviction." Pros Resp at 16 & n.27.

But Section 5 of MRTMA protects against more than criminal convictions. It prevents "penalty *in any manner*" and provides that compliant marijuana use or possession "are not grounds to deny *any other right or privilege*." MCL 333.27955(1) (italics added). When the MRTMA-compliant use or possession of marijuana triggers the revocation of probation, it acts as "grounds to deny" the "privilege" of probation. *People v Kaczmarek*, 464 Mich 478, 483 (2001) (revocation "clears the way for resentencing on the original offense"). Similarly, a probation sanction is a "penalty in any manner" that punishes MRTMA-compliant behavior. As the plain text of the probation statute makes clear, the probation sanction punishes the violation: "a probationer who commits a technical probation violation and is sentenced to temporary incarceration may be incarcerated *for each technical violation*." MCL 771.4b(1) (italics added).

A probation violation can also increase the penalty at resentencing, even though the sentence imposed punishes the underlying conviction. MCL 771.4(5). The "sentencing court is not precluded from considering events surrounding the probation violation when sentencing the defendant on the original offense." *People v Hendrick*, 472 Mich 555, 557

(2005). A court may consider the violation and the person’s performance on probation when deciding whether to depart from the guidelines. *Id.* at 563. A court may even base a departure on the mere existence of the “probation violation itself” as “an affront to the court” and “worthy of independent consideration,” rather than “focus[ing] exclusively on the underlying conduct” that resulted in the violation. *People v Schaafsman*, 267 Mich App 184, 185-186 (2005).

Ms. Hess’s case demonstrates how a probation violation predicated on MRTMA-compliant behavior can snowball into additional penalties and lost privileges. Ms. Hess was charged with retail fraud, a nonserious misdemeanor for which the Legislature imposed a rebuttable presumption that her sentence would be “a fine, community service, or other nonjail or nonprobation sentence.” MCL 769.5(3)²; see MCL 780.811 (defining serious misdemeanors). The district court found probation and HYTA were “appropriate” at sentencing, since Ms. Hess had “no criminal record.” 40a-41a. This was a proportionate sentence: it balanced the presumption of a lesser sentence for a nonserious misdemeanor against the benefit of HYTA, which required probation but would result in dismissal of the case upon successful completion. MCL 762.13(3); MCL 762.14(1).

The event that triggered the revocation of that sentence and the imposition of 10 days’ jail was Ms. Hess’s MRTMA-compliant recreational use of marijuana. 48a, 66a-67a. The revocation of HYTA and probation was in itself the loss of privilege caused by MRTMA-

² The amendment enacting this presumption took effect in March 2021. 395 PA 2020. Ms. Hess pleaded guilty in August 2021, 32a, and was sentenced in September 2021, 40a.

compliant behavior. Then the violation factored into Ms. Hess’s penalty at resentencing when the district court fashioned an “upward departure” from the presumed nonjail, nonprobation sentence. MCL 769.5(3); see *People v Mason*, __ Mich App __ ; __ NW3d __ (2024) (Docket No. 372327); slip op at 4. Ms. Hess had completed counseling, paid all but \$195 of the \$1,175 she owed in fines and costs, and never missed a court date. 8a, 79a-80a, 82a. The prosecution explicitly argued that twice using marijuana “knowing she wasn’t supposed to . . . warrants the loss of her [H]YTA status and a stay in jail.” 79a. And the district court observed that Ms. Hess “knew . . . at the time she was placed on probation, this [marijuana prohibition] was a condition.” 78a. In a case where Ms. Hess had no previous criminal convictions and committed no new crimes, paid \$980 in fines, and completed court-ordered counseling, the district court’s only basis to rebut the presumption that Ms. Hess should not be jailed was that she had violated probation by using recreational marijuana. Ms. Hess was directly penalized for MRTMA-compliant behavior.

The same protections apply to a person on probation for conduct that violated MRTMA. MRTMA only authorizes punishment for conduct enumerated in Section 4. MCL 333.27954; MCL 333.27955(1). The statute never authorizes additional penalty or loss of privilege for lawful behavior because a person previously violated MRTMA. *Lopez-Hernandez* illustrates the problem. *People v Lopez-Hernandez*, __ Mich App __ ; __ NW3d __ (2024) (Docket No. 367731). The district court concluded that 2 days’ jail and 6 months’ probation was a proportionate sentence for driving under the influence of marijuana, conduct not authorized or protected by MRTMA. *Lopez-Hernandez*, slip op at 1; MCL 333.27954(1)(a). Later, the court charged Mr. Lopez-Hernandez with two technical violations for testing positive for marijuana. *Lopez-*

Hernandez, slip op at 1. Those technical violations were predicated on MRTMA-compliant behavior. Mr. Lopez-Hernandez’s MRTMA-violative behavior had already been prosecuted and sentenced—it could not serve as the basis for resentencing or additional penalty without a probation violation. As with Ms. Hess, the triggering event was the MRTMA-compliant use of marijuana. MRTMA’s Section 4 and Section 5 prohibit that outcome. See Ms. Hess’s Supp Br at 25-27.

