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Court of Appeals
Division III
State of Washington
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No. 36010-5-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent

v.

MIKHAIL BARBAROSH,

Appellant

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR BENTON COUNTY

NO. 17-1-01220-7

SUPPLEMENTAL BRIEF OF RESPONDENT

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I. ARGUMENT

Issue: Is sentencing the defendant for possession of marijuana an option since marijuana is now generally legal in Washington?

Answer: No.

“[A] sentence must be authorized by a jury’s verdict.” *State v. Clark-El*, 196 Wn. App. 614, 624, 384 P.3d 627 (2016), citing *State v. Morales*, 196 Wn. App. 106, 383 P.3d 539 (2016). Marijuana is treated differently than other controlled substances. Possession of marijuana for individuals over 21 is legal. RCW 69.50.4013 (3)(a). Further, “marijuana” has a legal definition requiring a THC concentration greater than 0.3 percent of a dry weight basis. RCW 69.50.101 (x). No other controlled substance has a requirement for purity.

Here, Mr. Barbarosh’s date of birth is April 5, 1986. CP 1. Therefore, he was 31-years-old on the date of the offense. The forensic scientist testing the methamphetamine described the amount as a residue, which is “a small amount of material,” so small it would be impractical to weigh. RP at 102. For both reasons—the age of the defendant and the lack of testing of the THC concentration—the defendant cannot be convicted of possession of marijuana.

The defendant argues that he must be sentenced for possession of 40 grams of marijuana or less under RCW 69.50.4014. This is wrong

because RCW 69.50.4013 (3) makes marijuana possession legal for individuals over the age of 21. RCW 69.50.4014 only applies to individuals under 21. As stated in RCW 69.50.4013 (2), “Except as provided in RCW 69.50.4014, any person who violates this section is guilty of a Class C felony punishable under chapter 9A.20 RCW.” Putting the two statutes together, marijuana possession under 40 grams for a person under the age of 21 is a misdemeanor.

State v. Gonzalez, 2 Wn. App. 2d 96, 109, 408 P.3d 743 (2018) considered these statutes and concluded, “The effect of RCW 69.50.4013 (2)’s reference to RCW 69.50.4014 is to establish that the unlawful possession of 40 grams or less of marijuana is considered a misdemeanor, with a statutory maximum sentence of 90 days” With all due respect to the *Gonzalez* court, this analysis overlooks RCW 69.50.4013 (3), which states that possession of marijuana is legal for 21-year-olds. That was one purpose of Initiative 502, which became effective in 2013. It would have been accurate if the *Gonzalez* court had written, “The effect of RCW 69.50.4013 (2)’s reference to RCW 69.50.4014 is to establish that the *if an individual is under 21 years of age*, unlawful possession of 40 grams or less of marijuana *which has a THC concentration of 0.3 percent by dry weight* is considered a misdemeanor, with a statutory maximum sentence of 90 days”

Marijuana possession is not a lesser included offense of methamphetamine possession. Therefore, the jury's verdict finding the defendant guilty of Possession of a Controlled Substance did not authorize a sentence for marijuana possession.

Issue: Should the offense be considered an unranked felony?

Answer: Possession of a Controlled Substance is a ranked offense, but the Court could consider the offense as involving a Schedule V controlled substance.

The offenses of Possession of a Controlled Substance that is either a heroin or a narcotic from Schedules I or II and Possession of a Controlled Substance that is a Narcotic from Schedules III, IV, and V or Nonnarcotics from Schedules I-V are included as ranked offenses in RCW 9.94A.518. So, the direct answer to the Court's question is: No, the offense herein should not be treated as an unranked offense.

However, the Court could treat the conviction as being for a narcotic or drug listed in Schedule V, which is for substances with a low potential for abuse. RCW 69.50.211 (1). This would result in the same sentence as a sentence for methamphetamine since narcotics or non-narcotics in Schedules I-V are all ranked at a serious level of I in Table 3-Drug Offense Sentencing Grid. RCW 9.94A.517.

II. CONCLUSION

The jury verdict does not authorize a sentence for marijuana possession. In fact, it was legal for the defendant at the time of the offense to possess marijuana.

