31561-4-III

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON, APPELLANT

V.

MARC E. REED, RESPONDENT

APPEAL FROM THE SUPERIOR COURT OF SPOKANE COUNTY

BRIEF OF RESPONDENT

THE LAW OFFICES OF
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I. ASSIGNMENTS OF ERROR

The Appellant, State of Washington, has set forth two assignments of error in this appeal. First, that 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 manufacturing marijuana in violation of the medical marijuana statutes, as amended in July, 2011. Second, that the trial court erred when it concluded that there was insufficient probable cause to issue the warrant in this case.

II. ISSUES PRESENTED

1. Does a search warrant lack probable cause that a crime has been committed when it alleges a defendant was manufacturing marijuana without alleging the defendant was not in compliance with the Medical Use of Cannabis Act?

2. Did the trial court properly find the warrant here lacked probable cause because it failed to allege that Mr. Reed was not in compliance with the statutory scheme of the Medical Use of Cannabis Act?

III. STATEMENT OF THE CASE

For the purposes of this appeal, Marc Reed accepts the State's Statement of the Facts as recited in the Brief of Appellant.

IV. SUMMARY OF ARGUMENT

Prior to July, 2011, the lawful use of marijuana in compliance with RCW Chapter 69.51A was an affirmative defense to prosecution. However, RCW 69.51A was amended in July, 2011, to provide that the use, possession and/or manufacture of marijuana in compliance with RCW 69.51A (renamed Medical Use of Cannabis Act) is no longer a criminal offense. See, Laws 2011, Chapter 181 §§ 102 and 401.

Therefore, before a search warrant may issue, law enforcement must establish probable cause that such use, possession or manufacturing of marijuana failed to comply with the terms and conditions of the Medical Use of Cannabis Act.

In *State v. Kurtz*, ___Wn.2d ___, 309 P.3d 472 (2013). WL 5310161 (September 19, 2013) the State Supreme Court concluded, without equivocation, that the Act legalizes medical cannabis use.[1] This belies the State's contention that, because of the Governor's vetoes, only the pre-2011 amendment affirmative defenses remain available under the Act.

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[1] Id. at 475 n.3 ("The legislature has since amended the statute to state that such a use 'does not constitute a crime.'")(citing RCW 69.51A.040); Id. at 478 ("Moreover, in 2011 the legislature amended the Act making qualifying marijuana use a legal use, not simply an affirmative defense."); Id. ("The 2011 amendment legalizing qualified marijuana use strongly suggests that the Act was not intended to abrogate or supplant the common law necessity defense.").

Here, the trial court properly found that the police affidavit purporting to establish probable cause failed to allege that if Mr. Reed was growing marijuana, he was not doing so in compliance with the statutory scheme. As a consequence, the warrant lacked probable cause.

V. ARGUMENT

1. PURSUANT TO CHAPTER RCW 69.51A, THE SEARCH WARRANT AFFIDAVIT LACKED PROBABLE CAUSE, THUS THE TRIAL COURT PROPERLY SUPPRESSED THE EVIDENCE SEIZED PURSUANT TO THE WARRANT.

A. Due to the 2011 Amendments to RCW 69.51A, the Search Warrant Affidavit Lacked Probable Cause as it Failed to Allege Mr. Reed was not in Compliance with the Statutory Scheme of the Medical Use of Cannabis Act.

The July, 2011, amendment to RCW 69.51A removed the previously codified "affirmative defense" language, and decriminalized the qualified medical use of cannabis. RCW 69.51A.040 now reads:

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

(emphasis added). *See also* RCW 69.51A.025 ("Nothing in this chapter or in the rules adopted to implement it precludes a qualifying patient or designated provider from engaging in the private, unlicensed, noncommercial production, possession, transportation, delivery, or administration of cannabis for medical use as authorized under RCW 69.51A.040.").

Thus, in order to establish probable cause to believe a person is committing a violation of RCW 69.50.401, the police must show more than mere use, possession or manufacturing of marijuana. Probable cause can only be established if the police show the use, possession, or manufacturing failed to comply with the conditions in chapter RCW 69.51A. Otherwise, the individual is not committing a crime under state law. RCW 69.51A.040.

B. The Governor's Veto of Section 901 Removed any Reference to the Registry, and Likewise, Removed Registration as a "Term And Condition" of the Medical Use of Cannabis Act.

