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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

31561-4-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, APPELLANT

v.

MARC E. REED, RESPONDENT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF APPELLANT

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I.

ASSIGNMENTS OF ERROR

- (1) The trial court erred when it concluded that an affidavit for a search warrant for the crime of manufacturing marijuana must contain facts that the person was not manufacturing marijuana in violation of the medical marijuana statute. (Conclusions of Law numbers 3, 5, 6, 7, 8, 9 and 10. The State is not assigning error to that portion of Conclusion of Law number 3 that concludes that there was probable cause to issue the search warrant prior to the 2011 amendments).
- (2) The trial court erred when it concluded that there was insufficient probable cause to issue the search warrant in this case.

II.

ISSUES PRESENTED

- (1) Whether, after the 2011 amendments to RCW 69.51A, an affidavit for a search warrant for the crime of manufacturing marijuana must assert facts there is reason to believe that a person is not in compliance with the medical marijuana law, before a judge can find probable cause to issue a search warrant for evidence of that crime.

III.

STATEMENT OF THE CASE

The defendant, Mark E. Reed, is charged by Information with one count of Manufacture of a Controlled Substance-Marijuana. (CP 1) On December 23, 2011, officers of the Spokane Police Department served a search warrant at 5211 N. Walnut, Spokane. The officers discovered and seized a marijuana grow in the garage of the residence. (CP 4)

The defendant filed a motion to suppress evidence on October 8, 2012. (CP 6) The suppression motion was heard on November 15, 2012, and the court filed a written opinion on November 26, 2012. (CP 42-47).

The trial court granted the motion to suppress. (CP 47) The trial court concluded that since the affidavit for the search warrant did not allege facts that the defendant was manufacturing marijuana in violation of the medical marijuana statute, there was no basis to show probable cause that the defendant was committing a crime. (CP 42) In its written Findings of Fact and Conclusions of Law the trial court concluded that if the search warrant affidavit had been presented to a magistrate prior to the 2011 amendments there would be sufficient probable cause to issue a search warrant. (CP 49)

Findings of Fact and Conclusions of Law were signed on February 12, 2013. (CP 48-51) The State filed a Motion for Reconsideration on February 22, 2013. (CP 52). The court denied the motion for Reconsideration on March 1,

2013, and dismissed the case without prejudice. (CP 68-69). The State filed a timely Notice of Appeal. (CP 70-73).

IV.

ARGUMENT

- A. WHEN THE GOVERNOR VETOED SECTION 901 OF THE 2011 AMENDMENTS TO RCW 69.51A, IT BECAME IMPOSSIBLE FOR A PERSON TO BE IN COMPLIANCE WITH RCW 69.51A.040.

The manufacture of marijuana is a crime in the State of Washington. RCW 69.50.401. During the 2011 legislative session, the Washington Legislature passed Engrossed Second Substitute Senate Bill (hereinafter “E2SSB”) 5073, which amended Washington’s Medical Marijuana (now Medical Cannabis) law. Among the other modifications to the language of RCW 69.51A.040, the bill would have established a statewide voluntary registry for qualifying patients. Essentially, the use of medical marijuana by qualifying patients who registered and met certain other requirements would not have constituted a crime and those patients would be immune from arrest and other consequences.

Section 901 of E2SSB 5073 directed the Washington State Department of Health to create a “secure and confidential registration system” for qualifying patients, designated providers, and licensed producers, processors and dispensers. Registration was to be “optional for qualified patients and designated providers, not mandatory....[and] qualifying patients must be able to remove themselves

from the registry at any time. *See*, E2SSB 5073 § 901(6). The legislature directed that peace officers be able “to verify at any time whether a person” was on the registry. *See*, E2SSB 5073 § 901(1)(a).

Qualifying patients and designated providers who were on the registry and met certain other requirements would not have been subject to arrest, prosecution, or other criminal or civil sanctions. *See*, E2SSB 5073 § 401, *codified at*, RCW 69.51A.040, *see also* E2SSB 5073 Senate Report Bill at 2. (Qualifying patients and their designated providers are provided with arrest protection and protection from warrantless searches if they are registered with the Department of Health and meet other requirements). Similarly, licensed producers, processors and dispensers were not subject to arrest, search, prosecution or other criminal or civil consequences if they were licensed. *See* E2SSB 5073 § 601 (producers), § 602 (processors), and § 701 (dispensers).

The State submits that the registry was a central and essential component of making the use of medical marijuana not to constitute a crime. Indeed, the scheme created by the Legislature in E2SSB 5073 clearly contemplated two sets of qualifying patients: those who were voluntarily on the registry and those who were not registered (but who possessed “valid documentation” from their health care provider). The first group would not be committing a crime when they used medical marijuana and met the other requirements contained in the bill. The second group would be committing a crime, but would be able to use the

affirmative defense contained in RCW 69.51A.043. The dual structure underlines the legislature's understanding that it was not "legalizing" marijuana but making the use of medical marijuana for medical purposes by those who had registered, and met other requirements, to not constitute a crime. Manufacture of marijuana remained presumptively a crime, even under the framework that would have been created by E2SSB 5073.

