

No. 87078-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Plaintiff-Appellee,
v.

WILLIAM ANDREW KURTZ,
Defendant-Appellant.

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

The Honorable Carol Murphy, Judge

PETITIONER'S
~~APPELLANT'S~~ SUPPLEMENTAL BRIEF

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I. SUPPLEMENTAL STATEMENT OF THE CASE

William A. Kurtz was charged with one count of manufacturing marijuana and one count of possession of marijuana with the intent to deliver. CP 24-41. Both counts were alleged to have occurred on March 1, 2010.

Prior to trial the State asked the Court to exclude any evidence of the medical marijuana or medical necessity defenses at trial. 10/25/10 RP at 1-22. The defense objected and stated that Kurtz had a qualifying condition and an authorization for medical marijuana from Dr. Greg Carter. Exhibits 1 and 2, RP 22-38.

The trial judge ruled that neither defense could be presented to the jury. 10/25/10 RP at 69-72. She found that, because Kurtz did not have a signed authorization on the date that he was arrested (he got the authorization after his arrest), he was not entitled to the statutory defense. In addition, she found that the decision in *State v. Butler*, 126 Wn. App. 741, 109 P.3d 493 (2005), prevented Kurtz from presenting the medical necessity defense. *Id.*

In the Court of Appeals, Kurtz argued that *Butler* should be overturned. That Court refused to do so. *See* Slip Opinion at 2. Kurtz filed a petition for review which this Court granted.

II. IS *STATE V. BUTLER* WRONGLY DECIDED AND SHOULD THIS COURT OVERRULE IT?

A. HISTORICAL DEVELOPMENT OF MEDICAL NECESSITY AND MEDICAL MARIJUANA DEFENSES

Division III recognized that “necessity” could be a defense to a prosecution for possession of marijuana in 1979. *State v. Diana*, 24 Wn. App. 908, 604 P.2d 1312 (1979). In that case, the defendant claimed that marijuana had an ameliorative effect on his symptoms of multiple sclerosis. That Court said:

To summarize, medical necessity exists in this case if the court finds that (1) the defendant reasonably believed his use of marijuana was necessary to minimize the effects of multiple sclerosis; (2) the benefits derived from its use are greater than the harm sought to be prevented by the controlled substances law; and (3) no drug is as effective in minimizing the effects of the disease. To support the defendant's assertions that he reasonably believed his actions were necessary to protect his health, corroborating medical testimony is required. In reaching its decision, the court must balance the defendant's interest in preserving his health against the State's interest in regulating the drug involved. Defendant bears the burden of proving the existence of necessity, an affirmative defense, by a preponderance of the evidence.

Id. at 916.

Division II adopted the reasoning of *Diana* in 1994 in *State v. Cole*, 74 Wn. App. 571, 874 P.2d 878, *review denied*, 125 Wn.2d 1012, 889 P.2d 499 (1994). In that case, the defendant testified that he had suffered from intractable back pain for years. Although he had asked

many doctors about medications including marijuana, he did not obtain a declaration from a doctor supporting his use of the drug until after his arrest. *Id.* at 574-75. For that reason, the trial judge questioned the doctor's credibility and forbid Cole from presenting the necessity defense to a jury. This Court reversed the trial court and found that, because Cole had presented some evidence to establish each of the elements of the necessity defense, he should have been allowed to present that defense to a jury. *Id.* at 578-79. The court stated:

As noted in *Diana*, Cole's interest in preserving his health must be balanced against the State's interest in regulating the drug involved. It is for the trier of fact to determine by a preponderance of the evidence whether Cole's actions were justified by medical necessity.

Id. at 580.

Division I has not directly addressed the question. But in *State v. Pittman*, 88 Wn. App. 188, 943 P.2d 713 (1997), the trial court gave a necessity instruction after Pittman presented evidence that she supplied marijuana to another person who used it to treat his glaucoma. The defense was presented to the jury but the jury rejected the defense. Pittman appealed and argued that the trial court's necessity instruction did not correctly state the law. The Court declined to reverse but had no quarrel with the opinion in *Diana*, *supra*.