The Governor's veto of one section of the 2011 amendments to chapter RCW 69.51A does not alter the language in the statute that one cannot be arrested or prosecuted for a crime absent allegations he or she were not in compliance with the statutory requirements. The State

places great emphasis on the Governor's veto of section 901[2] of the 2011 amendment in arguing that one cannot be arrested or charged with a crime only if he or she has registered, and such registry does not exist in light of the Governor's veto. Brief of Appellant 7-12. Thus, according to the State, in light of the Governor's veto of the registry, only an affirmative defense exists for those complying with chapter RCW 69.51A. *Id.*

This argument is contrary to the plain meaning of RCW 69.51A.040 and the Supreme Court's recent decision in *State v. Kurtz,* ___Wn.2d ___, 309 P.3d 472 (2013). WL 5310161 (September 19, 2013). (discussed part 3 infra)

The State's argument also confuses the legal effect of the Governor's veto. Contrary to the State's arguments, the Governor's veto removed the registry, and any reference to the registry, which

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[2] The portion of RCW 69.51A.040 vetoed by the Governor, stated that a person cannot be arrested, charged, or prosecuted for the use, possession, or manufacturing of marijuana, if:

> (3) 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;

consequently removed registration as a term and condition of the Act. "The Governor's veto of a portion of a measure, if the veto is not overridden, removes the vetoed material from the legislation as effectively as though it had never been considered by the legislature." *Hallin v. Trent*, 94 Wn.2d 671, 677, 619 P.2d 357 (1980). Any remaining references to the registry are "incidentally vetoed" and "manifestly obsolete." *Washington Federation of State Employees, AFL-CIO, Council 8, AFSCME v. State*, 101 Wn.2d 536, 544, 682 P.2d 869 (1984). Said another way, registry with the Department of Health was removed as a "term and condition" of the chapter upon the Governor's veto. The registry was vetoed by the governor, and thus, references to the registry are likewise obsolete. Therefore, the affirmative defense established in RCW 69.51A.043, for failing to register, is removed "as though it had never been considered by the legislature." *Hallin*, 94 Wn.2d at 677.

Furthermore, there is a level of absurdity in the state's argument. Patients are effectively trapped in a paradox of contradictory regulations — a patient must comply with terms and conditions of the Act, which, the State argues, are impossible to comply with. This "Catch-22" interpretation of our state's criminal statutes is not permissible.

The State would read certain portions out of the statute – the portions stating one cannot be arrested, charged, and or prosecuted, yet keep in the one provision that works in its favor – providing the defendant only an affirmative defense. This construction is in direct conflict with the intent of the Legislature and leads to an absurd result. The State's arguments must be rejected.

When interpreting a statute, the court's fundamental objective is to ascertain and carry out the legislature's intent. *State v. Jacobs,* 154 Wn.2d 596, 600, 115 P.3d 281 (2005). The starting point is the statute's plain language and ordinary meaning. *State* v. *J. P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). When the plain language is unambiguous, the legislative intent is apparent, and courts will not employ principles of construction to construe the statute otherwise. *JP.,* 149 Wn.2d at 450. In determining the plain meaning of a provision, courts look to the text of the statutory provision in question as well as "the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." *Jacobs,* 154 Wn.2d at 600, 115 P.3d 281. Here the position taken by the State, nullifies the crux of the 2011 amendments and the Legislature's intent.

C. The Washington Supreme Court in *State V. Kurtz* Referred to the 2011 Amendments to RCW 69.51A as "Making Qualified Marijuana use Legal use, not Just an Affirmative Defense."

In *State v. Kurtz*, the Court addressed the issue whether the common law medical necessity defense to marijuana use or possession had been abrogated by the Medical Use of Marijuana Act. RCW 69.51A (renamed Medical Use of Cannabis Act in the 2011 amendment)(RCW 69.51A.900). At trial, Kurtz attempted to present evidence of medical marijuana use in support of a common law defense and a statutory medical marijuana defense. The trial court refused to allow either defense, and the Court of Appeals affirmed. The Washington Supreme Court reversed.

The *Kurtz* Court traced the history of the necessity defense as first applied to marijuana possession in *State v. Diana*, 24 Wash.App. 908, 916, 604 P.2d 1312 (1979) and later recognized in *State v. Pittman*, 88 Wash.App. 188, 196 943 P.2d 713 (1997) and *State v. Cole*, 74 Wash.App. 571, 578-80, 874 P.2d 878 (1994). The *Kurtz* Court noted that those decisions were called into question by *State v. Williams*, 93 Wash.App. 340, 347, 968 P.2d 1034 (1998), which held that "accepted medical use" was a requirement of the necessity defense, and that the legislature had not found an accepted medical use for marijuana. Thus, there could not be a common law necessity defense for marijuana use. *Kurtz,* at 474-475.

