Summaries of Published Opinions

November 4, 2019

2019 CO 89. No. 14SC282. Melton v. People. *Proportionality Review—Per Se Grave or Serious Crimes—Habitual Criminal Punishment.*

In this case and two companion cases, the Supreme Court considered multiple issues that lie at the intersection of proportionality review and habitual criminal punishment. Consistent with *Wells-Yates v. People*, the lead case, the Court held that: (1) possession of schedule I and II controlled substances is not per se grave or serious; and (2) in determining the gravity or seriousness of the triggering and predicate offenses during an abbreviated proportionality review, the court should consider any relevant legislative amendments enacted after the dates of those offenses, even if the amendments do not apply retroactively. Additionally, the Court held that theft is not a per se grave or serious offense.

Because the Court of Appeals reached different conclusions, its judgment was reversed. And, because additional factual determinations are necessary to properly address defendant's proportionality challenge, the case was remanded with instructions to return it to the trial court for a new proportionality review.

2019 CO 90. No. 16SC592. Wells-Yates v. People. *Proportionality Review—Per Se Grave or Serious Crimes—Habitual Criminal Punishment.*

In this case and two companion cases, the Supreme Court considered multiple issues that lie at the intersection of proportionality review and habitual criminal punishment. In the process, the Court endeavored to shed light on these areas of the law and to correct a few misstatements that appear in the case law.

The Court held that: (1) during an abbreviated proportionality review of a habitual criminal sentence, the court must consider each triggering offense and the predicate offenses together and determine whether, in combination, they are so lacking in gravity or seriousness as to raise an inference that the sentence imposed on that triggering offense is grossly disproportionate; (2) in determining the gravity or seriousness of the triggering offense and the predicate offenses, the court should consider any relevant legislative amendments enacted after the dates of those offenses, even if the amendments do not apply retroactively; (3) not all narcotic offenses are per se grave or serious; and (4) the narcotic offenses of possession and possession with intent are not per se grave or serious. Because the Court of Appeals' decision is at odds with this opinion, its judgment was reversed. Accordingly, the case was remanded with instructions to return it to the trial court for further proceedings consistent with this opinion.

2019 CO 91. No. 16SC753. People v. McRae. *Proportionality Review—Per Se Grave or Serious Crimes—Habitual Criminal Punishment.*

In this case and two companion cases, the Supreme Court considered multiple issues that lie at the intersection of proportionality review and habitual criminal punishment. Consistent with *Wells-Yates v. People*, the lead

case, the Court held that, in determining the gravity or seriousness of triggering and predicate offenses during an abbreviated proportionality review, the court should consider any relevant legislative amendments enacted after the dates of those offenses, even if the amendments do not apply retroactively.

Although the Court of Appeals reached a similar conclusion, it erred in failing to recognize that, rather than considering relevant prospective legislative amendments enacted after the dates of the triggering and predicate offenses, the trial court actually applied those amendments retroactively. Therefore, its judgment was reversed. And, because additional factual determinations are necessary to properly address defendant's proportionality challenge, the case was remanded with instructions to return it to the trial court for a new proportionality review.

November 12, 2019

2019 CO 92. No. 18SC621. Doe v. Colorado Department of Public Health and Environment. *Administrative Law—Open Meetings Law—State Administrative Procedure Act—Medical Marijuana.*

Consistent with Medical Marijuana Policy No. 2014-01 (the Referral Policy), which the Colorado Department of Public Health and Environment (CDPHE) developed after receiving input from staff of the Colorado Medical Board (the Board), the CDPHE referred John Does 1–9 (the Doctors) to the Board for investigation of unprofessional conduct regarding the certification of patients for the use of medical marijuana. The Doctors then filed the present action, contending, among other things, that (1) the Referral Policy was void because it was developed in violation of the Colorado Open Meetings Law (OML), CRS § 24-6-402, and (2) both the Referral Policy and the referrals to the Board constituted final agency actions under the State Administrative Procedure Act (APA), CRS §§ 24-4-101 to -108, and the CDPHE did not follow the procedures outlined therein, thereby rendering both the Referral Policy and the referrals void.

The Supreme Court concluded that (1) an entire state agency cannot be a "state public body" within the meaning of the OML, and therefore the Doctors have not established that the CDPHE violated the OML; (2) the Referral Policy is an interpretive rather than a legislative rule, and therefore it falls within an exception to the APA and was not subject to the APA's rulemaking requirements; and (3) the act of referring the Doctors to the Board did not constitute final agency action and therefore was not reviewable under the APA.

The Court of Appeals' judgment was affirmed.

