

No. 40624-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

G.B. BROWN
Appellant.

FILED
COURT OF APPEALS
DIVISION II
10 OCT 20 PM 1:24
STATE OF WASHINGTON
BY [Signature]
DEPUTY

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

The Honorable, Judge Richard Hicks and Judge Gary Tabor
Cause No. 09-1-01807-7

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

B. STATEMENT OF THE CASE 1

C. ARGUMENT 3

1. The trial court was correct in ruling that Mr. Brown failed to establish sufficient evidence to submit the affirmative defense of "designated provider" to the jury 3

D. CONCLUSION..... 11

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

State v. Collins
110 Wn.2d 253, 751 P.2d 837 (1988) 8

State v. Fry,
168 Wn.2d 1, 228 P.3d 1 (2010) 6

State v. Janes,
121 Wn.2d 220, 850 P.2d 495 (1993) 5

State v. Riker,
123 Wn. 2d 351, 869 P. 2d 43 (1994) 4

State v. Tracy,
158 Wn.2d 683, 147 P.3d 559 (2006) 5-6

State v. Votava,
149 Wn. 2d 178, 66 P.3d 1050 (2003) 4

Statutes and Rules

RCW 69.51A.005 5

RCW 69.51A.010(1)..... 4, 6

RCW 69.51A.010(1)(d) 7

RCW 69.51A.040 6

RCW 69.51A.040(2)..... 3-4

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Was the trial court correct in ruling that Mr. Brown failed to establish sufficient evidence to submit the affirmative defense of "designated provider" to the jury?

B. STATEMENT OF THE CASE.

The State accepts the Appellant's Statement of the Case with the following additions and corrections.

Contrary to Mr. Brown's Appeal Brief, Mr. Brown did not testify at the March 8, 2010 or March 29, 2010 hearings regarding whether the defense had provided sufficient evidence to submit the affirmative defense of being a "designated provider" to the jury. RP 1-43 [March 8, 2010 hearing (only Sgt. Rudloff testified at that hearing)] and RP 1-15 [March 29, 2010 motion to reconsider hearing (no live testimony was presented but the defense made an offer of proof from Mr. Brewster)].

In fact, in the Findings of Facts entered on March 29, 2010 for the March 8, 2010 hearing, the trial court entered the following undisputed fact:

- (10) The defendant admitted to providing medical marijuana to three people.

[CP 87-89].

After denying the defendant's motion to reconsider, the trial court again entered findings of fact and conclusions of law. [CP 90-92].

On March 30, 2010, Mr. Brown waived his right to a jury trial and submitted his case to the trial court as a stipulated facts bench trial. [CP 93-126]. The stipulation included that the defendant stipulated that the police reports would be incorporated by reference into the record and that the facts contained in these police reports were "sufficient for a finding of guilt beyond a reasonable doubt". [CP 93]. In Sergeant Rudloff's report (incorporated per the stipulation of the defendant), he describes the following conversation with Mr. Brown on August 21, 2009:

"After making all my observations to GB, he admitted that he was nervous because he did in fact have several ounces of Marijuana product in his home. Specifically, he now indicated that he was a provider of medical marijuana to several medical marijuana {sic} patients. He stated that he had paperwork that would verify all this. I asked him if there was anything else he wanted me to know before I applied for my search warrant. He now additionally stated that the marijuana grown at Don's place was actually his. He stated that he and Don had an agreement. Specifically, that GB would supply Don with all the medical marijuana he needed to allow the use of one of his rooms for a grow. I asked him how many people he provided medical marijuana to and he stated there were three. I asked him how many people he provided or sold marijuana to that did not

have medical marijuana prescriptions and he stated there were none. I told him if that were true it is not likely that I would be at his residence. I explained the scenario of how I come to about him and the {sic} row. Specifically, that it was suggested that he was the “sugar daddy” of a drug court participant. He denied this allegation and again insisted that he did not sell or otherwise provide marijuana to anyone other than the three persons who he had medical marijuana paperwork on file.”

[CP 110].

Mr. Brown had in his possession approximately one-and-a – half-pounds of packaged marijuana; the marijuana was packaged in three separate bags: one gram of marijuana packed by itself in a bag, approximately one half-pound of marijuana packaged in a bag, and a vacuum sealed bag containing approximately one pound of marijuana. [CP 94].

C. ARGUMENT.

1. The trial court was correct in ruling that Mr. Brown failed to establish sufficient evidence to submit the affirmative defense of "designated provider" to the jury.

RCW 69.51A.040(2) states, “If charged with a violation of state law relating to marijuana, ...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...compliance with the requirements provided in this chapter.

The definition for a “Designated Provider” is found in RCW 69.51A.010(1) and states that to qualify, the requirements for the person are as follows:

- (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.

The present issue is specific to subsection (d) of RCW 69.51A.010(1), which states, “[I]s the designated provider to only one patient at any one time.”