However, the Governor vetoed several sections of the bill. The registry provision was vetoed, as were the sections regarding producers, processors and dispensers. The veto of these sections eliminated the immunity from arrest and other protections that had been in the bill.

The Governor's partial veto message clarifies that qualifying patients and designated providers may still assert an affirmative defense, but do not have immunity from arrest:

I am not vetoing Sections 402 or 406, which establish affirmative defenses for a qualifying patient or designated provider who is not registered with the registry established in section 901. Because these sections govern those who have not registered, this section is meaningful even though section 901 has been vetoed.

Washington Governor's Partial Veto Message, April 29, 2011.

The Governor did not veto section 102 of the bill, which is codified as RCW 69.51A.005.

The language in the provisions of RCW 69.51A.005(2) clearly states the legislature's intention that qualifying patients, designated providers and health care professionals should not be subject to criminal and civil penalties when they were in compliance with the medical marijuana law. However, a statement of legislative intent, used by the legislature as a preface to an enactment, lacks operative enforcement in itself, although it may serve as an important guide in understanding the intended effect of operative sections. *Hartman v. State Game Commission*, 85 Wn.2d 176, 179, 532 P.2d 614 (1975). RCW 69.51A.005 does not create immunity from arrest and prosecution or other consequences by itself; there must be some other operative section that does so. There is no other section in this chapter that does so.

Once the registry provisions were vetoed, it is not possible for a person to be in compliance with sections (2) and (3), as they require a qualifying patient or provider to possess proof of registration with the Department of Health. Because it is impossible to meet all of the requirements of RCW 69.51A.040, there is no protection from arrest, prosecution or other criminal or civil penalties for the use of medical marijuana. RCW 69.51A.043, .045 and .047 provide affirmative defenses to someone who is arrested or prosecuted for a violation of RCW 69.50.401 that involves the use, possession or manufacture of marijuana.

The State submits that when this Court construes the remaining portions of the medical marijuana law as codified in RCW 69.51A, it should conclude that that the Legislature did not intend to decriminalize all marijuana grow operations. Nor is there an intention to place the burden upon law enforcement officers to demonstrate to a magistrate that a grower of marijuana is not a qualified medical marijuana patient or a designated provider. RCW 69.51A.020 and .043 make it clear that the possession, consumption and manufacture of marijuana remain crimes. Those persons who are lawfully in possession of marijuana pursuant to the medical marijuana laws have the burden to provide evidence that they are in compliance with those laws.

The trial court came to the conclusion that the legislature intended to decriminalize the medical use of marijuana and that it was an exception to the criminal statutes relating to marijuana (Conclusion of Law number 5 and 10). While that may have been the legislature's intent, the governor's veto of section 901 meant that a person could not be in compliance with RCW 69.51A.040. The trial court's construction of RCW 69.51A.040 following the governor's veto of section 901 makes the provisions of RCW 69.51A.043 superfluous. If a statute's meaning is plain on its face a court must give effect to that plain meaning of legislative intent. *Mason v. Georgia-Pacific Corp.*, 166 Wn. App. 859, 863,

271 P.3d 381 (2012). Courts are to avoid constructing a statute in a manner that results in “unlikely, absurd, or strained consequences”. *Glaubach v. Regence BlueShield*, 149 Wn.2d 827, 833, 271 P.3d 381 (2003). The trial court’s conclusion that the statutory scheme set forth in RCW 69.51A survived the governor’s veto is a strained construction of that statute. The trial court’s decision did not give effect to the plain meaning of RCW 69.51A. and its decision must be reversed.

B. THE POTENTIAL EXISTENCE OF AN AFFIRMATIVE DEFENSE DOES NOT NEGATE PROBABLE CAUSE TO ISSUE A SEARCH WARRANT.

Since the Governor’s veto of section 901 of E2SSB 5073 makes it impossible for someone to be in compliance with all of the provisions of RCW 69.51A.040 that would make the medical use of marijuana not a crime, all the defendant has is the possibility of an affirmative defense at trial. The court’s decision in *State v. Fry*, 168 Wn.2d 1, 7-8, 228 P.3d 1 (2010), indicates that an affirmative defense does not negate probable cause to believe that a crime has occurred. At best, the defendant has an affirmative defense to be presented at trial. The officers executed a valid search warrant on December 23, 2011.

V.

CONCLUSION

For the reasons stated above, the trial court's decision that there was insufficient probable cause to issue the search warrant should be reversed by this court, and the case remanded for trial.

Dated this 5 day of August, 2013.

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