81210-1

NO. 255247

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

RESPONDENT,

vs.

JASON LEE FRY,

APPELLANT.

RESPONDENT'S BRIEF

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I. STATEMENT OF FACTS.

On December 20, 2004, Stevens County Sheriff's Sergeant Dan Anderson and Deputy Bill Bitton went to the residence of Jason and Tina Fry at 850-I Finley Gulch Road, Stevens County, Washington, on information these officers had received about a suspected marijuana growing operation at this address. As the officers walked up to the front porch, they could smell the scent of burning marijuana or marijuana smoke. A man, whom identified himself as Jason Fry, answered the door. As he opened the door, the officers noticed a much stronger odor of marijuana (CP 45-46).

Mr. Fry said he had a legal prescription for marijuana and advised the officers to leave absent a search warrant. His wife, Tina Fry gave the officers documents entitled "medical marijuana authorization".

The officers obtained a search warrant, and found in the Fry residence several containers with marijuana, growing marijuana plants, growing equipment, paraphernalia, and scales. The marijuana was found to weigh 911 grams. (CP 45-48).

Jason Fry was subsequently charged with Manufacture of Marijuana (CP 1-2), later amended to include a second count of Possession of More Than 40 Grams of Marijuana (CP35-36).

Jason Fry filed a Motion to Suppress and Give Notice of Affirmative Defense of Medical Marijuana Authorization, (CP 4). After hearing, the Honorable Allen C. Neilson, Judge, entered an Order Denying Motion to Suppress, (CP 39-41), concluding that the officers demonstrated probable cause to search the residence, based on the statement of a strong odor of marijuana, and other facts as described in the telephonic affidavit. (CP 39-40). The court ruled that although RCW 69.51A.010 et. seq.the Medical Marijuana Act, created an affirmative defense to the crimes, allegations of an affirmative defense are to be proved to the trier of fact at trial. The existence of a potential affirmative defense does not negate the existence of probable cause to search, and "is not for this court to consider at a CrR 3.6 hearing" (CP 40).

The court also concluded that the telephonic affidavit does not show that the defendants presented the officers with proof of their identity, as required for a medical marijuana defense under RCW 69.51A. (RP 19), (CP 40).

Defendant petitioned for Discretionary Review which was denied on the basis of McBride v. Walla Walla, 95 Wn.App. 33, 40, 975 P.2d 1029 amended, 990 P.2d 967 (1990) (an affirmative defense is to be proved to the trier of fact at the trial) (CP 100,101).

Subsequently, the State moved in limine to prevent the defendant from presenting a medical marijuana defense on various grounds, including lack of

proof of a qualifying condition. (CP 13). The State alleged that Mr. Fry did not have a qualifying condition, as the medical marijuana authorization gave the medical condition as "Severe anxiety, rage & depression related to childhood" (CP 15); a copy of the authorization form with related medical records is found in the record (CP 20-23; CP 8-11). Current information from the Washington State Department of Health, Medical Quality Assurance Board (commission) of medical conditions approved for treatment by medical marijuana was provided to the court (CP 30-34).

By Order on Pre-Trial Motions, the court ruled that Mr. Fry was not a "qualifying patient" as defined by RCW 69.51A. The court ruled it is bound by the list of qualifying conditions as set forth in the act, and the defendant's diagnosed condition of 'severe anxiety, rage & depression related to childhood' is not a qualifying condition (CP 102), (RP 47-48).[1]

The parties then proceeded by a trial on stipulated facts. The court found Mr. Fry guilty of Possession of a Controlled Substance, Marijuana, in a quantity

[1] Although there was evidence that the defendant possessed 911 grams of marijuana (CP 15,46,48), the court did not rule on the 60-day supply issue, leaving it for the trier of fact (RP 49)

of more than 40 grams (CP 46). The charge of Manufacture of Marijuana, Count 1 was dismissed (CP 50). Mr. Fry was sentenced to 30 days jail, all converted to 240 hours of community service (CP 56-57).

