

**FILED**

OCT 24, 2016

Court of Appeals  
Division III  
State of Washington

**No. 34069-4-III**

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

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STATE OF WASHINGTON, Respondent

v.

JIOVANNY JIMENEZ, Appellant

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APPEAL FROM THE SUPERIOR COURT  
OF YAKIMA COUNTY

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BRIEF OF APPELLANT

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Marie J. Trombley, WSBA 41410  
PO Box 829  
Graham, WA  
253-445-7920

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I. ASSIGNMENTS OF ERROR

A. The trial court erred when entered Conclusion of Law 6:

“The Court notes that the definitions stated in RCW 69.50.101 may not apply where “the context clearly requires otherwise,” and the Court is satisfied that the Legislature intended the words “regardless of THC concentration” to indicate that the definition of marihuana at RCW 69.50.101(v) would not apply in cases involving minors.” (CP 29).

B. The trial court erred when it entered Conclusion of Law 7:

“On October 11, 2015 in Yakima, WA the respondent was under 21 years of age and he had in his pants pocket a baggie containing marijuana.” (CP 29).

C. The trial court erred when it found Mr. Jimenez guilty of underage possession of less than 40 grams of marihuana. (CP 30).

ISSUES RELATING TO ASSIGNMENTS OF ERROR

A. The Washington State Legislature enacted a statutory definition of marijuana in pertinent part as “all parts of the plant *Cannabis*, whether growing or not, with a THC

concentration greater than 0.3 percent on a dry weight basis” RCW 69.50.101. In 2015, the Legislature added RCW 69.50.4013(4): “No person under twenty-one years of age may possess, manufacture, sell or distribute marijuana, marijuana-infused products, or marijuana concentrates, regardless of THC concentration.” To prove beyond a reasonable doubt a minor is in possession of marijuana, must the State prove the THC concentration level of greater than 0.3% to show the plant meets the statutory definition of marijuana?

## II. STATEMENT OF FACTS

Yakima County Prosecutors charged Jiovanny Jimenez (“Jimenez”) by information with first degree criminal trespass- RCW 9A.52.070 and minor in possession of a controlled substance, marijuana, less than 40 grams. RCW 69.50.4014. CP 2. At the fact-finding hearing prosecutors elected not to pursue the trespass charge. RP 13.

On October 11, 2015, Jimenez was arrested by Officer Davis of the Yakima police department for first degree criminal trespass. (2/1/16 RP 27;40). In a search incident to arrest, Davis found a

baggie of a green leafy substance in one of Jimenez's pockets. (2/1/16 RP 30).

At the fact-finding hearing a forensic scientist from the Washington State Patrol Crime Lab (WSPCL) testified he used a gas chromatography mass spectrometer (GCMS) to determine whether THC was present in the substance. (2/1/16 RP 55). The substance had some THC, but because he could not measure its concentration he could not definitively say the sample was not simply hemp. (2/1/16 RP 64-65). The WSPCL lab in Kennewick did not have the capability to measure the amount of THC concentrate in the substance. (2/1/16 RP 63).

At the disposition hearing, the court considered whether the state had to prove the green leafy substance met the statutory definition of marijuana provided in RCW 69.50.101(v) in order to find Jimenez guilty of possession of marijuana by a minor. (2/1/16 RP 117). The court reasoned:

So, for the argument today it would be that I don't really know whether its marijuana have (sic) a green botanical substance, plant substance, plant-based substance that the scientist has testified the only plan (sic) in which THC can be found is a marijuana plant, whether we're calling it marijuana or not, I'm satisfied I have marijuana regardless of the THC concentration, which clearly has not been testified to here today, I think does carry the day. (2/1/16 RP 118).

The court found Jimenez guilty of possessing a controlled substance, marijuana, less than 40 grams and being under the age of 21 as charged in the information. (2/1/16 RP 121-22). The court imposed two days, with credit for the time served, with no probation. (2/4/16 RP 141; CP 18-20).

The court entered findings of fact and conclusions of law. (CP 26-30). Jimenez makes this timely appeal. (CP 17-21).

