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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
B, _____

31760-9-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, APPELLANT

v.

DOUGLAS J. NELSON, RESPONDENT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

HONORABLE JAMES M. TRIPLET

BRIEF OF APPELLANT

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INDEX

ASSIGNMENTS OF ERROR..... 1

ISSUE PRESENTED..... 1

STATEMENT OF THE CASE 2

ARGUMENT..... 7

 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..... 7

 B. THE POTENTIAL EXISTENCE OF AN AFFIRMATIVE
 DEFENSE DOES NOT NEGATE PROBABLE CAUSE
 TO ISSUE A SEARCH WARRANT 12

CONCLUSION..... 13

TABLE OF AUTHORITIES

WASHINGTON CASES

| | |
|--|----|
| GLAUBACH V. REGENCE BLUESHIELD, 149 Wn.2d 827, 271 P.3d 381 (2003) | 12 |
| HARTMAN V. STATE GAME COMMISSION, 85 Wn.2d 176, 532 P.2d 614 (1975) | 10 |
| MASON V. GEORGIA-PACIFIC CORP., 166 Wn. App. 859, 271 P.3d 381 (2012) | 11 |
| STATE V. FRY, 168 Wn.2d 1, 228 P.3d 1 (2010) | 12 |

STATUTES

| | |
|------------------------------|------------------|
| E2SSB 5073 | 7, 8, 9 |
| E2SSB 5073 § 401 | 8 |
| E2SSB 5073 § 601 | 8 |
| E2SSB 5073 § 602 | 8 |
| E2SSB 5073 § 701 | 8 |
| E2SSB 5073 § 901 | 7, 12 |
| E2SSB 5073 § 901(1)(a) | 7 |
| E2SSB 5073 § 901(6) | 7 |
| RCW 69.50.401 | 10 |
| RCW 69.51A.005 | 9, 10 |
| RCW 69.51A.005(2) | 10 |
| RCW 69.51A.020 | 11 |
| RCW 69.51A.040 | 7, 8, 10, 11, 12 |

| | |
|----------------------|-----------|
| RCW 69.51A.043 | 8, 10, 11 |
| RCW 69.51A.045 | 10 |
| RCW 69.51A.047 | 10 |

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 1, 2, 3, 4, 5, and 6. The State is not assigning error to that portion of Conclusion of Law number 1 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) Must an affidavit for a search warrant for the crime of manufacturing marijuana assert facts that there is reason to believe 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 after the 2011 amendments to RCW 69.51A?

III.

STATEMENT OF THE CASE

The defendant, Douglas J. Nelson, is charged by Information with one count of Manufacture of a Controlled Substance-Marijuana and one count of Possession of a Controlled Substance with Intent to Deliver-Marijuana. CP 1.

Douglas Nelson was arrested on February 22, 2012, for manufacture of a controlled substance (marijuana) and possession of a controlled substance with intent to deliver (marijuana). The arrest was based upon the execution of two search warrants that discovered a marijuana growing operation and additional marijuana packaged for delivery. CP 2-3.

On February 22, 2012, the Spokane Police Department executed two search warrants authored by Detective Larry Bowman and authorized by a District Court Judge. One search warrant authorized the search of 2721 N. Crestline St. in Spokane, Washington. CP 61-66. The other search warrant authorized a search of 314 E. Wabash St. in Spokane, Washington. CP 67-71. The search warrants relied upon the same search warrant affidavit. CP 73-82.

The search warrant affidavit details that on August 19, 2011, Detective Bowman received information from Sgt. Sean Nemec regarding a possible marijuana grow operation inside the apparently vacant house located at 2721 N. Crestline. CP 73-82. Detective Bowman conducted a records check to determine ownership of the house and found that one of the property owners was listed as an

“other” person in a marijuana growing operation in 2005. CP 73-82. Subsequently, Detective Bowman observed a Chevrolet Impala parked in the driveway of the Crestline address that investigation determined was registered to Felicia N. Holland. Ms. Holland had been arrested in 2009 for possessing marijuana, though the charge was eventually dismissed. CP 73-82.

Detective Bowman contacted Avista Utilities for subscriber and power usage information regarding the Crestline address. Avista Utilities reported the utility subscriber as Jenny Yeom. A criminal records check showed no law enforcement record. CP 73-82. Avista Utilities reported a dramatic increase of power usage during the period after Ms. Yeom opened the account. Based upon his many years of experience in drug investigations, Detective Bowman wrote that the significant increase in power usage was consistent with an indoor marijuana growing operation. CP 73-82.

Detective Bowman walked by the Crestline address on several occasions noting that the windows were covered with moisture visible on the inside of the window. CP 73-82. Further, Officer Baldwin, whose experience with marijuana growing operations was detailed in the search warrant affidavit, walked by the Crestline address and observed the odor of marijuana coming from the residence, as well as the sound of fans or air conditioners running inside the residence. Officer Baldwin also observed that several of the windows were covered, but a light could be seen through the windows. CP 73-82.

On January 20, 2012, Detective Bowman requested an updated report of power usage from Avista Utilities for the Crestline address. Avista reported that Ms. Yeom was the subscriber and that the power consumption remained at a high rate. After receiving the Avista report, Officer Baldwin walked by the Crestline address and again smelled the odor of marijuana emanating from the residence. Officer Baldwin reiterated hearing fans operating within the residence. CP 73-82.