The prosecution’s other arguments do not overcome the statute’s plain language. The voters did not abrogate the probation statute “by implication,” Pros Resp at 11, they did so explicitly with Section 4: “All other laws inconsistent with this act do not apply to conduct that is permitted by this act.” MCL 333.27954(5); see also MCL 333.27955(1) (“Notwithstanding any other law”). Nor does MRTMA prohibit pregnant people from smoking marijuana; it requires a warning label on marijuana products. MCL 333.27958(1)(e)(iv). And the conflict MRTMA poses to specialty courts who receive federal funding must be resolved by the Legislature following the procedure set forth in Article 2, § 9, of our Constitution—as the Legislature swiftly did when it amended the MMMA following *Thue* to permit the regulation of medical marijuana in specialty treatment courts. 186 PA 2022; MCL 333.26427(e).

The voters of this State passed MRTMA by ballot initiative, a procedure that receives “special emphasis on the duty of judicial restraint.” *People v Hartwick*, 498 Mich 192, 210 (2015). The prosecution’s preference to regulate marijuana on probation is a judgment on “the wisdom of the [recreational] use of marijuana in Michigan.” *Id.* It is not “derived from the plain language of the statute,” *id.*, whose text plainly provides that a court may not punish a person or revoke a privilege because they lawfully used recreational marijuana while on probation.

II. A person sentenced to probation cannot be forced to comply with unlawful probation conditions.

A trial court's authority to impose probation conditions is not unlimited. There is no legal support for the prosecution's argument that a person can be required to obey an unlawful probation condition or that unlawful probation conditions should be "equitably enforced" against our citizens. Pros Resp at 17-20. A person cannot consent to be bound by an unlawful condition.³

A court may impose "*lawful* conditions of probation." MCL 771.3(3) (italics added); *People v Johnson*, 210 Mich App 630, 634 (1995). "Only if conditions are unlawful will the judge's determination be disturbed." *People v Miller*, 182 Mich App 711, 713 (1990).

Michigan courts have never held that people on probation are contractually bound to follow unlawful conditions. This question was squarely presented in *Higgins*, where a college basketball player

³ To the extent the prosecution implies Ms. Hess waived her right to challenge her conditions, see Pros Resp at 18, they abandoned this argument by not raising it in the district court or on appeal to the circuit court. *Gross v Gen Motors Corp*, 448 Mich 147, 161 n.8 (1995); *People v Walker*, 504 Mich 267, 276 n.3 (2019). And it is without merit. A person sentenced to probation has two opportunities to appeal their probation conditions: immediately after sentencing or at the time their probation is revoked. *People v Pickett*, 391 Mich 305, 316 (1974); see *People v Ford*, 410 Mich 902 (1981); *McNeil*, 104 Mich App at 26; *People v Pinkney*, unpublished per curiam opinion of the Court of Appeals, issued July 14, 2009 (Docket Nos 282144, 286992), unpub op at p34.

pleaded guilty to breaking and entering. *People v Higgins*, 22 Mich App 479, 481 (1970). At sentencing, the trial judge added a special condition that Mr. Higgins play no college or professional basketball for five years. *Id.* The Court of Appeals rejected the prosecution’s argument that Mr. Higgins had consented to the condition, acknowledging the inherently coercive nature of probation “contracts”: “[Mr. Higgins] could understandably have believed that if he did not accept the probation terms as set down by the trial judge, the offer of probation would be revoked and he would be sent to jail.” *Id.* The appellate court concluded the condition was unlawful and eliminated it. *Id.* at 482. Once a trial court “decides to order probation rather than imprisonment the conditions he imposes on such probation must be lawful.” *Id.* at 481.

Likewise, a trial judge in *Heil* imposed a probation condition that Mr. Heil annually pay the victim’s wife half of her deceased husband’s salary. *People v Heil*, 79 Mich App 739, 741 (1977). Mr. Heil initially agreed, but appealed and challenged the condition after his probation was revoked for failure to make those payments. *Id.* Because the ordered payments were not lawful restitution, the Court of Appeals reinstated probation: “[R]evocation of probation may not be based on failure to comply with these unlawful conditions.” *Id.* at 748-749.

Recently, in *Pinkney*, a trial judge imposed at sentencing a condition that prohibited “defamatory and demeaning behavior.” *People v Pinkney*, *supra* unpub op at p33.⁴ Mr. Pinkney did not object, but later

⁴ Ms. Hess cites *Pinkney* with the knowledge that unpublished opinions are not precedential. MCR 7.215(C)(1). Because appeals of probation conditions are infrequent and precedential cases are few, *Pinkney* is instructive. *Cox v Hartman*, 322 Mich App 292, 228 (2017).

had his probation revoked for writing an inflammatory op-ed criticizing the judge. *Id.* at p37. The Court of Appeals held the condition was unlawful and concluded: “Because this prohibition was not proper, the trial court abused its discretion in revoking the defendant’s probation based on a violation of the prohibition.” *Id.* Probation was reinstated. *Id.*

In all of these instances, a person “consented” to an unlawful condition at sentencing and entered into probation. Consent does not exonerate an unlawful probation condition.

If the condition is unlawful, failure to comply with it is not a probation violation and not grounds for revoking probation. Ms. Hess is entitled to reinstatement of HYTA and reinstatement of probation because her failure to comply with the district court’s conditions prohibiting MRTMA-compliant marijuana use were unlawful.

Conclusion and Relief Requested

For the reasons stated above, Danielle Hess respectfully requests that this Honorable Court grant the relief requested herein.

Respectfully submitted,

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