

FILED  
COURT OF APPEALS

No. 40624-1-II

APR 11 2011 11:37  
COURT OF APPEALS  
BY: *[Signature]*

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

---

STATE OF WASHINGTON

v.

GB BROWN

---

BRIEF OF APPELLANT

---

Thomas E. Weaver  
WSBA #22488  
Attorney for Appellant

The Law Office of Thomas E. Weaver  
P.O. Box 1056  
Bremerton, WA 98337  
(360) 792-9345

ORIGINAL

*1111 0-25-10*

## TABLE OF CONTENTS

A. Assignments of Error.....	1
B. Statement of the Case.....	1
C. Argument.....	8
D. Conclusion.....	16

## TABLE OF AUTHORITIES

### Cases

<u>Harvill</u> at __, citing <u>State v. Quismundo</u> , 164 Wn.2d 499, 504, 192 P.3d 342 (2008).....	8
<u>Higgins v. Stafford</u> , 123 Wn.2d 160, 168, 866 P.2d 31 (1994).....	13
<u>In re Personal Restraint of Mahrle</u> , 88 Wn. App. 410, 945 P.2d 1142 (1997).....	15
<u>In re the Estate of Adler</u> , 52 Wash. 539; 100 P. 1019 (1909).....	13
<u>State v. Collins</u> , 110 Wn.2d 253, 258, 751 P.2d 837 (1988). ....	13
<u>State v. Fry</u> , 168 Wn.2d 1, 228 P.3d 1 (2001). ....	10
<u>State v. Harvill</u> . __ Wn.2d __ (decided July 22, 2010), citing <u>State v. Williams</u> , 132 Wn.2d 248, 259-60, 937 P.2d 1052 (1997).....	8
<u>Sutton v. Tyrrell</u> , 10 Vt. 91, 94 (1838) .....	12

## A. Assignments of Error

### Assignments of Error

The trial court erred by finding in limine that Mr. Brown was not a Designated Provider of medical marijuana and was legally precluded from presenting his defense.

### Issues Pertaining to Assignments of Error

The trial court found that Mr. Brown was not a Designated Provider of medical marijuana because he possessed Designated Provider Certificates for two people and the statute prohibits being a Designated Provider for more than one person at any one time. Should Mr. Brown have been afforded the opportunity to present his defense when: (1) his execution of a Designated Provider Certificate implicitly revoked any previously executed Certificates as a matter of law, and (2) he was not, in fact, providing marijuana for more than one person?

## B. Statement of the Facts

G.B. Brown was charged by amended information with possession of a controlled substance (marijuana) with intent to deliver and unlawful manufacture of a controlled substance, marijuana. CP, 78. He is fifty-one years old. CP, 3. His defense was that he was a medical provider. He was convicted on stipulated facts after the trial court granted the state's motion

to preclude this defense. CP, 39, 93. Mr. Brown's motion for reconsideration of the pre-trial hearing was denied as well. CP, 79. He appeals.

The underlying facts that led to Mr. Brown's arrest need only be briefly stated and are taken from the CrR 3.5/3.6 hearing held on February 22, 2010. Mr. Brown was the subject of a knock-and-talk at his home by Sergeant Rudloff and Deputy Cassidy. RP, 21. When they arrived the front door was open with a closed screen door. RP, 8. The officers knocked on the door and yelled into the screen door, identifying themselves as police officers. RP, 8. Mr. Brown responded and came outside, standing on the front porch. RP, 9.

The officers told him that they had received a tip of marijuana sells from the residence. RP, 10. Mr. Brown denied growing, selling, or using marijuana. RP, 10. Sergeant Rudloff could smell marijuana coming from the house and pointed that out to Mr. Brown, who denied the presence of the marijuana odor. RP, 10-11. Mr. Brown denied consent to search his home. RP, 11. At that time, Sergeant Rudloff said he believed he had probable cause to get a warrant and he was "freezing" the residence while he attempted to get the warrant, but Mr. Brown was free to leave if he wished. RP, 11.

Mr. Brown then indicated towards his neighbor's house and inferred that the marijuana smell might be coming from that house. RP, 13. Sergeant Rudloff walked over to the neighbor's house and could smell marijuana from that house as well. RP, 13. Later investigation determined that the neighbor was Don Wise. CP, 32. When Sergeant Rudloff returned to Mr. Brown's residence, there was some more discussion with the Sergeant saying he still intended to request a warrant. RP, 16-17. At that time, according to Sergeant Rudloff, Mr. Brown said he did have about a pound of marijuana in his home, but that he was a medical marijuana provider for a number of subjects with viable medical marijuana prescriptions. RP, 16. He said that his neighbor had a medical marijuana prescription and that he provided medical marijuana for him. RP, 17. At a later hearing, Mr. Brown contested what was said in this conversation, contending that he never identified the number of people he was a Designated Provider for, but that the Sergeant just assumed it was for three people because he produced documentation for three people. RP, 8 (March 29, 2010).