The “designated provider” defense is like the “compassionate use” defense, or self defense, whereby it is an affirmative defense. RCW 69.51A. 040(2). An affirmative defense admits the defendant committed a criminal act but pleads an excuse for doing so. *State v. Votava*, 149 Wn. 2d 178, 187-8, 66 P.3d 1050 (2003) (*citing State v. Riker*, 123 Wn. 2d 351, 367-68, 869 P. 2d 43 (1994)).

Regarding the “compassionate use” defense, the trial court considered a case where an otherwise qualifying patient received authorization to use medical marijuana from a doctor in California. *State v. Tracy*, 158 Wn.2d 683, 147 P.3d 559 (2006). The court interpreted the provision in the Act defining qualifying doctors as “those licensed under Washington law” to require that a qualifying doctor must be formally licensed in Washington. *Id.*, at 690. The majority opinion concluded that “[s]ince Tracy was not a patient of a qualifying doctor, she was not entitled to assert the defense.” *Id.* The court stated unequivocally that “[o]nly qualifying patients are entitled to the defense under the act.” *Id.* at 690; (citing former RCW 69.51A.005).

A defendant asserting an affirmative defense, such as the “compassionate use” defense, bears the burden of offering sufficient evidence to support that defense. *Id.*, at 689; *citing State v. Janes*, 121 Wn.2d 220, 236-37, 850 P.2d 495 (1993). The Court in *Tracey* ruled that Ms. Tracey bore the burden of producing at least some evidence that she was a qualified patient of a qualified physician before she could assert the affirmative defense; since she could not carry that burden, the trial court was correct in not allowing her to argue the “compassionate use” defense at trial. *Id.*

Likewise, in *State v. Fry*, 168 Wn.2d 1, 228 P.3d 1(2010), in a plurality decision, the Court affirmed the trial court and declined to allow Mr. Fry to claim the compassionate use defense at trial. *Id.*, at 3. The Court, citing to *State v. Tracy*, ruled that as Mr. Fry did not suffer a statutory “qualifying illness” he was not entitled to argue the compassionate use defense at trial. *Id.*, at 13.

While the present case deals with the statutory term “designated provider” rather than the statutory term “qualifying patient” the statutory requirements for both are established under RCW 69.51A.040, and under the statute both a “designated provider” and a “qualifying patient” must provide proof of their full compliance with the requirements provided in the chapter to establish an affirmative defense under the chapter. RCW 69.51A.010(1) provides that a “designated provider” shall be a provider to only one patient at any one time. As such, both *Fry* and *Tracy* offer guidance regarding a defendant’s responsibility to be fully compliant with the requirements of the Act prior to asserting an affirmative defense.

In the present case, the defendant, Mr. Brown claims that he is a medical marijuana Designated Provider. However, as detailed above, the defendant admitted to Sergeant Rudloff that he provided

medical marijuana to three different people. The defendant provided law enforcement with various medical marijuana documentation for three different people. These facts are contained in the stipulated facts bench trial. Under RCW 69.51A.010(1)(d), a “designated provider” of medical marijuana may only be a “designated provider” to only one patient at any one time.

The facts of this case establish that the defendant was in fact a provider of marijuana to three different people at the same time, and as such the defendant was not in full compliance with requirements of the statute governing “designated providers.” Since the defendant was not fully compliant with the requirements of the statute and, as established by case law, the trial court was correct in preventing Mr. Brown from asserting the affirmative defense of being a “designated provider” based on the record that the trial court had before it.

Mr. Brown attempts to argue for the first time that he had impliedly revoked the medical marijuana documentation regarding Mr. Brewster when he entered into a new such agreement with Mr.

Wise nine days later.¹ This argument was not advanced at the trial court level and there is no factual support for the appellant's claim. As a verity before this court is the trial court's undisputed finding that Mr. Brown had provided marijuana to three different people; in the Findings of Facts entered on March 29, 2010 for the March 8, 2010 hearing, the trial court entered the following undisputed fact:

(10) The defendant admitted to providing medical marijuana to three people.

[CP 87-89].

While the appellant attempts to craft a creative argument regarding "implied revocation", there is no case law authority for this doctrine in this context. Appellant's reliance on *State v. Collins*, 110 Wn.2d 253, 751 P.2d 837 (1988), is misplaced. In *Collins*, the Court considered a case where the victim invited the defendant into

¹ In the trial court's findings of fact and conclusions of law entered on March 29, 2010, the court found that the defendant provided documentation to law enforcement that Donald Wise was a medical marijuana patient and an authorization from Mr. Wise that Mr. Brown would be his designated provider; this authorization was dated August 8, 2009. [Findings #13 and #16, CP 88]. The court also found that the defendant provided documentation to law enforcement that Carl Brewster was a medical marijuana patient and an authorization from Mr. Brewster that Mr. Brown would be his designated provider; this authorization was dated July 30, 2009. [Findings #14 and #17, CP 88]. Also, the court found that the defendant provided documentation that Ernestine Wiggins was a medical marijuana patient. [Finding #15, CP 88]. All of the above documentation was provided by Mr. Brown to law enforcement on August 21, 2009. [CP 87-88].