The Court could consider the conviction for the least harmful drugs in Schedule V of RCW 69.50.212. But, that will not actually help the defendant since a Schedule V drug is ranked the same as a Schedule I drug. For that purpose, *Gonzales* and *Clark-El* do not apply because the actual controlled substance does not increase the possible sentence for the defendant.

RESPECTFULLY SUBMITTED on July 9, 2019.

ANDY MILLER
Prosecutor

A handwritten signature in black ink, appearing to read "T. J. Bloor", is written over a horizontal line.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

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E-mail service by agreement
was made to the following
parties:
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Signed at Kennewick, Washington on July 9, 2019.


Demetra Murphy
Appellate Secretary

Appendices

Appendix A: RCW 69.50.4013

Appendix B: RCW 69.50.4014

Appendix A

RCW 69.50.4013

RCW 69.50.4013

Possession of controlled substance—Penalty—Possession of useable marijuana, marijuana concentrates, or marijuana-infused products—Delivery.

(1) It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this chapter.

(2) Except as provided in RCW 69.50.4014, any person who violates this section is guilty of a class C felony punishable under chapter 9A.20 RCW.

(3)(a) The possession, by a person twenty-one years of age or older, of useable marijuana, marijuana concentrates, or marijuana-infused products in amounts that do not exceed those set forth in RCW 69.50.360(3) is not a violation of this section, this chapter, or any other provision of Washington state law.

(b) The possession of marijuana, useable marijuana, marijuana concentrates, and marijuana-infused products being physically transported or delivered within the state, in amounts not exceeding those that may be established under RCW 69.50.385(3), by a licensed employee of a common carrier when performing the duties authorized in accordance with RCW 69.50.382 and 69.50.385, is not a violation of this section, this chapter, or any other provision of Washington state law.

(4)(a) The delivery by a person twenty-one years of age or older to one or more persons twenty-one years of age or older, during a single twenty-four hour period, for noncommercial purposes and not conditioned upon or done in connection with the provision or receipt of financial consideration, of any of the following marijuana products, is not a violation of this section, this chapter, or any other provisions of Washington state law:

- (i) One-half ounce of useable marijuana;
- (ii) Eight ounces of marijuana-infused product in solid form;
- (iii) Thirty-six ounces of marijuana-infused product in liquid form; or
- (iv) Three and one-half grams of marijuana concentrates.

(b) The act of delivering marijuana or a marijuana product as authorized under this subsection (4) must meet one of the following requirements:

- (i) The delivery must be done in a location outside of the view of general public and in a nonpublic place; or
- (ii) The marijuana or marijuana product must be in the original packaging as purchased from the marijuana retailer.

(5) 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. This does not include qualifying patients with a valid authorization.

(6) The possession by a qualifying patient or designated provider of marijuana concentrates, useable marijuana, marijuana-infused products, or plants in accordance with chapter 69.51A RCW is not a violation of this section, this chapter, or any other provision of Washington state law.

[2017 c 317 § 15; 2015 2nd sp.s. c 4 § 503; 2015 c 70 § 14; 2013 c 3 § 20 (Initiative Measure No. 502, approved November 6, 2012); 2003 c 53 § 334.]

NOTES:

Findings—Application—2017 c 317: See notes following RCW 69.50.325.

Findings—Intent—Effective dates—2015 2nd sp.s. c 4: See notes following RCW 69.50.334.

Short title—Findings—Intent—References to Washington state liquor control board—Draft legislation—2015 c 70: See notes following RCW 66.08.012.

Intent—2013 c 3 (Initiative Measure No. 502): See note following RCW 69.50.101.

Intent—Effective date—2003 c 53: See notes following RCW 2.48.180.

Appendix B

RCW 69.50.4014

RCW 69.50.4014

Possession of forty grams or less of marijuana—Penalty.

Except as provided in RCW 69.50.401(2)(c) or as otherwise authorized by this chapter, any person found guilty of possession of forty grams or less of marijuana is guilty of a misdemeanor.

[2015 2nd sp.s. c 4 § 505; 2003 c 53 § 335.]

NOTES:

Findings—Intent—Effective dates—2015 2nd sp.s. c 4: See notes following RCW 69.50.334.

Intent—Effective date—2003 c 53: See notes following RCW 2.48.180.

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