II. ARGUMENT.

1. The trial court correctly ruled that there was probable cause for a search warrant.

'{w}hen an officer who is trained and experienced in marijuana detection actually detects the odor of marijuana, this by itself provides sufficient evidence to constitute probable cause justifying a search.' State v. Olson, 73 Wn. App. 348, 356, 869 P.2d 110 (1994). Thus, the court here correctly found that the officers shown probable cause for a search warrant of the Fry residence.

The fact that the Frys showed the officers the medical marijuana authorization prior to the search does not affect the result, because the potential existence of an affirmative defense does not negate probable cause, McBride v. Walla Walla County, 95 Wash.App. 33, 40, 975 P.2d 1029 (1999), amended, 990 P.2d 967 (1999). As McBride makes clear, an affirmative defense can be asserted to make an otherwise unlawful act lawful; but the officers on the scene are not

judge or jury; they do not make this determination. McBride, at p. 40. The trial court correctly noted that this is a determination to be made by the trier of fact. (CP 40).

Defendant failed to meet the requirements of RCW 69.51A when he did not provide adequate documentation to the officers. The trial court concluded that the telephonic affidavit (for the search warrant) does not show that the defendants[2] presented the officers with proof of their identity, as required for a medical marijuana defense (CP 40).

RCW 69.51A.040 (1) provides that any 'qualifying patient' will be deemed to have established an affirmative defense by proof of compliance with the requirement of the medical marijuana act. One of the requirements is that the qualifying patient:

> "(c) Present his or her valid documentation to any law enforcement official who questions the patient regarding his or her medical use of marijuana".

RCW 69.51A.040(2)(c).

"Valid documentation" is defined by RCW 69.51A.010(5):

"(a) a statement signed by a qualifying patient's physician . . . and

[2] Mrs. Tina Fry was also charged from this incident, but her case was dismissed as part of the resolution of her husband's case.

(b) Proof of identity such as a Washington state driver's license or identicard, as defined in RCW 46.20.035" (emphasis added).

Because Mr. Fry did not provide his proof of identity, he did not meet the plain statutory requirements of the Medical Marijuana Act. He may not therefore use the affirmative defense as a means of negating the probable cause for the search.

2. The trial court correctly ruled that Mr. Fry was not a qualifying patient.

Only qualifying patients are entitled to use the medical marijuana defense. It is limited to: *Qualifying patients* with terminal or debilitating illnesses who, in the judgment of their physicians, would benefit from the medical use of marijuana, shall not be found guilty of a crime under state law for their possession and limited use of marijuana; State v. Tracy 158 Wash.2d 683, 688, 147 P.3d 559 (2006) (emphasis in original).

The issue here is whether Mr. Fry had a terminal or debilitating condition as described in RCW 69.51A.010(4). On the second page of the authorization form, Dr. Orvald documents the debilitating medical condition from previous healthcare provider:

"Severe anxiety, rage & depression related to childhood" (CP 21).

The doctor's comments state that Fry 'has found use of medical cannabis allows him to function self control of (anger?)[3] rage & depression' (CP 23).

RCW 69.51A.010(4) defines several qualifying terminal or debilitating conditions; Mr. Fry's condition is not among those listed.

In addition to the statutory medical conditions, the board acting pursuant to RCW 69.51A.010(4)(d), has approved medical marijuana for Crohn's Disease, Hepatitis C, and "Any disease, including anorexia, which results in nausea, vomiting, wasting, appetite loss, cramping, seizures and/or spasticity, when these symptoms are unrelieved by standard treatments" (CP 33).

Mr. Fry has not shown that he suffers from any of these conditions or symptoms. A defendant asserting an affirmative defense, such as the compassionate use defense, bears the burden of offering sufficient evidence to support that defense. State v. Janes, 121 Wash.2d 220, 236-37, 850 P.2d 495 (1993); Tracy, at 689.

The court therefore correctly ruled that Mr. Fry is not, therefore, a "qualifying patient" as a matter of law, and likewise correctly ruled that he may not present the affirmative medical marijuana defense.

