NO. 322823

**COURT OF APPEALS, DIVISION III**
**OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,
Plaintiff/Respondent,

v.

JUSTIN ROSE,
Defendant/Petitioner.

# OPENING BRIEF

KRAIG GARDNER
WSBA #31935
309 N. 6th Ave
Yakima, WA 98902
(509) 406-3849
kraiggardner@yahoo.com

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## I. INTRODUCTION

This case concerns the application of the criminal savings clause RCW 10.01.040, on prosecutions for marijuana offenses that were pending at the time that the legislation approved by Initiative 502, decriminalizing marijuana became effective on December 6, 2012. In other words, did the operation of law terminate pending prosecutions for minor marijuana offenses when I 502 took effect.

## II. ASSIGNMENT OF ERROR

The trial court denied Mr. Rose's motion to dismiss this case as a result of the passage and effective date of I 502. The Superior Court affirmed the denial of the motion on appeal. This is the sole assignment of error in this case. Therefore the only issue before this court on appeal is whether, for cases

that were pending after the effective date of I 502, codified in RCW69.50.101 does the general criminal savings clause preserve those cases for prosecution. Expressed differently, does the intent of the people, expressed in the language of I 502, prevent the State from continuing prosecution of those cases despite the general savings clause.

## III. STATEMENT OF THE CASE

On June 26th 2012, Justin Rose, appellant, was charged with possession of marijuana less than 40 grams and use of drug paraphernalia in violation of RCW 69.50.401 and RCW 69.50.412.1 respectively. On October 30, 2012 the defendant entered into a stipulated order of continuance which continued the case in pretrial status for one year. This agreement contemplated the dismissal of the charges after one year if Mr. Rose fulfilled his obligations under the agreement. On January 7, 2013 a motion and certification for review of the conditions of the stay was filed in the District Court. At a hearing on

February 28, 2013, Mr. Rose stipulated that he had not fulfilled the conditions and the prosecution moved to revoke the stay. The court found Mr. Rose guilty and set sentencing over. On March 13, 2103, Mr. Rose filed a motion to dismiss the charge based upon the passage and effective date of Initiative 502, which decriminalized adult possession and use of small amounts of marijuana. A hearing was held on April 4, 2013 wherein the district court heard argument on the matter. The court issued a memorandum decision denying the motion to dismiss. Sentencing was held on May 9, 2013 and a notice of appeal was presented to the court at the conclusion of that hearing.

Meanwhile..... during the pendency of the case in the district court, the people of the State of Washington passed Initiative 502 on November 6, 2012. The provisions of the initiative became effective 30 days later on December 6, 2012. Those provisions are now codified into RCW title 69. It is Mr.

Rose's position that the initiative and the statutory provisions that it enacted nullified pending prosecutions for the offense he was charged with when the initiative's effective date occurred.

## IV. LAW AND ARGUMENT

### A. The intent of Initiative 502 was to end the prosecution of adults for marijuana possession and use.

The first Sentence of I 502 expresses the intent of the legislation. It reads:

> The people intend to stop treating adult marijuana usage as a crime and try a new approach that:
>
> (1) Allows law enforcement resources to be focused on violent and property crimes;
> (2) Generates new state and local tax revenue for education, health care, research, and substance abuse prevention; and
> (3) Takes marijuana out of the hands of illegal drug organizations and brings it under a tightly regulated, state-licensed system similar to that for controlling hard alcohol.
>
> Initiative 502, now codified at RCW69.50.101.

The most important portion of the stated intent of I 502 for the purposes of this appeal is of course the first clause of the first sentence which unambiguously proclaims that:

**The people intend to stop treating adult marijuana usage as a crime...**

Id.

The other portions of the intent section may contain a statement of what else the initiative is intended to do, or may contain a statement of how the legislation intends to carry out the implementation of the intended cessation of criminal prosecutions, but the intent of the legislation regarding the prosecution of persons that had occurred before the passage and effective date of the initiative is clear. It was to stop.

It is also important to note that "use of marijuana" was never a criminal offense in the State of Washington. The prohibition on use of marijuana had been accomplished

through the prohibition of possession of the plant and through a prohibition on the use of paraphernalia. In other words, the prohibition on use of marijuana had been carried out by enforcement of the exact crimes with which Mr. Rose was charged.

B. The general criminal savings statute does not apply to the law as amended by I 502 because the intent of the legislation regarding the effect on pending prosecutions is fairly stated.