In 1997, this Court decided *Seeley v. State*, 132 Wn.2d 776, 940 P.2d 604 (1997). In that case, Seeley, a very ill cancer patient, filed a declaratory judgment action to challenge the Washington statute that placed marijuana on Schedule 1 of the controlled substances act. *Id.* at 785. Seeley was affected by that decision because, by placing marijuana on Schedule 1, doctors could not prescribe him marijuana. He framed his challenge under the state privileges and immunities clause and the state equal protection clause. The Supreme Court ultimately concluded only that:

The challenged legislation involves conclusions concerning a myriad of complicated medical, psychological and moral issues of considerable controversy. We are not prepared on this limited record to conclude that the legislature could not reasonably conclude that marijuana should be placed in schedule I of controlled substances. It is clear not only from the record in this case but also from the long history of marijuana's treatment under the law that disagreement persists concerning the health effects of marijuana use and its effectiveness as a medicinal drug. The evidence presented by the Respondent is insufficient to convince this court that it should interfere with the broad judicially recognized prerogative of the legislature.

Id. at 805.

In 1998 the people passed Initiative 692 which authorized patients with terminal or debilitating illnesses to use marijuana for medical purposes based upon their treating physician's professional opinions. That Initiative is now codified at RCW 69.51A. The statute specifically states:

The People of Washington State find that some patients with terminal or debilitating illnesses, under their physician's care, may benefit from the medical use of marijuana. Some of the illnesses for which marijuana appears to be beneficial include chemotherapy-related nausea and vomiting in cancer patients; AIDS wasting syndrome; severe muscle spasms associated with multiple sclerosis and other spasticity disorders; epilepsy; acute or chronic glaucoma; and some forms of intractable pain.

The People find that humanitarian compassion necessitates that the decision to authorize the medical use of marijuana by patients with terminal or debilitating illnesses is a personal, individual decision, based upon their physician's professional medical judgment and discretion.

Therefore, The people of the state of Washington intend that:

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;

Persons who act as primary caregivers to such patients shall also not be found guilty of a crime under state law for assisting with the medical use of marijuana; and

Physicians also be excepted from liability and prosecution for the authorization of marijuana use to qualifying patients for whom, in the physician's professional judgment, medical marijuana may prove beneficial.

RCW 69.51A.005. This legislation, thus, expressly adopted the fact that marijuana does have accepted medical uses, effectively overturned the

*Williams*¹ decision and should have revived the medical necessity defense with regard to marijuana.

B. THE MEDICAL NECESSITY DEFENSE FOR MARIJUANA WAS NOT ABOLISHED BY THE SEELEY DECISION

In *State v. Butler*, supra, that court was asked to review a trial court order denying Butler funds for an expert regarding his use of medical marijuana. Citing *Williams*, the court was of the view that “Washington does not recognize a common law defense of medical necessity for the use of marijuana.” *Id.* at 496. Paradoxically, the court also concluded that the Medical Marijuana Act was inconsistent with the common law and, thus, superceded the common law defense of medical necessity. *Id.* at 750. The court held that enactment of the Initiative meant that the only avenue for raising a medical marijuana defense was via the statute. Because *Butler* had not strictly complied with the Act, he could not raise the defense and was not entitled to funds to hire an expert.

Butler is incorrect in its conclusion that Washington does not recognize a common law defense of medical necessity for the use of marijuana. As discussed above, for many years Washington did recognize a common law medical marijuana defense. See *Diana, Cole* and *Pittman*,

¹ *State v. Williams*, 93 Wn. App. 340, 968 P.2d 216 (1998).

supra. In *Butler*, the court relied on *Williams* holding that: “*Seeley*, by implication, overrules both *Cole* and *Diana*.” *Id.* at 347.

But, the *Seeley* Court specifically did not overrule *Diana*. Instead the Court recognized the medical necessity defense and stated:

The only case law the Respondent cites to support his position is a Washington Court of Appeals decision, *State v. Diana*, 24 Wash. App. 908, 604 P.2d 1312 (1979). Respondent's reliance on *Diana*, however, is misplaced as the court did not address the constitutionality of marijuana's scheduling. The Court of Appeals in *Diana* recognized that, under limited circumstances, an individual may assert a medical necessity defense to a criminal marijuana possession charge. *Id.* at 913, 604 P.2d 1312. The recognition of a potential medical necessity defense for criminal liability of marijuana possession is not relevant in this equal protection analysis.

Seeley, 132 Wn.2d at 798.

C. THE MEDICAL MARIJUANA ACT DID NOT SUPERCEDE THE COMMON LAW AS DESCRIBED IN *DIANA*, *COLE* AND *PITTMAN*

“In the absence of an indication from the Legislature that it intended to overrule the common law, new legislation will be presumed to be in line with prior judicial decisions in a field of law.” *State v. McCullum*, 98 Wn.2d 484, 493, 656 P.2d 1064, 1070 (1983) (citing *Neil F. Lampson Equip. Rental and Sales, Inc. v. West Pasco Water Sys., Inc.*, 68 Wn.2d 172, 175-76, 412 P.2d 106 (1966)); accord *Price v. Kitsap Transit*, 125 Wn.2d 456, 463, 886 P.2d 556 (1994) (“[T]he Legislature is

presumed to know the existing state of the case law in those areas in which it is legislating and a statute will not be construed in derogation of the common law unless the Legislature has clearly expressed its intention to vary it.” (citations omitted)).

