No. 44549-2-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

V.

JONATHAN W. BROOKS, APPELLANT

Appeal from the Superior Court of Mason County
The Honorable Amber L. Finlay, Judge
The Honorable Toni A. Sheldon, Judge

No. 12-1-00105-7

BRIEF OF RESPONDENT

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A. STATE'S COUNTER-STATEMENT OF ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1) Prior to seeking a search warrant for seizure of evidence of the crime of manufacturing marijuana, officers who had received an anonymous tip about a marijuana grow operation approached Brooks' residence to knock on the door and talk to him. While at the residence, officers observed, by smell and sound, that there was a marijuana grow operation at the residence. Based upon these facts the officers obtained a search warrant and seized evidence. Because the lawful manufacture of marijuana required that the grower be registered with a registry as defined by 69.51A RCW and there was no such registry in existence on the date of the offense, officers were not required to rule out medical authorization before obtaining and executing a search warrant.

2) On the facts of the instant case the crime of possession of marijuana and the crime of manufacture of marijuana comprise a single, recognizable plan with the same criminal objective to possess marijuana.

3) Because there are no facts to support a finding that alcohol or the use of alcohol contributed to Brooks' crimes of conviction, under current precedent the prohibition against the possession of alcohol is error and should be stricken from his judgment and sentence.

B. FACTS AND STATEMENT OF THE CASE

On March 15, 2012, after receiving an anonymous tip of a marijuana grow operation, police officers went to a residence located at

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262 Kissin Tree Lane in Tahuya, Washington, to knock on the door and talk with the occupant. RP 131-32, 173. When officers got out of their car and began to approach the house, they immediately smelled the odor of fresh marijuana. RP 131, 173.

As the officer's approached the house, the smell of marijuana increased. RP 131. Officer's knocked on the door, but no one answered. RP 131. The officers could hear the sound of fans and buzzing of grow lights from within the house. RP 132. The officers could see that several of the windows to the house were covered with black plastic and Styrofoam insulation. RP 132. The officers had prior experience with drug investigation, including grow operations, and they recognized these sights and sounds as signs of a marijuana grow operation. RP 133.

The officers obtained a search warrant and returned to the house to search it. RP 135. When the police returned with the search warrant, Jonathan Brooks was in the house. RP 135.

Officer's searched the house and found two rooms that housed marijuana plants in various stages of growth ranging from starter plants in Dixie cups up to mature plants with buds attached. RP 136, 141, 154, 167-68, 173-74, 179-80. There was a ventilation system for growing marijuana, the windows were covered with black plastic and Styrofoam

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insulation, and there were containers of fertilizer, carbon dioxide, vermiculite, high intensity halide lights, umbrella lights, and other materials for growing marijuana. RP 141-42, 154, 174, 177-79. More marijuana was found growing in a shed. RP 142, 174.

Officers found 111 growing plants and found large quantities of harvested marijuana. RP 144. Some fully grown plants with buds still attached were hanging upside down on racks for drying and for concentrating the THC in the flowering buds. RP 141, 180. Other marijuana was processed into sandwich bags. RP 141, 174. There was a trashcan that contained discarded stems and leaves of the processed marijuana plants. RP 141. There was more than 40 grams of harvested, processed marijuana. RP 174.

The State charged Brooks with the crimes of manufacture of a controlled substance, possession of more than forty grams of marijuana. CP 97-98. While these charges were pending, Brooks signed a court order that required him to appear in court July 10, 2012, but Brooks failed to appear as ordered. RP 214. Thereafter, Brooks signed another court order, which required him to appear on October 23, 2012, but Brooks again failed to appear as ordered. RP 214-15.

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The State filed an amended information that charged the crimes charged in the original information and also added two counts of bail jumping and added an additional charge of possession of a controlled substance with intent to deliver. CP 57-59; CP 102-04. After receiving the evidence above, a Mason County jury returned guilty verdicts for the charges of manufacture of controlled substance, possession of more than forty grams of marijuana, and two counts of bail jumping, and returned a not guilty verdict for the charge of possession of a controlled substance with intent to deliver. CP 21-25; RP 281-82.

C. ARGUMENT

1) Prior to seeking a search warrant for seizure of evidence of the crime of manufacturing marijuana, officers who had received an anonymous tip about a marijuana grow operation approached Brooks' residence to knock on the door and talk to him. While at the residence, officers observed, by smell and sound, that there was a marijuana grow operation at the residence. Based upon these facts the officers obtained a search warrant and seized evidence. Because the lawful manufacture of marijuana required that the grower be registered with a registry as defined by 69.51A RCW and there was no such registry in existence on the date of the offense, officers were not required to rule out medical authorization before obtaining and executing a search warrant.