2019 CO 93. No. 18SC330. Colorado Medical Board v. McLaughlin. *Administrative Law—Colorado Medical Board—Disciplinary Procedures—Subpoenas.*

The Supreme Court was asked to determine whether an investigative subpoena issued by the Colorado Medical Board (the Board) can have a lawfully authorized purpose if the investigation was prompted by a complaint made by the Colorado Department of Public Health and Environment (CDPHE) pursuant to a policy that violated the Open Meetings Law (OML) or the State Administrative Procedure Act (APA).

In *Doe v. Colorado Department of Public Health & Environment*, 2019 CO 92, __ P.3d __, decided the same day, the Court concluded that (1) the CDPHE, as a state agency, is not a "state public body" under the OML and therefore could not violate that statute, and (2) the CDPHE did not violate the APA in developing the policy at issue or in referring doctors to the Board under that policy. For this reason alone, the Court necessarily rejected respondent's argument that the investigative subpoena lacked a lawfully authorized purpose because it was based on a policy that violated the OML and the APA. However, the Court concluded that even if the CDPHE's adoption of the policy at issue and its reliance on it were invalid, the Board's investigative subpoena had a lawfully authorized purpose because it was issued pursuant to the Board's statutory authority to investigate allegations of unprofessional conduct and was properly tailored to that purpose.

The Court of Appeals' judgment was reversed and the case was remanded for further proceedings consistent with this opinion.

2019 CO 94. No. 18SC331. Boland v. Colorado Medical Board. *Administrative Law—Colorado Medical Board—Disciplinary Procedures—Subpoenas.*

In this companion case to *Colorado Medical Board v. McLaughlin*, 2019 CO 93, __ P.3d __, decided the same day, the Court was asked to determine whether an investigative subpoena issued by the Colorado Medical Board (the Board) can have a lawfully authorized purpose if the investigation was prompted by a complaint made by the Colorado Department of Public Health and Environment (CDPHE) pursuant to a policy that violated the Open Meetings Law (OML) or the State Administrative Procedure Act (APA).

For the reasons articulated in *McLaughlin*, ¶¶ 22 to 37, the Court concluded that because the CDPHE, as a state agency and not a "state public body," could not violate the OML and

did not violate the APA in developing the policy at issue or in referring doctors to the Board under that policy, petitioner's argument that the investigative subpoena lacked a lawfully authorized purpose because it was based on a policy that violated the OML and the APA is based on a flawed premise and is therefore unpersuasive. However, the Court concluded that even if the CDPHE's adoption of the policy at issue and its reliance on it were invalid, the Board's investigative subpoena had a lawfully authorized purpose because it was issued pursuant to the Board's statutory authority to investigate allegations of unprofessional conduct and was properly tailored to that purpose.

The Court of Appeals' judgment was affirmed and the case was remanded for further proceedings consistent with this opinion.

November 18, 2019

2019 CO 95. No. 18SC84. Walton v. People. *Statutory Interpretation—Plain Language—Probation—Medical Marijuana.*

In this opinion, the Supreme Court reviewed a district court's review of a county court's interpretation and application of CRS § 18-1.3-204(2)(a)(VIII). The Court held that the statute's plain language creates a presumption that a defendant who is sentenced to a term of probation may use medical marijuana unless one of the enumerated exceptions applies. The prosecution bears the burden of overcoming the presumption. The relevant exception in this case requires the court to make particularized findings, based on material evidence, that prohibiting defendant's otherwise-authorized medical marijuana use is necessary and appropriate to promote statutory sentencing goals. Because the county court made no such findings here, the Court disapproved of the district court's order affirming the county court's decision.

2019 CO 96. No. 16SC508. Fransua v. People. *Criminal Law—Sentencing and Punishment—Presentence Confinement Credit.*

In this case, the Supreme Court addressed two issues related to the calculation of a defendant's credit for presentence confinement. First, the Court concluded that when a defendant who is out of custody on bond in one case commits another offense and is unable to post bond in that second case, the defendant is not entitled to presentence confinement credit (PSCC) in the first case for time spent in custody for the second case. Second, the Court held that a defendant is entitled to PSCC for both the first and last days of his or her presentence confinement. Accordingly, the Court affirmed the Court of Appeals' judgment and remanded the case for correction of the amount of PSCC awarded to defendant consistent with this opinion.

2019 CO 97. No. 17SC570. People v. Baker. *Criminal Law—Sentencing and Punishment—Presentence Confinement Credit.*

The Supreme Court held that a motion to correct the amount of presentence confinement credit (PSCC) awarded to a defendant is not appropriately framed as a Crim. P. 35(a) claim that a sentence was "not authorized by law." An error in PSCC does not render a sentence "not authorized by law" because PSCC is not a component of the sentence. Rather, it is credit earned for time served prior to sentencing that is later applied against the sentence. Accordingly, the Court reversed the Court of Appeals' judgment and remanded the case with instructions to return it to the district court for correction consistent with this opinion. CL

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