Sergeant Rudloff then applied for and was granted a search warrant. RP, 18. During the search, Mr. Brown produced the medical marijuana paperwork for three people and provided it to the officers. RP, 18.

The medical marijuana paperwork is attached to the State's Motion for Denial of Defendant's Presentation of a Medical Marijuana Defense. The first is a Documentation of Physician Authorization to Engage in the Medical Use of Marijuana in Washington State. CP, 35. The Document is an authorization for Donald Wise to use marijuana. Page two of the Document states, "I, Donald Wise, hereby designate G.B. Brown to be my Designated Provider for obtaining and/or growing medical grade marijuana. This relationship will ensure that I, a Washington State authorized medical marijuana patient, am supplied with and/or aided to grow sufficient medication as outlined in Chapter 69.51A RCW. G.B. Brown is and will be my only Designated Provider." It is signed by Donald Wise and G.B. Brown and dated August 8, 2009. CP, 36.

The second document is also a Documentation of Physician Authorization to Engage in the Medical Use of Marijuana in Washington State. The person named on this Document is Ernestine Wiggins and is dated November 18, 2008. There is not, however, a Designated Provider certificate attached to this second document. CP, 37.

The third document is also a Documentation of Physician Authorization to Engage in the Medical Use of Marijuana in Washington State. This form is for Carl Brewster. CP, 38. This third document has a Designated Provider certificate that reads identical to the first document

accept the name of the recipient (Carl Brewster) and the date (July 30, 2009). CP, 39.

The State filed a pre-trial motion arguing that because Mr. Brown was purportedly the Designated Provider for at least two, and possibly three, patients, he was not entitled to the medical marijuana defense pursuant to RCW 69.51A.040. CP, 24. The defense objected on the ground that this was an issue best resolved by the trier of fact and not the court. CP, 73. At a hearing on March 8, 2010, the trial court granted the State's motion. RP, 37 (March 8, 2010).

Mr. Brown filed a motion for reconsideration. CP, 79. Attached to the motion is a Declaration of Counsel, signed by Greg Smith, Mr. Brown's attorney. CP, 80. In the Declaration, Mr. Smith represented that a defense investigator had interviewed Carl Brewster. According to the interview, Mr. Brewster would testify that he was a qualified medical marijuana user and he designated Mr. Brown to be a Designated Provider CP, 80. The Declaration continues, "However, they did not specify a date when Brown would start to serve him, nor did Brown ever give him marijuana." CP, 80. The Declaration also points out that the total amount of marijuana recovered from Mr. Brown and Mr. Wise's residences was fifteen plants and 23.8 ounces of loose marijuana. CP, 80-81. Mr. Smith states, "This proffer of evidence regarding the quantity discovered in the

police investigation is relevant as its proximation [sic] to the limits allowed by the law and tends to show the defendant was attempting, in good faith, to serve one person. This presents a question of fact as to who [sic] and how many persons were being served by defendant.” CP, 81.

A hearing was held on the motion for reconsideration on March 29, 2010. At the hearing, defense counsel stated, “[Carl Brewster] indicated to me that Mr. Brown had never provided him with any marijuana and while [Mr. Brewster] had provided Mr. Brown with authorization to be his medical marijuana provider according to the statute, he in fact – that is Mr. Brewster never did receive marijuana from GB Brown.” RP, 5. Regarding the issue of whether Mr. Brown made contradictory statements to Sergeant Rudloff, Mr. Brown argued, “I think that should be brought to the jury so the jury can decide what weight, if any, it wanted to give Rudloff’s testimony regarding what Mr. Brown allegedly admitted to.” RP, 8-9.

Although the trial court considered Mr. Brown’s offer of proof as to Mr. Brewster’s proposed testimony (RP, 11), the court concluded that the three exhibits unequivocally establish that Mr. Brown was acting as a Designated provider for both Mr. Wise and Mr. Brewster. RP, 13. Therefore, as a matter of law, he did not meet the definition of a Designated Provider and the motion for reconsideration was denied. RP, 14.

In the trial court's findings of fact and conclusions of law from the non-jury trial, the trial court found, in part, the following:

4. During his conversation with the deputies Mr. Brown said he did possess marijuana and that he was a qualified provider of medical marijuana. CP, 93.

5. According to the police report, Deputy Rudloff stated that Mr. Brown said that the marijuana growing in the adjoined duplex residence was his. CP, 93.