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Brooks does not dispute that the application for a search warrant sets forth probable cause to believe that Brooks was growing marijuana; instead, he asserts that the growing of marijuana is not *per se* illegal and that, therefore, even if Brooks was growing marijuana, the officers lacked probable cause to believe that a crime was being committed. Br. of Appellant at 6. Brooks contends that Trooper Los lacked sufficient information with which to eliminate the possibility that Brooks' act of growing marijuana was lawful under the Medical Use of Marijuana Act, RCW 69.51A.005 *et seq*.

In the search warrant application, Trooper Los provided information about his training and experience and explained that when he went to Brook's house to knock on his door and talk to him, "[t]he obvious odor of growing marijuana was emitting from the building." PT Ex. 1 at p. 2. Trooper Los also declared that he saw other signs that he recognized as evidence of a marijuana grow operation, such as plastic and Styrofoam coverings on the windows and the humming noise of fans and grow lights from within the residence. PT Ex. 1 at p. 3.

The Medical Use of Marijuana Act declares, in relevant part, that:

> The medical use of cannabis *in accordance with the terms and conditions of this chapter* [emphasis added] does not constitute a crime and a qualifying patient or designated provider in

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> compliance with the terms and conditions of this chapter may not be arrested, prosecuted, or subject to other criminal sanctions or civil consequences, for possession, manufacture, or delivery of, or for possession with intent to manufacture or deliver, cannabis under state law....

RCW 69.51A.040. Brooks contends that when police officers in this case applied for a search warrant based only upon the fact that he was growing marijuana, they did not have probable cause to believe that his act of growing marijuana was illegal, because the officers had insufficient information to know whether his manufacture of marijuana was legal under RCW 69.51A.040. Br. of Appellant at 8.

Brooks contends that, after amendments to the Medical Use of Marijuana Act enacted in 2011, the possession or manufacture of a limited amount of marijuana by a qualifying patient is *per se* legal and, therefore, medical authorization is now an absolute defense rather than an affirmative defense. Br. Appellant at 9. Brooks argues that, because under the 2011 amendments medical marijuana is now *per se* legal, the 2010 case of *State v. Fry*, 168 Wn.2d 1, 228 P.3d 1 (2010) -- which holds that the affirmative defense of medical marijuana authorization does not negate probable cause to search for marijuana -- is now obsolete. Br. of Appellant at 8-9. Brooks argues that because police in the instant case had no way of knowing whether his manufacture of marijuana was within

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statutory limits, there application for a search warrant did not identify probable cause to believe that his manufacture of marijuana was a crime.

However, Brooks fails to consider that among the "terms and conditions" (RCW 69.51A.040) that he must abide by under the Medical Use of Marijuana Act, in order for his manufacture of marijuana to be legal under the act, is the requirement that:

> The qualifying patient or designated provider keeps a copy of his or her proof of registration with the registry established in section 901 of this act and the qualifying patient or designated provider's contact information posted prominently next to any cannabis plants, cannabis products, or useable cannabis located at his or her residence[.]

69.51A.040(3). But, section 901 was vetoed and was never enacted into law. See, 2011 Wash. Legis. Serv. Ch. 181 (S.S.S.B. 5073). Thus, it is impossible for Brooks' act of manufacturing marijuana on March 15, 2011, to be *per se* legal. Instead, his act of growing marijuana on March 15, 2011, is *per se* illegal. RCW 69.50.401(1); *State v. Fry*, 168 Wn.2d 1, 228 P.3d 1 (2010).

Although there is no "registry" and it is, therefore, impossible to register with the registry, the manufacture of marijuana may qualify for an affirmative defense, as follows:

> (1) A qualifying patient or designated provider who is not registered with the registry established in *section 901 of this act

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> may raise the affirmative defense set forth in subsection (2) of this section, if:
> (a) The qualifying patient or designated provider presents his or her valid documentation to any peace officer who questions the patient or provider regarding his or her medical use of cannabis;
> (b) The qualifying patient or designated provider possesses no more cannabis than the limits set forth in RCW 69.51A.040(1);
> (c) The qualifying patient or designated provider is in compliance with all other terms and conditions of this chapter;
> (d) The investigating peace officer does not have probable cause to believe that the qualifying patient or designated provider has committed a felony, or is committing a misdemeanor in the officer's presence, that does not relate to the medical use of cannabis;
> (e) No outstanding warrant for arrest exists for the qualifying patient or designated provider; and
> (f) The investigating peace officer has not observed evidence of any of the circumstances identified in *section 901(4) of this act.
> (2) A qualifying patient or designated provider who is not registered with the registry established in *section 901 of this act, but who presents his or her valid documentation to any peace officer who questions the patient or provider regarding his or her medical use of cannabis, may assert an affirmative defense to charges of violations of state law relating to cannabis through proof at trial, by a preponderance of the evidence, that he or she otherwise meets the requirements of RCW 69.51A.040. A qualifying patient or designated provider meeting the conditions of this subsection but possessing more cannabis than the limits set forth in RCW 69.51A.040(1) may, in the investigating peace officer's discretion, be taken into custody and booked into jail in connection with the investigation of the incident.