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[3] Dr. Orvald's handwriting is not completely readable.

State v. Shepard, 110 Wash. App. 544, 41 P.3d 1235 (2002), a 'caretaker' case cited by the appellant, does not assist Mr. Fry. In that case, the Court of Appeals noted that the patient, a Mr. Wilson, suffered from a variety of conditions including bipolar disorder and a debilitating spine condition, Shepard, p.547. His spinal condition also disabled him from growing and maintaining his own marijuana supply. The court was not asked to consider whether this was a legally sufficient terminal or debilitating condition. It appears that the parties conceded that it was such a condition without argument; debilitating back pain could likely fall within the scope of "intractable pain" in RCW 69.51A.010(4)(b); State v. Ginn, 128 Wash. App. 872, 881-882, 117 P.3d 1155 (2005). Regardless, the legal sufficiency of the medical condition in Shepard was not addressed by the Court of Appeals.

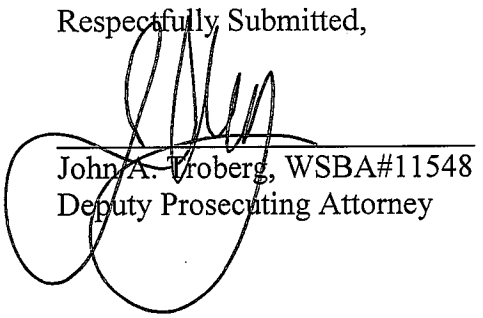
The information provided by Dr. Orvald here makes it clear that the Mr. Fry's medical condition is not, as a matter of law, of the type to make him a qualifying patient. The trial court therefore correctly ruled that he was not a qualifying patient.

III. CONCLUSION.

This court should affirm the conviction of Mr. Jason Fry for Possession of More Than 40 Grams of Marijuana.

9 May 2007

Respectfully Submitted,



John A. Troberg, WSBA#11548
Deputy Prosecuting Attorney

Documentation of Medical Authorization to
Possess Marijuana for Medical Purposes in Washington State

Patient Name: Jason Fry

Date of Birth: 03-05-82

I am a physician licensed in the State of Washington. I am treating the above named patient for a terminal illness or debilitating condition as defined in RCW 69.51A.010.

I have advised the above named patient about the potential risks and benefits of the medical use of marijuana. I have assessed the above named patient's medical history and medical condition. It is my medical opinion that the potential benefits of the medical use of marijuana would likely outweigh the health risks for this patient.

Signature of Physician: Thomas Orvald, MD. Date: 8/25/04

Printed Name of Physician: Thomas Orvald, MD

Risks and benefits of medical marijuana

Under Washington State Law, the use of medical marijuana is now permissible for some patients with terminal or debilitating illnesses. The law regulating this (RCW 69.51A) allows physicians to advise patients about the risks and benefits of the medical use of marijuana.

The medical and scientific evidence supporting the use of medical marijuana remains controversial in the medical community. Not all health care providers believe that medical marijuana is safe or effective and some providers feel that it is a dangerous drug.

According to the Washington state law the benefits of medical marijuana may include treating nausea and vomiting from chemotherapy; AIDS wasting syndrome; severe muscle spasms from multiple sclerosis or other spasticity disorders; glaucoma; and some types of intractable pain.

Some of the risks of medical marijuana may include possible long-term effects of the brain in the areas of memory, coordination and cognition; impairment of the ability to drive or operate heavy machinery; respiratory damage; possible lung cancer; and physical or psychological dependence.

Text on this form provided by the Washington State Medical Association.

60 days = 3 oz.