### III. ARGUMENT

The Evidence Was Insufficient To Sustain A Conviction For Minor In Possession Of Marijuana.

The right to due process is guaranteed under the Washington Constitution, Article 1, §3, and the United States Constitution Fourteenth Amendment. It requires the State to prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Evidence is sufficient to support a conviction only if, when viewed in the light most favorable to the State, a rational trier of fact could find each element of the crime beyond a reasonable doubt. *State v. Smith*, 155 Wn.2d 496, 502, 120 P.3d 559 (2005).

The State charged Mr. Jimenez with minor in possession of marijuana, less than 40 grams, in violation of RCW 69.50.4013(4). To prove unlawful possession of a controlled substance, the state was required to prove this age, the nature of the substance and the fact of possession. *State v. Hathaway*, 161 Wn.App. 634, 251 P.3d 253 (2011). Mr. Jimenez contends the State did not carry its burden of proving beyond a reasonable doubt that the cannabis contained the required statutory minimum percentage of THC to even qualify as marijuana.

#### Statutory Definitions for Marijuana and THC

With the passage of Initiative Measure 502 decriminalizing the possession and use of small amounts of marijuana, the Washington State legislature redefined marijuana as:

... all parts of the plant *cannabis*, whether growing or not, ***with a THC concentration greater than 0.3 percent*** on a dry weight basis; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds or resin. The term does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of the plant which is incapable of germination.

RCW 69.50.101(v). (Emphasis added).

"THC concentration" is statutory defined as:

...percent of delta-9 tetrahydrocannabinol content per dry weight of any part of the plant Cannabis, or per volume or weight of marijuana product, or the combined percent of delta-9 tetrahydrocannabinol and tetrahydrocannabinolic acid in any part of the plant Cannabis regardless of moisture content.

RCW 69.50.101(rr).

Under Washington law, only cannabis with *greater than a 0.3% THC concentration* is marijuana. It is listed as a Schedule I drug under the Uniform Controlled Substances Act. RCW 69.50.204(c)(22).

By contrast, all parts and varieties of cannabis, growing or not, that contain **a THC concentration of 0.3 percent or less** by dry weight is classified as "industrial hemp." RCW 15.120.010(3). Hemp is not listed as a drug under the Uniform Controlled Substances Act. Under Washington law, the only distinction between industrial hemp and marijuana is the THC concentration. Above 0.3% it is marijuana, at or below 0.3% it is not marijuana.

The forensic analyst from the WSPCL testified other State labs were equipped to perform the necessary testing to quantify the percentage of THC. His lab, however, was only able to perform a basic test for presence of THC and he was therefore, unable to

conclude the substance was anything other than hemp. (2/1/16 RP 63-65).

The State charged Mr. Jimenez specifically with possession of marijuana. The State did prove beyond a reasonable doubt the substance met the statutory definition criminalizing possession of marijuana.

#### IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Jimenez respectfully asks this Court to reverse his disposition and dismiss with prejudice for insufficiency of the evidence.

Dated this 24<sup>th</sup> day of October 2016.

Respectfully submitted,

*Marie Trombley*

WSBA 41410  
Attorney for Jiovanny Jimenez  
PO Box 829  
Graham, WA  
253-445-7920  
marietrombley@comcast.net

CERTIFICATE OF SERVICE

I, Marie J. Trombley, attorney for Jiovanny Jimenez, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of the Appellant's Opening Brief was sent by first class mail, postage prepaid, on October 24, 2016 to:

Jiovanny Jimenez  
307 S. 4<sup>th</sup> St.  
Yakima, WA 98901

And I electronically served, by prior agreement between the parties, a true and correct copy of the Appellant's Opening Brief to :

EMAIL: [appeals@co.yakima.wa.us](mailto:appeals@co.yakima.wa.us)  
Tamara Hanlon  
Yakima County Prosecutor  
128 N. 2<sup>nd</sup> St.  
Yakima, WA 98901

*Marie Trombley*

P.O. Box 829  
Graham, WA 98338