69.51A.043. Thus, the holding of *State v. Fry*, 168 Wn.2d 1, 228 P.3d 1 (2010), is not obsolete.

To qualify for the medical marijuana affirmative defense, Brooks was required to prove with a preponderance of evidence that he qualified

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for the defense by having satisfied each of the provisions of Chapter 51A of Title 69 of the Revised Code of Washington. RCW 69.51A.040(1); *State v. Fry*, 168 Wn.2d 1, 228 P.3d 1 (2010).

RCW 69.51A.010(4) sets forth several criteria that a person must satisfy before qualifying for the affirmative defense of a "qualifying patient." The quantity of marijuana, growing or processed, that a "qualifying patient" may possess is a separate restriction. RCW 69.51A.040(1).

To legally qualify as a medical marijuana patient requires more than to merely possess medical marijuana-patient documentation or the purported recommendation of a doctor or qualifying medical professional. *State v. Fry*, 168 Wn.2d 1, 6, 228 P.3d 1 (2010).

Merely claiming medical authorization to possess or grow marijuana, or merely presenting a purported authorization document to officers executing a search warrant, does not negate probable cause or the validity of the search warrant. *Id.* at 6. At most, the authorization created a potential, future affirmative defense, but the authorization document would not result in making the manufacture of marijuana noncriminal or negate any element of the offense. *Id.* 7-8.

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2) On the facts of the instant case the crime of possession of marijuana and the crime of manufacture of marijuana comprise a single, recognizable plan with the same criminal objective to possess marijuana.

A trial court's determination of whether two crimes constitute the same criminal conduct is reviewed on appeal for an abuse of discretion or misapplication of law. *State v. Freeman,* 118 Wn. App. 365, 377, 76 P.3d 732 (2003), *aff'd,* 153 Wn.2d 765, 108 P.3d 753 (2005). The term "same criminal conduct" is to be construed narrowly. *State v. Hernandez,* 95 Wn. App. 480, 485, 976 P.2d 165 (1999).

Two or more crimes may be considered the same criminal conduct if they (1) require the same criminal intent; (2) are committed at the same time and place; and (3) involve the same victim. RCW 9.94A.589(1)(a). The absence of any one of the prongs prevents a finding of "same criminal conduct." *State v. Price,* 103 Wn. App. 845, 855, 14 P.3d 841 (2000) (citing *State v. Vike,* 125 Wn.2d 407, 410, 885 P.2d 824 (1994)), *review denied,* 143 Wn.2d 1014 (2001).

To determine whether Brooks' crime of possession of marijuana and manufacture of marijuana constituted the same criminal conduct, the test is whether, when viewed objectively, his intent changed from one crime to the next and whether one crime furthered the other. *State v.*

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Freeman, 118 Wn. App. 365, 377, 76 P.3d 732 (2003), *aff'd*, 153 Wn.2d 765, 108 P.3d 753 (2005). The defendant bears the burden of proving that the two offenses constituted the same criminal conduct. *State v. Graciano*, 176 Wn.2d 531, 540, 295 P.3d 219 (2013). "If the defendant fails to prove any element under the statute, the crimes are not the 'same criminal conduct.'" *Id.* (quoting and citing *State v. Maxfield*, 125 Wn.2d 378, 383, 886 P.2d 123 (1994)). RCW 9.94A.589 is narrowly construed so as to disallow most claims of same criminal conduct. *Graciano* at 540.

"[I]f one crime furthered another, and if the time and place of the crimes remained the same, then the defendant's criminal purpose or intent did not change and the offenses encompass the same criminal conduct." *State v. Lessley*, 118 Wn.2d 773, 777, 827 P.2d 996 (1992), citing *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237, 749 P.2d 160 (1987).

The standard is whether, when viewed objectively as opposed to subjectively, the criminal intent changed from one crime to the next. *State v. Vike*, 125 Wn. 2d 407, 411, 885 P.2d 824 (1994) (citing *State v. Dunaway,* 109 Wn.2d 207, 215, 743 P.2d 1237, 749 P.2d 160 (1987)).