6. Mr. Brown told the deputies that he provided medical marijuana to the occupant of the adjoined duplex in exchange for Mr. Brown being allowed to grow his marijuana in his adjoined neighbor's residence. CP, 93.

7. Mr. Brown provided documentation of being a designated medical marijuana provider to Mr. Wise and Mr. Brewster. CP, 94.

8. Mr. Brown also provided paperwork regarding Ms. Wiggins. CP, 94.

9. [Evidence recovered from Mr. Brown's residence included] 2 baggies with one containing approximately 1 gram of marijuana and the other containing approximately one half pound of marijuana. CP, 94.

10. [Evidence recovered from Mr. Wise's residence included] 15 mature plants. CP, 94.

The Court then concluded that Mr. Brown does not qualify as a designated medical marijuana provider and found him guilty beyond a reasonable doubt. CP, 95. Mr. Brown appeals.

### C. Argument

Mr. Brown timely asserted his intent to rely on the affirmative defense at trial that he is a Designated Provider of medical marijuana. A defendant "is entitled to have the jury instructed on his theory of the case if there is evidence to support that theory. Failure to so instruct is reversible error." State v. Harvill, \_\_ Wn.2d \_\_ (decided July 22, 2010), citing State v. Williams, 132 Wn.2d 248, 259-60, 937 P.2d 1052 (1997). Mr. Brown asserted the affirmative defense that he was a Designated Provider of medical marijuana. The Court determined that he was not entitled to the defense as a matter of law because he is a Designated Provider for more than one person. A trial court necessarily abuses its discretion if it denies an affirmative defense on an erroneous view of the law. Harvill at \_\_, citing State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008).

RCW 69.51A.040 creates an affirmative defense to any criminal offense involving marijuana. It reads:

(2) If charged with a violation of state law relating to marijuana, any qualifying patient who is engaged in the medical use of marijuana, or any designated provider who assists a qualifying patient in the medical use of marijuana, will be deemed to have established an affirmative defense to such charges by proof of his or her compliance with the requirements provided in this chapter. Any person meeting the requirements appropriate to his or her status under this chapter shall be considered to have engaged in activities permitted by this chapter and shall not be penalized in any manner, or denied any right or privilege, for such actions.

(3) A qualifying patient, if eighteen years of age or older, or a designated provider shall:

(a) Meet all criteria for status as a qualifying patient or designated provider;

(b) Possess no more marijuana than is necessary for the patient's personal, medical use, not exceeding the amount necessary for a sixty-day supply; and

(c) Present his or her valid documentation to any law enforcement official who questions the patient or provider regarding his or her medical use of marijuana.

RCW 69.51A.010(1) defines a Designated Provider as a person who:

(a) Is eighteen years of age or older;

(b) Has been designated in writing by a patient to serve as a designated provider under this chapter;

(c) Is prohibited from consuming marijuana obtained for the personal, medical use of the patient for whom the individual is acting as designated provider; and

(d) Is the designated provider to only one patient at any one time.

Read in its entirety, there are six requirements for this defense, each of which must be proved by a preponderance of the evidence: (1) Possess no more than a sixty-day supply of marijuana; (2) Present valid documentation to any law enforcement official; (3) Be 18 years old; (4) Be

designated in writing that he or she is a Designated Provider; (5) Not consume marijuana obtained for the patient; and (6) Be the Designated Provider to only one patient at any one time. From this record, there appears to be no dispute that Mr. Brown possessed less than a 60 day supply, he presented his documentation to the officers as soon as they allowed him back in his house, he has been designated in writing as a Designated Provider, he is not consuming marijuana, and he is fifty-one years old. The only dispute in this record is whether he is the Designated Provider for more than one person at any one time.

There are no cases directly interpreting RCW 69.51A.010(1)(d). In the trial court, both sides relied heavily on the case of State v. Fry, 168 Wn.2d 1, 228 P.3d 1 (2001). In Fry, the main issue was the circumstances under which it is appropriate for a trial court to rule on a medical marijuana defense as a matter of law. The State argued that the defendant could not meet the definition of a Qualifying Patient because he did not have a debilitating illness, as required by the statute. Discerning the ruling in Fry is complicated, however, by the fact that there is no majority opinion. It is further complicated by the fact that the defendant's attorney conceded that his client did not have a debilitating illness.