her home to use the phone and the defendant subsequently dragged the 72 year-old and 84 year-old victims to a bedroom where he committed a rape and an assault. *Id.*, at 254-55. The defendant was convicted of rape, assault, and burglary; regarding the burglary, the Court recognized an implied limitation on consent to entry and held, depending on the facts of the case, a limitation on or revocation of the privilege to be on the premises may be inferred from the circumstances of the case. *Id.*, at 260-62. And, as there is no case law to support for his contention, there is also no factual support.²

Finally, the appellant is simply wrong when he states that there was a “relatively small amount of marijuana”; Mr. Brown had

² On August 21, 2009, Sergeant Rudloff contacted all three individuals that Mr. Brown stated that he supplied with medical marijuana. [CP 112-3]. Mr. Wise told law enforcement that he had a medical marijuana prescription and that the marijuana grow in his home belonged to himself and Mr. Brown; he further stated that Mr. Brown purchased everything for the marijuana grow and Mr. Brown was going to give him all the marijuana that he needed in exchange for letting him maintain the grow in his home. [CP 113]. Mr. Wise claimed that he knew that Mr. Brown provided medical marijuana to a few people but claimed he did not know all of his business. [CP 113]. Sergeant Rudloff spoke to Mr. Brewster; Mr. Brewster confirmed that he had a medical marijuana prescription and “suggested” that Mr. Brown was the provider of his medical marijuana. [CP 113]. Mr. Brewster would not elaborate how much he was paying Mr. Brown or how much marijuana he was receiving from Mr. Brown; Mr. Brewster stated that he was not trying to be difficult but his doctor had told him not to speak about the details beyond the fact that he is a medical marijuana prescription holder. [CP 113]. Finally, Sergeant Rudloff also spoke to Ms. Wiggins on August 21, 2009; Ms. Wiggins confirmed that she was a medical marijuana prescription holder and that Mr. Brown was her provider of marijuana. [CP 113]. Ms. Wiggins stated that she “barter[s]” for the marijuana from Mr. Brown and that she comes to his home 2-3 times a week and that she gets “a lot” of marijuana from Mr. Brown.

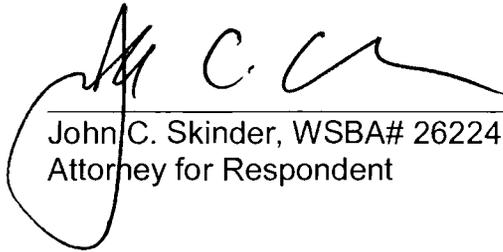
in his possession approximately one-and-a-half pounds of packaged marijuana; the marijuana was packaged in three separate bags: one gram of marijuana packed by itself in a bag, approximately one half-pound of marijuana packaged in a bag, and a vacuum sealed bag containing approximately one pound of marijuana. [CP 94]. This one-and-a-half pounds of packaged marijuana was in addition to the live mature marijuana plants that the defendant also had in his possession (along with all of the other components of manufacturing marijuana). [CP 94]. The large amount of processed marijuana also supports that this was more marijuana than would be allowed for only one qualifying patient.

The appellant did not provide the trial court sufficient evidence to support the giving the “designated provider” affirmative defense instruction. Mr. Brown provided medical marijuana to at least three different persons and this fact prevented him from asserting the “designated provider” affirmative defense as defined per statute. Therefore, the trial court was correct, as a matter of law, in preventing Mr. Brown from asserting the affirmative defense, based on the record before the trial court.

D. CONCLUSION.

Based on the above, the State respectfully requests that this court affirm the trial court's ruling preventing Mr. Brown from claiming the "designated provider" affirmative defense.

Respectfully submitted this 19th day of October 2010.



John C. Skinder, WSBA# 26224
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the BRIEF OF RESPONDENT, on all parties or their counsel of record on the date below as follows:

- US Mail Postage Prepaid
- ABC/Legal Messenger
- Hand delivered by to Supreme Court

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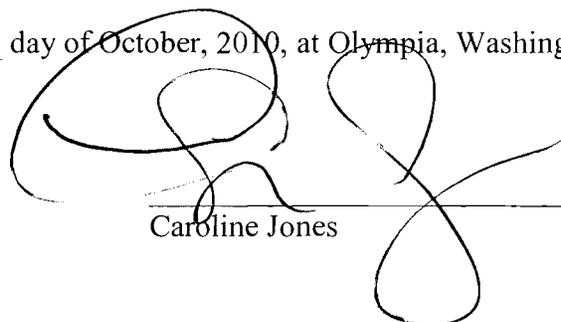
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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 19 day of October, 2010, at Olympia, Washington.



Caroline Jones