Detective Bowman obtained a warrant authorizing placement of a GPS tracking device on the Chevy Impala observed at the Crestline address. The monitoring device documented that the Chevy travelled between the Crestline and 314 E. Wabash St. addresses numerous times. CP 73-82. Detective Bowman observed that the front picture and many other windows of the Wabash residence were covered with clear plastic on the inside. Avista advised that the subscriber was Felicia Holland and that there was a high rate of power consumption compared to a nearby residence. CP 73-82.

Prior to executing the search warrants on February 22, 2012, Detective Bowman surveilled the Chevy Impala at both the Wabash and Crestline addresses. CP 84-87. Detective Bowman followed as Felicia Holland drove the Chevy from the Wabash residence, but eventually lost sight of the vehicle in traffic. CP 84-87. Detective Bowman drove to the Crestline address and observed the Chevy Impala pull into the driveway and park. Detective Bowman could not identify the driver from his location, but did observe the driver exit the vehicle, remove a bag

from the trunk, enter the residence and exit a few minutes later, then drive away. CP 84-87.

Officers stopped the Chevy at the intersection of Perry and Dalton. Detective Bowman contacted the driver and identified him as Douglas Nelson. Detective Bowman advised Mr. Nelson of the search warrant for the Crestline address and asked if he wished to provide the keys to the residence. Mr. Nelson initially indicated that he was at the Crestline address to visit and had not entered. When Detective Bowman asked Mr. Nelson about the residence being a marijuana grow house, he requested an attorney. CP 84-87. Detective Bowman proceeded to the Crestline address to execute the search warrant and discovered a marijuana growing operation within the residence. CP 84-87.

Detective Fausti remained with Mr. Nelson at the scene of the traffic stop and arrested him for drug violations once the search warrant was executed. CP 89-91. Shortly thereafter, Mr. Nelson notified Detective Fausti that he wanted to give a statement and to revoke his request for an attorney. Detective Fausti read Mr. Nelson his constitutional rights. Mr. Nelson acknowledged that he understood his rights and wished to answer questions. CP 89-91. Mr. Nelson stated he was the sole person tending to the marijuana grow at the Crestline address and that he was growing marijuana to assist in paying rent. He further indicated that his wife, Felicia Holland, had no knowledge of the marijuana growing operation. CP 89-91.

A search warrant was also executed at the Wabash address where Felicia Holland and additional marijuana was found inside. CP 84-87.

The defendant filed a motion to suppress evidence on March 1, 2013. CP 8. The suppression motion was heard on April 18, 2013, and the court entered its factual findings and legal conclusions on June 6, 2013. CP 104-106.

The trial court granted the motion to suppress. CP 104-106. The trial court concluded that there was no probable cause that Mr. Nelson was committing a crime since the search warrant affidavit did not allege that he was manufacturing marijuana in violation of the medical marijuana statute. CP 104-106. Nevertheless, the trial court's written Conclusions of Law was that had the search warrant affidavit been presented to a magistrate prior to the 2011 amendments there would be sufficient probable cause to issue a search warrant. CP 104-106.

The court's Findings of Fact and Conclusions of Law with an order dismissing the case without prejudice were signed on June 6, 2013. CP 104-106, 107. The State filed a timely Notice of Appeal. CP 108-110.

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. One modification to RCW 69.51A.040 would have established a statewide voluntary registry for qualifying patients. The result would render qualifying patients who registered essentially immune from arrest and other consequences for the possession of marijuana since it had been decriminalized.

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).

Registered qualifying patients and designated providers who satisfied specified additional requirements would be protected from 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, statutorily licensed producers, processors and dispensers would not be subject to arrest, search, prosecution or other criminal or civil consequences. *See* E2SSB 5073 § 601 (producers), § 602 (processors), and § 701 (dispensers).

The State submits that the registry was a central and essential component of the decriminalization of the use of medical marijuana. By E2SSB 5073, the Legislature clearly contemplated two sets of qualifying patients: those who were voluntarily on the registry and those who were not registered (yet 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 manifests the Legislature’s perspective that

it was not “legalizing” marijuana but decriminalizing the use of medical marijuana for medical purposes by qualifying registered patients. Nevertheless, the manufacturing 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, including the registry, as well as 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, yet 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 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 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 3). 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. Here, the trial court's construction of RCW 69.51A.040 in light of the Governor's veto of section 901 renders the provisions of RCW 69.51A.043 obsolete and unnecessary. 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 legal conclusion did not give effect to the plain meaning of RCW 69.51A., thus its decision must be reversed.

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

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, so the defendant is left with merely the possibility of an affirmative defense at trial. *State v. Fry*, 168 Wn.2d 1, 7-8, 228 P.3d 1 (2010), holds that an affirmative defense does not negate probable cause to believe that a crime has occurred. Here, the defendant has an affirmative defense to be presented at trial at best. The officers executed a valid search warrant on December 23, 2011.

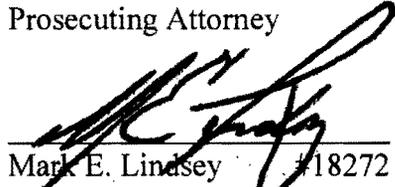
V.

CONCLUSION

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

Dated this 20th day of September, 2013.

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Prosecuting Attorney

A handwritten signature in black ink, appearing to read 'Mark E. Lindsey', is written over a horizontal line.

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