31280-1-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DANIEL K. ELLIS, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I.

ASSIGNMENTS OF ERROR

1. The trial court erred in concluding that "[b]ased on the state of the law, as it currently exists, the search warrant was valid." Conclusion of Law No. 6, CP 36.

2. The trial court erred in concluding that "[l]aw enforcement was lawfully allowed to search the home and gather evidence." Conclusion of Law No. 7, CP 36.

3. The trial court erred in denying Mr. Ellis' motion to suppress evidence that was illegally seized. Conclusion of Law No. 8, CP 36.

II.

ISSUE

A. HAS THE DEFENDANT SHOWN THAT THE POLICE COULD NOT EXECUTE A SEARCH WARRANT (AFTER SMELLING MARIJUANA) BECAUSE THE OWNER OF THE PREMISES MIGHT HAVE HAD A MEDICAL MARIJUANA CARD?

III.

STATEMENT OF THE CASE

For the purposes of this appeal, the State accepts the defendant's reproduction of the Findings of Fact as noted in the defense brief.

IV.

ARGUMENT

A. THE DEFENDANT HAS NOT SHOWN THAT THE PRESENCE OR ABSENCE OF A MEDICAL MARIJUANA CARD AND LEGISLATION IN *STATE V. FRY* INVALIDATES PROBABLE CAUSE ON A SEARCH WARRANT.

The defendant begins his arguments by stating the incorrect standard for review. The defendant cites to *State v. Apodaca*, 67 Wn. App 736, 739, 839 P.2d 352 (1992) which was overruled. *Apodaca* cites to *State v. Mennegar*, 114 Wn.2d 304, 310, 787 P.2d 1347 (1990) which was also overruled. *Mennegar* cites to *State v. Daugherty*, 94 Wn.2d 263, 616 P.2d 649 (1980) which was also overturned.

Thus the defendant's argument that the trial court's findings of fact are reviewed under a substantial evidence standard is based on three cases which the defendant fails to note have been overruled in whole or in part. The correct standard here comes from *State v. Hill*, 123 Wn.2d 641, 870 P.2d 313 (1994). According to the Court in *Hill:* "It is well-established law that an unchallenged

finding of fact will be accepted as a verity upon appeal." *Hill* at 644. The State is unable to locate any defense challenges to the facts as found by the trial court. Quite to the contrary of the defendant's position, the findings of facts in this case are verities on appeal and should not be reviewed by the appellate court.

An affidavit supporting a search warrant is presumed valid. *State v. Atchley*, 142 Wn. App. 147, 157, 173 P.3d 323 (2007).

"When an officer who is trained and experienced in marijuana detection actually detects the odor of marijuana, this by itself provides sufficient evidence to constitute probable cause justifying a search." *State v. Olson*, 73 Wn. App. 348, 356, 869 P.2d 110 (1994). This was the situation here. Deputy Mark Brenner (one of the officers providing information) is trained in the detection of the odor of marijuana. CP 55.

The defendant cites to no authority that the presence of a medical marijuana authorization card negates probable cause in a search warrant situation. The defendant's arguments on the legitimacy of a search warrant are not logical. The State asks: "How do the police know the amount of marijuana being grown or whether the owner possesses a valid medical marijuana card?" Marijuana is an illegal substance despite legislation permitting the use, growing and possession of marijuana for medical purposes. The police cannot logically be prevented from searching a designated site because the marijuana detected at the site *might* be covered by a medical marijuana card. The amount of marijuana possessed is

relevant and unknowable to police unless a search warrant is executed. Even the validity of the medical marijuana card may be subject to question. In any event, the card is not available to the police from outside a building suspected of containing marijuana. The search warrant must be executed before any questions of legality can be addressed.

"As an affirmative defense, the compassionate use defense does not eliminate probable cause where a trained officer detects the odor of marijuana. A doctor's authorization does not indicate that the presenter is totally complying with the Act; e.g., the amounts may be excessive. An affirmative defense does not per se legalize an activity and does not negate probable cause that a crime has been committed." *State v. Fry*, 168 Wn.2d 1, 10, 228 P.3d 1 (2010).

The defendant appears to hope that the Washington State Supreme Court decision in *State v. Fry* will be changed by the Court. The defendant points out that the legislature has changed the medical marijuana laws and the defendant would like to see *Fry* changed to reflect those legislative enactments. Unfortunately for the defendant, the Supreme Court has not seen fit to do that as of yet. The appeals court, before which the defendant finds himself, must follow the law as handed down by the Washington State Supreme Court. *See State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984). *Fry* is controlling in this case and as of the date of the filing of this brief, *Fry* is still "good law."

The officers executed a properly constituted search warrant and discovered the firearm that the defendant's criminal history prevented him from possessing.

V.

CONCLUSION

For the reasons stated previously, the State respectfully requests that the defendant's conviction be affirmed.

Dated this 17th day of May, 2013.

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