The State will argue that Mr. Rose's prosecution is saved by the general criminal savings clause, RCW 10.01.040. The default rule is that when the law changes, all prosecutions for that offense cease as a matter of law. That is the common law rule. In order to prevent the inadvertent termination of prosecutions, the legislature enacted the savings clause. However, because the savings clause is in derogation of the common law, it is strictly construed. Washington Courts have applied these concepts by stating that it is not

necessary for a new statute to expressly state that it should terminate current prosecutions. The new provision must merely contain "words that fairly convey that intention."

A leading case applying these principles, and, helpfully, explaining them is *State v. Kane*, 101 Wash.App. 607, 5 P.3d 741 (Wash. App., 2000). A close reading of the *Kane* case demonstrates that the criminal savings clause, RCW 10.01.040 does not save Mr. Rose's prosecution. In fact, the *Kane* case requires dismissal of the charges in this case.

The analysis in the *Kane* case begins by identifying RCW 10.01.040 as the proper focus and cites the statute in detail. *Kane* 5 P.3d at 743. Kane then explains that the savings statute is in derogation of the common law.

> The saving statute, enacted in 1901, departs from the common law. The common law regards a repealed statute as if it had never existed except as to matters and transactions past and closed. Under

> the common law rule, all pending cases must be decided according to the state of the law "at the time of the decision." State v. Zornes, 78 Wash.2d 9, 12, 475 P.2d 109 (1970), overruled on other grounds in United States v. Batchelder, 442 U.S. 114, 99 S.Ct. 2198, 60 L.Ed.2d 755 (1979). In derogation of the common law, the saving statute preserves a potential or pending prosecution from being abated, perhaps inadvertently, by the Legislature's later act of repealing or amending the substantive law defining the offense or fixing its penalty. "Unless the later statutes clearly manifest a different intention, this general saving clause is deemed a part of every repealing statute as if expressly inserted therein, and hence renders unnecessary the incorporation of an individual saving clause in each statute which amends or repeals an existing penal statute." State v. Hanlen, 193 Wash. 494, 497, 76 P.2d 316 (1938); see also State v. Walker, 7 Wash.App. 878, 882, 503 P.2d 128 (1972). In the absence of a contrary expression from the Legislature, all crimes are to be prosecuted under the law existing at the time of their commission. State v. Lorenzy, 59 Wash. 308, 309, 109 P. 1064 (1910).

*Kane*, 5 P.3d at 743.

This point, that the savings statute is in derogation of the common law, is crucial. As the decision in *Kane* points out; "Because RCW 10.01.040 is in derogation of the common law, it is strictly construed." Id., citing *Zornes*, 78

Wash.2d at 13, 475 P.2d 109. The *Kane* court explains how this is to be applied by the courts.

" Because RCW 10.01.040 is in derogation of the common law, it is strictly construed. The saving force of the statute is applied narrowly and its exception—"unless a contrary intention is expressly declared in the amendatory or repealing act"—is interpreted broadly. **Thus, our Supreme Court has not insisted that a legislative intent to affect pending litigation be declared in express terms in a new statute. Rather, such intent need only be expressed in "words that fairly convey that intention**."

*Kane* 5 P.3d at 743-744. *Citing State v. Zornes*, 78 Wash.2d at 13, 475 P.2d 109; *State v. Grant,* 89 Wash.2d 678, 683, 575 P.2d 210 (1978).

The *Kane* court gives two examples of where this principle has been applied by this State's Supreme Court. ". In

*State v. Zornes*, the court reversed and dismissed the defendants' convictions under the Narcotic Drug Act for possession of marijuana. While the appeals were pending, an amendment to the Act became effective stating that "the provisions of this chapter shall not ever be applicable to any form of cannabis." *Zornes,* 78 Wash.2d at 11, 475 P.2d 109 (italics in original). From the words "not ever" preceding the words "be applicable", the Court found it could be reasonably inferred that the Legislature intended the amendment to apply to pending cases as well as those arising in the future. *Zornes*, 78 Wash.2d at 13-14, 26, 475 P.2d 109." *Kane* at 5 P.3d 744.

"In *State v. Grant*, a new act provided that "intoxicated persons may not be subjected to criminal prosecution solely because of their consumption of alcoholic beverages". *Grant*, 89 Wash.2d at 682, 575 P.2d 210. Finding this language, (may not), to be a fair expression of legislative intent so as to

avoid the default rule of the saving statute, the Supreme Court dismissed a charge of being intoxicated upon a public highway in a case that was pending before the new statute became effective. *State v. Grant*, 89 Wash.2d at 684, 575 P.2d 210." Id.

That is the issue in this case. Is there, at least, a fair expression that marijuana prosecutions should end? Mr. Rose asserts that there is such a fair expression, at the very least.

