

FILED

DEC 13 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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

REPLY BRIEF OF APPELLANT

STEVEN J. TUCKER
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WASHINGTON CASES

STATE V. FRY, 168 Wn.2d 1,
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STATE V. GORE, 101 Wn.2d 481,
681 P.2d 227 (1984)1

STATE V. KURTZ, ___ Wn. 2d ___,
309 P.3d 472 (2013)1

I.

ARGUMENT

The defendant relies heavily on *State v. Kurtz*, ___ Wn.2d ___, 309 P.3d 472 (2013). However, *Kurtz* has little or nothing to do with this case. The Court in *Kurtz* was dealing with the application of defenses to a marijuana manufacturing and possession *trial* not a search warrant. *Id.* at 474.

The defendant attempts to argue that *State v. Fry*, 168 Wn.2d 1, 11, 228 P.3d 1 (2010) is only relevant to prosecutions that occurred prior to Legislative changes in the marijuana laws in 2011. The defendant tries to claim that the holding in *Fry* that affirmative defenses do not negate probable cause to issue a search warrant is “questionable.” Brf. of Resp. 10-11. The defendant makes that unsupported statement that *Fry*’s continued relevance is likewise questionable.

The Washington State Supreme Court in *Kurtz, supra*, mentions *Fry, supra*, but did not take the opportunity to abrogate *Fry*. This court must follow the law of the Washington State Supreme Court up to and until it is reversed or abrogated. *State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984).

The defendant’s statements on the legality of his possession or manufacturing of marijuana are of no moment in the question of probable cause to search. If the logic of the trial court here were to prevail, officers would be faced with the unpleasant choice of simply accepting any claim made by a defendant

about to be searched, or trying to ascertain the propriety of the search without being able to obtain direct information on the circumstances of the search. In other words, the police would have to figure out whether a defendant is complying with some defense, or not. Following the defendant's positions, each attempt to obtain a search warrant would devolve into a "mini-trial" with only part of the information available. If the police now have to contact a suspect for information on potential defenses, it is unlikely that whatever the police are searching for will still be on the premises at the time of the search. Since a defendant need only make a bald claim, it is unlikely that a search warrant for marijuana related items could ever be successfully obtained as the decision in this case puts the burden on the police to show that the suspect is, or is not actually complying with the law related to defenses. That information is under the control of the suspect.

The trial court's decision here has created a "Catch 22." The police cannot ascertain the actual situation without gathering information from the suspect. Without the suspect's information, the search warrant cannot be obtained. As mentioned above, the suspect will surely purge any evidence of illegal activity as soon as the police contact the suspect to obtain information needed for a search warrant. The existence of any defenses must be resolved at trial, not at the search warrant stage. The position put forth by *Fry* is the only practical approach.

II.

CONCLUSION

The decision of the trial court is in conflict with existing decisions of the Washington State Supreme Court. The decision of the trial court creates an unworkable situation that will essentially prevent officers from ever obtaining search warrants related to marijuana. The Trial Court's decision should be reversed.

Dated this 13TH day of December, 2013.

STEVEN J. TUCKER
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Andrew J. Metts", is written over the typed name and number.

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