The *Kurtz* Court also noted, however, that Initiative 692, now codified as RCW 69.51A, had been adopted one month before *Williams* was decided. The Initiative declared that medical use of marijuana by qualifying patients was an affirmative defense to possession of marijuana. See, Former RCW 69.51A.040. *Williams* had mentioned, but failed to discuss that statute in detail.

The *Kurtz Court* then considered whether RCW 60.51A.040 abrogated or superseded the common law medical necessity defense for marijuana. The Court noted that there was no language expressing legislative intent to abrogate the common law. In addressing and rejecting numerous arguments raised by the State, the Court, after considering the 2011 amendment to the earlier codification of medical marijuana use, made the following statement:

> Moreover, in 2011, the legislature amended the Act *making qualifying marijuana use a legal use, not simply an affirmative defense.*

Kurtz, at 478. (emphasis added).

After reasoning that a necessity defense arises only when a person acts contrary to the law, the Court noted that RCW 69.51A.005(2)(a) states that no person "shall be arrested, prosecuted, or subject to other criminal actions or civil consequences under state law based solely on

their medical use of cannabis, notwithstanding any other provision of law." *Kurtz*, at 478. The Court concluded that a person who uses marijuana while complying with the requirements of the statute is not committing a crime. The Court could not have reached this conclusion if it contemplated that the Governor's veto of certain sections made compliance with the Act impossible.

Accordingly, *Kurtz* now renders unassailable the proposition that medical use of marijuana in the State of Washington is not a crime. Only the use, possession, or manufacture of marijuana that fails to comply with the requirements of RCW Chapter 69.51A is criminal. Thus, evidence that a person is using, possessing, or manufacturing marijuana is sufficient to establish probable cause only when there are facts and circumstances showing that the conduct falls outside that which is expressly permitted under Washington law.

D. *State v. Fry* is Only Relevant to Prosecutions for Alleged Violations Occurring Prior to the Act's 2011 Amendment.

The State, in continuation of its argument that only the pre-amendment affirmative defenses are available, relies on the Supreme Court decision in *State v. Fry*, 168 Wn.2d 1, 228 P.3d 1 (2010) for the proposition that affirmative defenses do not negate probable cause to believe a crime has occurred. Brief of Appellant at 12.

Fry's continued relevance is questionable. At the time of the decision in *Fry,* RCW 69.51A.040 stated:

> 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.

Former RCW 69.51A.040 (2) (2008).

As previously stated, the *Kurtz Court* noted that "the legislature amended the Act making qualifying marijuana use a legal use, not simply an affirmative defense." *Kurtz,* at 478. The Court made clear that an individual meeting the specific requirements in RCW 69.51A "may not be charged with committing a crime[.]" *Id.*

Thus, to the extent *Fry* has any relevance; it is applicable only to those persons prosecuted prior to the 2011 amendments where only an affirmative defense was available.

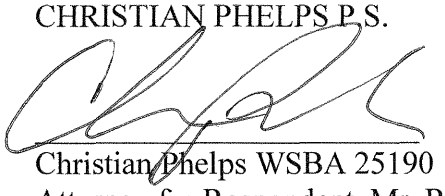
VI. CONCLUSION

For the reasons stated, Mr. Reed asks this Court to affirm the trial court's order suppressing the evidence seized pursuant to the search warrant.

DATED this 27th day of November, 2013.

Respectfully submitted,

THE LAW OFFICES OF
CHRISTIAN PHELPS P.S.



Christian Phelps WSBA 25190
Attorney for Respondent, Mr. Reed

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

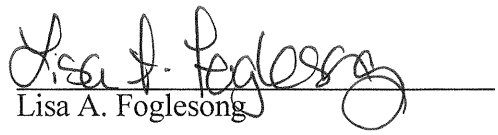
DIVISION III

STATE OF WASHINGTON,	)	
	)	
Appellant,	)	No. 31561-4-III
	)	
	)	
v.	)	CERTIFICATE OF
	)	SERVICE
MARC E. REED,	)	
	)	
Respondent.	)	

I certify under penalty of perjury under the laws of the State of Washington, that on November 27, 2013, I hand delivered a copy of the RESPONDENT'S BRIEF in this matter, addressed to the following:

Mary Ann Brady
Deputy Spokane Prosecuting Attorney
Broadway Center Building
721 N. Jefferson
Spokane, WA 99206

Signed in Spokane, Washington this 27th day of November, 2013.



Lisa A. Foglesong