No. 31158-9-III
Whitman County Superior Court No. 11-1-00074-0

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,
Plaintiff-Appellee,
v.

TYLER MARKWART,
Defendant-Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR WHITMAN COUNTY

The Honorable David Frazier, Judge

APPELLANT'S REPLY BRIEF

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I. REPLY ARGUMENTS

A. THERE WAS PRIMA FACIE EVIDENCE THAT MARKWART MET THE REQUIREMENTS OF A DESIGNATED PROVIDER UNDER THE MEDICAL MARIJUANA ACT, RCW 69.51A

The State fails to address *State v. Ginn*, 128 Wn. App. 872, 878, 117 P.3d 1155 (2005), *rev. denied*, 157 Wn.2d 1010, 139 P.3d 349 (2006); *State v. Adams*, 148 Wn. App. 231, 235, 198 P.3d 1057 (2009); *State v. Brown*, 166 Wn. App. 99, 269 P.3d 359 (2012); and *State v. Otis*, 151 Wn. App. 572, 213 P.3d 613 (2009). Those cases stand for the proposition that a defendant need only make a prima facie showing to raise a Medical Marijuana defense. And nothing in those cases states that the showing must come from evidence gathered by the defendant. Here, the evidence was crystal clear that Markwart believed he was acting within the law as a designated Medical Marijuana provider.

The trial court erred in this case, however, by misinterpreting the law and making factual findings that should have been left to the jury.

First, the trial judge found that, as a matter of law, Markwart could not avail himself of the defense because the documents presented to him during the undercover operation were "counterfeit." 12/2/11 RP 63. But there was no evidence Markwart knew they were fake. Nothing in the statute requires him to confirm their validity. Thus, the question of whether Markwart's defense was valid was a jury question. Clearly, the

State could have argued that Markwart knew or had reason to know that he was not operating within the Act. But the trial judge was not permitted to make this finding as a matter of law.

Similarly, Markwart was entitled to have the jury decide if he intended to deliver marijuana outside the confines of the Act, when he met with Detective Aase. 12/2/11 RP 64. It was the jury, not the judge, who should have decided if Markwart was acting in good faith when he first met with Aase, but then refused to provide him with marijuana.

And, finally, as to the manufacturing charge, the judge rejected the defense on what is now a clear misreading of the law. He said

> And as far as the manufacturing charge is concerned, which is also alleged to have occurred at the time the search warrant was issued on April 19, 2011, I am finding as a matter of law here that the affirmative defense of being a designated provider cannot apply in that case because at the time that the – what's been referred to as a grow operation was discovered and seized, that, in addition to the marijuana that was seized, that the police seized – in one place it says 17 and in another place it says 15 – and I believe it's 15 because there were some duplicates 15 individual care provider designation forms that were in the residence and in Mr. Markwart's possession. And the law, in order to be a designated provider, very clearly provides that you can only be the provider for one qualifying patient any one time.

12/2/11 RP 65.

State v. Shupe, 172 Wn. App. 341, 289 P.3d 741 (2012), *review denied*, 177 Wn.2d 1010, 302 P.3d 180 (2013), considered the meaning of

the phrase "only one patient at any one time" as used in RCW 69.51A.010(1)(d). This Court concluded that the phrase means one transaction after another so that each patient gets individual care. Thus, the trial judge misinterpreted the statute. Markwart can have as many designations as he wants so long as he gives marijuana to only one patient at a time. The State had no evidence whatsoever that Markwart provided marijuana to more than one patient at a time. Each of the controlled buys involved only one undercover officer or informant.

Thus, the State is incorrect when it attempts to argue that Markwart failed to provide competent admissible prima facie evidence of this defense to the trial judge. He should have been permitted to instruct the jury on the defense.

B. THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY REGARDING THE ENTRAPMENT DEFENSE

Similarly, the jury in this case was entitled to determine whether the crime arose in the mind of the detectives or the mind of the defendant. It is absolutely true that Markwart is an outspoken proponent of Medical Marijuana. But it is perfectly legal to support the statute and efforts to implement the law. The evidence is also clear that Markwart was attempting to follow the law and, but for the trickery engaged in by the police, was doing so. There is also evidence that the police did not merely

"afford the accused an opportunity to commit the offense." Instead the police devised a way to trick Markwart into violating the law because they were hostile to him and, apparently, to the Medical Marijuana Act.

C. THE STATE FAILS TO ESTABLISH THAT THE FINE IMPOSED IN THIS CASE WAS NOT EXCESSIVE

The State fails to rebut Markwart's legal arguments on this issue. The State's sole comment is "the trial court made a specific finding that the fine was directly tied to the illegal activity for which Mr. Markwart has been convicted." State's Brief at 14. Apparently, this is a reference to the court's conclusion that the fine would be a "deterrent to efforts to exploit this law for personal financial gain." 8/24/12 RP 370-71.

But nothing in the Medical Marijuana Act requires designated providers to give Medical Marijuana away. The actual cultivation requires a capital investment. Thus, it is entirely reasonable to charge for a legal activity. Moreover, the evidence is that Markwart was not making much money at all. At most, he "made" $1,000 on the four police-initiated purchases in this case. The record does not reveal how much of that was "profit." Nonetheless, a fine of $10,000 for a "crime" that netted $1,000 is excessive.

II. CONCLUSION

This Court must reverse.

DATED this 28th day of August, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by First Class United States Mail, postage prepaid, one copy of this brief on the following:

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