Name
(Last/First) Fry Jason Date: 25 Aug 04

Patient Information
Review of patient medical records

Documentation of debilitating medical condition from previous healthcare provider:
SEVERE ANXIETY RAGE & DEPRESSION
RELATED TO CHILDHOOD

Date reviewed: 8/25/04

Review of patient medical history questionnaire

Date reviewed: 8/25/04

Treatment plan: CAN Patient was given: ____

Oxycontin____ **Xanax**____ **Trazadone**____ **Prozac**____ **Aspirin**____
Oxycodone____ **Valium**____ **Balofen**____ **Paxil**____ **Ibuprofen**____
Percodan____ **Ambien**____ **Elevil**____ **Effexor**____ **Tylenol**____
Morphine____ **Tylenol/codeine**____ **Soma**____ **Zoloft**____
Alleve____ **Percocet**____ **Vicodin**____

Medicinal Marijuana

How administered ____ inhalation/ingestion ____

Frequency of use PRN.

Cautions AVOID OVERDOSE

Patient has received Risk/Benefit information ____ yes

Follow up: one month 2 months 3 months 6-12 months

Next visit with your Doctor: prn:

For questions/complications from Marijuana therapy call: THCF 503-281-5100

For questions regarding other medical issues call your regular physician.

Thomas Orvald, MD. 8/25/04
Thomas Orvald, M.D. *Date*

Name: JASON FY Date: 25 Aug 04

S 21 Y/O W/M C. ANXIETY & STRESS. IN FOSTER HOMES. "RAGE" ISSUES. ENTERED SERVICE. SEVERE ANXIETY!!! CAN'T FUNCTION

O ABOVE!!

A CANNIBUS (R)

P

Patient was given:

Oxycontin____ **Xanax**____ **Trazadone**____ **Prozac**____
Oxycodone____ **Valium**____ **Balofen**____ **Paxil**____
Percondan____ **Ambien**____ **Elevil**____ **Effexor**____
Morphine____ **Tylenol/codeine**____ **Soma**____ **NSAID**____
Percocet____ **Vicodin**____

Patient uses cannabis PRN times a day.

Thomas O. Orvald, MD. 8/25/04

Thomas Orvald, M.D. *Date*

PHYSICAL EXAMINATION

Blood Pressure: 120/70 Pulse: 80

Patient Name: JASon Fry Today's Date: 25 Aug 04

Date of Birth 03 / 05 / 82 Male X Female ____

(+) = WNL (-) = Abnormal

GENERAL APPEARANCE: Good ✓ Fair ____ Poor ____

Head: Normal (+) - scar behind (R) ear and chin; injured by horse

Eyes: EOM (+) - PERLA + - ____

Ears: TMS (+) - has hearing loss

Nose: (+) - Mouth: + - grinds teeth Throat: + "inflamed" sometimes has difficulty swallowing

Skin: (+) - WNL: ✓ HX: ____

Neck: + (-) Nodes: (+) - Tender: + (-) back of neck Thyroid: (+) -

Back: + (-) Tender: + (-) low back pain Scars: (+) -

Heart: (+) - ____ NSR: (+) - ____ Murmurs etc. (+) - ____

Lung/Chest: Rales (+) - CTA: (+) - diag. c̄ chronic bronchitis in service

Abdomen/Gastrintestinal: Masses (+) - Tender (+) - ____

Urinary/Venereal/Menstrual: ____ HX ____ Deferred ✓

Neurological: II –XII (+) -

Skeletal/Extremities: Cyan (+) - Edema (+) -

COMMENTS: Pt. has found use of medical cannabis allows him to function c̄ self control of angr, nage +, depression. Pt has been kicked in head 3 times by horses + suffered a unsettled gnawy upper faster homes. Pt. was in the service as an air - born nangr - where he traced to march and hell. 13

PHYSICIAN'S SIGNATURE: Thomas Ovald DATE: 8/25/04

Thomas Ovald, M.D.

CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that I mailed a true and correct copy of the foregoing Brief of Respondent to the Court of Appeals, Division III, P.O. Box 2159, Spokane, WA 99201; William D. Edelblute, Attorney at Law, 200 N. Mullan Rd. Ste 119, Spokane, WA 99206-6827 and to Jason Lee Fry, 850 Finley Gulch Road, Colville, WA 99114, on May 8, 2007.

Michele Lembcke

Michele Lembcke, Legal Assistant to
John A. Troberg