C. Applying the above principles of law to the language of I 502 leads to the conclusion that the savings statute does not apply.

Before addressing the specific language that Appellant believes is determinative in this case it may be useful to disarm a red herring in this analysis. Counsel has used the phrase "The people intend to stop treating adult marijuana use as a crime," several times in this writing. The writer is fully

aware that that is not where that sentence ends. However, it is Mr. Rose's position that the above phrase is the portion of the intent section of the legislation that applies in this case. Nothing in the above authorities indicates that the *only* intent of the legislation must be to end current prosecutions. The other portions of the intent section simply don't have anything to say about the initiative's intended effect on current prosecutions.

The Appellant's position is that the words "*The people intend to stop treating adult marijuana use as a crime*" is an express intention regarding what should happen to pending prosecutions. However, if it this is not a declaration of the intent in express terms, then these are certainly "words that fairly convey that intention." In either case, the savings clause would not apply and the prosecution would be void.

The authorities discussed above indicate that "*The people intend to stop treating adult marijuana use as a crime*"

is to be given a broad interpretation. The State's argument, that this language does not even fairly convey an intention for pending prosecutions to cease, requires the narrowest reading possible. The narrowest reasonable reading of the language would limit "stop" to events that occurred after the effective date of the law. In other words, if nothing else, prosecutions would "stop" when the law had actually changed and possession of small amounts was no longer a criminal act.

However, if this narrow reading were correct, it would make the statement of intent about stopping treating adult marijuana use as a crime surplusage. It wouldn't be necessary to express any further intent if that intent would be effectuated by the operation of the new law.

This intent language only has independent significance and meaning if it is given, as the law tells us it must, a broad interpretation. In a broad interpretation this intent language goes beyond the mere operation of the new law and directs

that the people no longer wish to prosecute persons for marijuana use.

A similar point in *Zornes* provided the court with additional evidence that the statute was to have more than prospective effect.

> While the 1969 act does not contain the words, 'This act shall apply to pending cases,' it contains language from which the intent that it shall apply to such cases can be reasonably inferred.
>
> Section 7(13) conveys that intent when it says: 'the provisions of this chapter shall not ever be applicable to any form of cannabis.'
>
> In construing a statute, the court seeks to find the legislative intent, and to give effect to the legislative purpose. Courts will not ascribe to the legislature a vain act, and a statute should, if possible, be so construed that no cause, sentence, or word shall be superfluous, void, or insignificant. Kasper v. Edmonds, 69 Wash.2d 799, 420 P.2d 346 (1966).
>
> If the act in question is to have only prospective effect, the words 'not ever' preceding the words 'be applicable' are unnecessary. We must assume that the legislature added these words for a purpose, and that purpose it would

> seem is to direct the courts to refrain from applying those provisions to offenses involving cannabis. If the provisions of the uniform narcotics act are not 'ever' to be applied to cannabis, then they are not to be applied in any case, whether pending or arising in the future.
>
> Zornes 78 Wn.2d at 13-14.

Similarly, if I 502 was to have only prospective effect, the language at issue here, that the people intend to stop treating adult marijuana use as a crime would not be necessary. The changes to the actual provisions of RCW title 69 would change the law for all prospective cases. The only additional purpose that this language can serve is to direct the courts to refrain from proceeding with simple possession and paraphernalia cases whether pending or arising in the future.

## V. CONCLUSION

In this case the intent language is that "the people intend to stop treating adult marijuana use as a crime." The legal question is whether this is at least fair expression of intent that

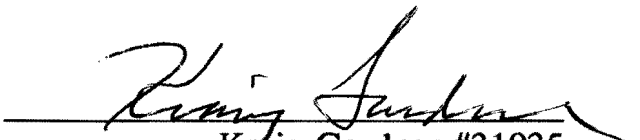
marijuana prosecutions should stop. Common sense, as well as the authorities cited above all lead to the conclusion that at the very least it is a fair expression of an intent to end these types of prosecutions.

The intent of this language is not hard to discern. Treating marijuana use as a crime means prosecuting people for possession and paraphernalia charges just as occurred in this case. Therefore the intent was that these prosecutions stop, that they not continue, that they terminate, that they come to an end.

Just as in *Zornes*, this language would be meaningless if it only meant that prosecutions for acts occurring after the effective date were prohibited. Those prosecutions are prohibited because those acts are no longer illegal. "Stop" means the cessation of something that is now occurring.

For the above reasons we ask the court to overrule the lower court's decision and remand this case for dismissal.

RESPECTFULLY SUBMITTED this 21st day of December, 2014.



Kraig Gardner #31935
Attorney for the Petitioner