The plurality lead opinion, authored by Justice James Johnson, only represented a total of four justices. Justice Chambers, writing for

himself and three other justices, held that the right to present a defense is inviolate and the defendant should have been afforded the opportunity to present his defense. Justice Chambers then concluded, however, that the concession by defense counsel that the defendant did not have a debilitating illness precluded jury consideration of the medical marijuana defense. Finally, Justice Sanders wrote a dissent in which he stated, “I agree with the concurrence to the extent it would hold that whether Fry had a qualifying condition is a question of fact that should be decided by a jury.” Fry at 35 (Justice Sanders, dissenting). Therefore, a majority of the court agreed that, in the absence of a concession that the requirements of the statute have not been met, the factual issue of whether a person is a qualifying patient or provider is a question of fact for the jury.

Mr. Brown presented significant factual issues that should have been presented to a jury. The State argued, and the trial court agreed, that Mr. Brown was attempting to act as a Designated Provider for more than one person at a time. This was an issue for the fact finder, not the court.

Although Mr. Brown possessed medical marijuana documentation from three qualifying patients, there was no indication that he was the Designated Provider for Ms. Wiggins. Mr. Brown concedes he was the

Designated Provider for Mr. Wise, so the issue is whether he was a Designated Provider for Mr. Brewster.

Mr. Brown was not a Designated Provider for Mr. Brewster. This is true for two reasons: (1) His execution of the August 8, 2009 Certification for Mr. Wise implicitly revoked his July 30, 2009 Certification for Mr. Brewster; and (2) He was not operating as a Designated Provider in fact for Mr. Brewster.

The common law doctrine of Implied Revocation has not been discussed much in Washington. The doctrine applies when courts have found, as a matter of law, that a subsequent act revokes an earlier legal doctrine even in the absence of an express revocation. The Vermont Supreme Court discussed the doctrine in an early case.

Revocations are express, or in fact; or implied, or in law. In relation to the first, they are made by the party, and are to be in the same form or manner in which the submission is made. If the submission be by deed, then the revocation must be under seal; if by writing, then so must be the revocation; and if, simply, by parol, then it may be so revoked. Implied revocations, or revocations in law, arise from the legal effect and necessary consequence of some intervening event, either providential or caused by the party, necessarily putting an end to the business. The death of the party, or umpire; the marriage of a party *feme sole*, the lunacy of a party, or the utter destruction or final end of the subject matter, are of this description.

Sutton v. Tyrrell, 10 Vt. 91, 94 (1838).

Most cases finding an implied revocation have been in the area of trusts and estates. For instance, at common law, the divorce and remarriage of the testator would act as an implied revocation of a will. See In re the Estate of Adler, 52 Wash. 539; 100 P. 1019 (1909). In the area of wills, the common law doctrine has been codified in RCW 11.12.040. Washington has also recognized the doctrine of implied revocation in the criminal burglary context where an invitation to be on the premises is deemed revoked when it becomes clear that the invitee has entered with a criminal purpose. State v. Collins, 110 Wn.2d 253, 258, 751 P.2d 837 (1988).

RCW 69.51A.010 prohibits a person from being a Designated Provider for more than one person at any one time. The trial court concluded that because Mr. Brown was in possession of nearly identical paperwork from two Qualified Patients at the same time, that he was acting as the Designated Provider for both. But this is not true. Because the statute prohibits a person from being the Designated Provider for more than one person at any one time, the execution of the second Certification revoked as a matter of law the first Certification. The only Certification that had any legal effect is the last one executed, i.e. the August 8, 2009 Certification for Mr. Wise.

Generally, mutual intent to rescind an agreement must be demonstrated; unilateral acts inconsistent with the agreement are not enough. Higgins v. Stafford, 123 Wn.2d 160, 168, 866 P.2d 31 (1994). However, intent need not be expressly stated. Mutual acts having the effect of rescinding the agreement are sufficient. Id at 168. While there is evidence that Mr. Brown and Mr. Brewster signed an agreement for Mr. Brown to be the Designated Provider, there is also evidence that Mr. Brown signed a subsequent agreement with Mr. Wise. This, coupled with the failure of Mr. Brown to ever provide Mr. Brewster with marijuana, had the effect of rescinding the earlier agreement.

The State will undoubtedly argue that the common law doctrine of implied revocation should not be applied because it abrogates the purpose of the statute, which is to prevent any one person from giving marijuana to more than one Qualified Patient. But this concern is a red herring. If an otherwise properly documented Designated Provider gives marijuana to anyone other than the one Qualified Patient to which he is aligned, then he is in violation of the statute and can no longer seek judicial protection with the affirmative defense. In other words, if, after executing the August 8 Certification for Mr. Wise, Mr. Brown gave marijuana to Mr. Brewster or Ms. Wiggins or anyone else, he would be in violation of the statute and

subject to prosecution. This is true because all previous Certifications are implicitly revoked by the August 8 Certification.