"Objective intent may be determined by examining whether one crime furthered the other or whether both crimes were a part of a recognizable scheme or plan." *State v. Wilson*, 136 Wn. App. 596, 613,

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150 P.3d 144 (2007), citing *State v. Lewis,* 115 Wn.2d 294, 302, 797 P.2d 1141 (1990). However, if the criminal intent objectively changes between the two crimes, then the crimes are not the same criminal conduct. *Wilson* at 613. "[W]here the second crime is 'accompanied by a new objective "intent,"' one crime can be said to have been completed before commencement of the second; therefore, the two crimes involved different criminal intents and they do not constitute the same criminal conduct." *Wilson* at 613-614, quoting *State v. Grantham,* 84 Wn. App. 854, 859, 932 P.2d 657 (1997).

In the instant case, Brooks' crime of manufacturing marijuana furthered his crime of possession of marijuana, and each crime was apparently a part of a recognizable scheme or plan to possess marijuana. If Brooks' trial counsel would have argued at sentencing that Brooks' crimes of manufacturing marijuana and possession of marijuana on the facts of the instant case constituted the same criminal conduct, it is likely that the trial court would have abused its discretion if it did not find that the two crimes did constitute the same criminal conduct. *State v. Bickle*, 153 Wn. App. 222, 235, 222 P.3d 113 (2009). Brooks contends that his trial counsel was ineffective for failing to raise a same criminal conduct argument at sentencing. Br. of Appellant at 14-16.

Ineffective assistance of counsel is a two-pronged test that requires the reviewing court to consider whether trial counsel's performance was deficient and, if so, whether counsel's errors were so serious as to deprive the defendant of a fair trial for which the result is unreliable. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 246 P.3d 1260, 1268 -1269 (2011).

Brooks argues that "[t]his Court cannot be confident the trial court would not have concluded the crimes constituted the same criminal conduct had it been asked to do so." Br. of Appellant at 16. However, the standard of review when asserting ineffective assistance of counsel requires Brooks to show that there is a reasonable probability that the outcome would have been different. *Strickland*, 466 U.S. at 697; *State v. Foster,* 140 Wn. App. 266, 273, 166 P.3d 726 (2007).

3) Because there are no facts to support a finding that alcohol or the use of alcohol contributed to Brooks' crimes of conviction, under current precedent the prohibition against the possession of alcohol is error and should be stricken from his judgment and sentence.

Pursuant to RCW 9.94A.703(3)(e) the sentencing court had statutory authority to require Brooks, as a condition of community

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custody, to "[r]efrain from consuming alcohol." The legislature has sole province to establish legal punishments; thus, community custody conditions must be authorized by statute. *State v. Kolesnik,* 146 Wn. App. 790, 806, 192 P.3d 937 (2008), *review denied,* 165 Wn.2d 1050 (2009).

There is no evidence in the record to indicate that alcohol was in any way connected to Brooks' crime of conviction. Therefore, the sentencing court had legal, statutory authority to require that Brooks not use alcohol, but the court lacked statutory authority to prohibit him from possessing alcohol.

The sentencing court was, on the facts of this case, required to order that Brooks "refrain from possessing or consuming controlled substances except pursuant to lawfully issued prescriptions," unless the trial court in its discretion exercised its statutory authority to waive this condition. RCW 9.94A.703(2)(c).

But the prohibition against the possession of alcohol and the prohibition against the possession or use of drugs are intermingled by the language of Brooks' judgment and sentence. CP 14. His judgment and sentence should be modified to remove the restriction against possession of alcohol and to state separately that he his prohibited from using or possessing controlled substances except with a valid prescription and that

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he is prohibited from consuming alcohol. *State v. Jones*, 118 Wn. App. 199, 207-208, 76 P.3d 258 (2003).

D. CONCLUSION

Because it was absolutely certain that on March 15, 2012, there was no registry as defined by the Medical Use of Marijuana Act, it is also absolutely certain that Brooks could not have registered with the registry as required by RCW 69.51A.040 before his manufacturing of marijuana would be legal. Therefore, medical marijuana authorization was at most an affirmative defense and did not act to negate any element of the charged offense or to make Brooks' act of manufacturing marijuana noncriminal. As such, the court did not err when it declined to suppress evidence obtained pursuant to a search warrant issued to seize evidence of the crime of manufacturing marijuana.

It appears, based upon the crimes of conviction in this case, that Brooks' act of manufacturing marijuana was a part of a criminal scheme that furthered his intent to possess marijuana. On these facts, precedent established by the case of *State v. Bickle*, 153 Wn. App. 222, 235, 222 P.3d 113 (2009), holds that the trial court would have abused its discretion

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if it had declined to find that Brooks' crime of possession of marijuana and his crime of manufacturing marijuana are same criminal conduct.

Finally, there was no evidence in the instant case from which to find that alcohol or the use of alcohol contributed to Brooks' crimes of conviction. Therefore, the prohibition against possession of alcohol should be stricken from Brooks' judgment and sentence.

DATED: November 20, 2013.

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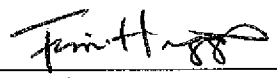

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