Even if this Court finds that the August 8 Certification does not implicitly revoke the July 30 Certification, Mr. Brown was still entitled to present his factual defense: he never provided Mr. Brewster with marijuana. The fact that Mr. Brown was in possession of Certification with Mr. Brewster's signature does not mean he was acting as Mr. Brewster's Designated Provider as a matter of fact. There are numerous possibilities for why Mr. Brewster chose not to receive medical marijuana from Mr. Brown including deciding that medical marijuana was not working for him, disliking the collateral medical effects were not worth it or finding another Designated Provider. Regardless of the reason, Mr. Brewster's signature on July 30, 2009 did not bind either party for eternity. Mr. Brown was entitled to present this evidence to a jury.

The statute requires that a person be the "designated *provider* to only one patient at any one time." The statute is unclear as to what a Designated Provider is. Is a Designated Provider a person who possesses paperwork for one or more Qualified Patients? Or is a Designated Provider a person who actually *provides* marijuana to one or more Qualified Patients? There is evidence in this record that Mr. Brown possesses paperwork for two Qualified Patients, but only actually provided

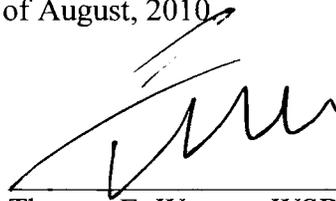
marijuana to one patient. To the extent that the statute is ambiguous on this point, the ambiguity must be resolved in favor of the defendant under the rule of lenity. In re Personal Restraint of Mahrle, 88 Wn. App. 410, 945 P.2d 1142 (1997)

Corroborating Mr. Brown's defense was the fact that he had a relatively small amount of marijuana. The trial court's findings of fact and conclusions of law from the trial found that he had approximately half a pound of loose marijuana and 15 mature plants. In his offer of proof, defense counsel suggested that at trial there would be evidence that these amounts were minimal and would not support providing medical marijuana for more than one person. Whether these amounts would or would not support more than one person is a factual issue, of course, but Mr. Brown was entitled to present his evidence to the jury for consideration.

#### D. Conclusion

Mr. Brown's case should be reversed and remanded for jury trial at which time he should be provided an opportunity to present his evidence that he is a Designated Provider of medical marijuana.

DATED this 23<sup>rd</sup> day of August, 2010

A handwritten signature in black ink, appearing to read 'T. E. Weaver', written over a horizontal line.

Thomas E. Weaver, WSBA #22488  
Attorney for Defendant

THE STATE COURT OF APPEALS  
STARTED 08/11/10 11:37  
STATE: KSC  
BY: \_\_\_\_\_

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

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

STATE OF WASHINGTON, ) Case No.: 09-1-01430-6  
)  
Respondent, ) Court of Appeals No. 40624-1-II  
)  
vs. ) AFFIDAVIT OF SERVICE  
)  
GB BROWN, )  
)  
Defendant. )

STATE OF WASHINGTON )  
)  
COUNTY OF KITSAP )

THOMAS E. WEAVER, being first duly sworn on oath, does depose and state:

I am a resident of Kitsap County, am of legal age, not a party to the above-entitled action,  
and competent to be a witness.

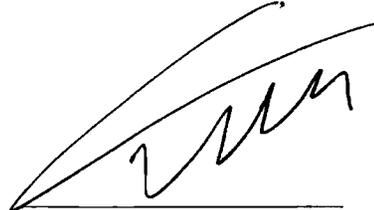
On August 23, 2010, I sent an original and a copy, postage prepaid, of the BRIEF OF  
APPELLANT to the Washington State Court of Appeals, Division II, 950 Broadway St., Suite  
300, Tacoma, WA 98402.

ORIGINAL

1 On August 23, 2010, I sent a copy, postage prepaid, of the BRIEF OF APPELLANT, to  
2 the Thurston County Prosecutor's Office, 2000 Lakeridge Dr. SW, Bldg. 2, Olympia, WA  
3 98502.

4 On August 23, 2010, I sent a copy, postage prepaid, of the BRIEF OF APPELLANT, to  
5 Mr. GB Brown, 4255 Lacey Blvd. SE, Lacey, WA 98503.

6  
7 Dated this 23<sup>rd</sup> day of August, 2010.



8  
9  
10 Thomas E. Weaver  
WSBA #22488  
Attorney for Defendant

11  
12 SUBSCRIBED AND SWORN to before me this 23<sup>rd</sup> day of August, 2010.



13  
14 Christy A. McAdoo  
NOTARY PUBLIC in and for  
15 the State of Washington.  
16 My commission expires: 07/31/2014