In general, our state is governed by the common law to the extent the common law is not inconsistent with constitutional, federal, or state law. RCW 4.04.010. The Legislature has the power to supersede, abrogate, or modify the common law. See *State v. Estill*, 50 Wn.2d 331, 334–35, 311 P.2d 667 (1957); *State v. Mays*, 57 Wn. 540, 542, 107 P. 363 (1910). However, we are hesitant to recognize an abrogation or derogation from the common law absent clear evidence of the legislature’s intent to deviate from the common law. “It is a well-established principle of statutory construction that “[t]he common law ... ought not to be deemed repealed, unless the language of statute be clear and explicit for this purpose.” *Norfolk Redevelopment & Hous. Auth. v. Chesapeake & Potomac Tel. Co. of Virginia*, 464 U.S. 30, 35–36, 104 S.Ct. 304, 78 L.Ed.2d 29 (1983) (alterations in original) (quoting *Fairfax’s Devisee v. Hunter’s Lessee*, 11 U.S. (7 Cranch) 603, 623, 3 L.Ed. 453 (1812)). A law abrogates the common law when “the provisions of a ... statute are so inconsistent with and repugnant to the prior common law that both cannot simultaneously be in force.” *State ex rel. Madden v. Pub. Util. Dist. No. 1*, 83 Wn.2d 219, 222, 517 P.2d 585 (1973). A statute in derogation of the common law “must be strictly construed and no intent to change that law will be found, unless it appears with clarity.” *McNeal v. Allen*, 95 Wn.2d 265, 269, 621 P.2d 1285 (1980).

Potter v. Washington State Patrol, 165 Wn.2d 67, 76-77, 196 P.3d 691 (2008) (footnotes omitted). In *Potter*, this Court held that a statute related to procedures for challenging the impoundment of vehicles did not

abrogate the common law cause of action for unlawful conversion because the statute did not provide an exclusive remedy and did not contain a clear statement indicating a Legislative intent to abrogate the cause of action.

Butler is inconsistent with *Potter*. Division II's case law requires only that a statute be inconsistent with the common law to be deemed as having abrogated the common law. But this Court has required "either an explicit statement or clear evidence of the legislature's intent to abrogate the common law." *Potter*, 165 Wn.2d at 76. Mere inconsistency is not enough. Rather, the provisions of the statute must be so inconsistent with and repugnant to the prior common law that both cannot simultaneously be in force. *Potter*, 165 Wn.2d at 77. *See also Lord v. Pierce County*, 166 Wn. App. 812, 823-25, 271 P.3d 944, 950 (2012) (holding that local ordinances related to permits for permanent flood prevention structures did not abrogate "common enemy doctrine" land owners may rely on to defeat liability caused by temporary flood control measures that damage adjacent property).

This case is very similar to the statute the Supreme Court confronted in *Potter*. Like the statute at issue in that case, the Medical Use of Marijuana Act does not purport to be the only means by which a defendant may raise a medical necessity defense and the two defenses provide different procedures. Moreover, they are not so inconsistent that

the statute must be seen as abrogating the common law defense. Cf. *Potter*, at 80-84 (statute did not contain express statement of exclusivity or evidence of intent to abrogate because the statute and common law tort served different purposes and provided different remedies). In fact, in many ways the two defenses are quite parallel.

Rules of statutory construction apply to initiatives. *Seeber v. Wash. State Pub. Disclosure Comm'n*, 96 Wn.2d 135, 139, 634 P.2d 303 (1981); *Gibson v. Dep't of Licensing*, 54 Wn. App. 188, 192, 773 P.2d 110, *review denied*, 113 Wn.2d 1020, 781 P.2d 1322 (1989). Thus, in determining the meaning of a statute enacted through the initiative process, the court's purpose is to ascertain the collective intent of the voters who, acting in their legislative capacity, enacted the measure. *Wash. State Dep't of Revenue v. Hoppe*, 82 Wn.2d 549, 552, 512 P.2d 1094 (1973). Where the voters' intent is clearly expressed in the statute, the court is not required to look further. *Senate Republican Campaign Comm. v. Pub. Disclosure Comm'n*, 133 Wn.2d 229, 242, 943 P.2d 1358 (1997); *City of Tacoma v. State*, 117 Wn.2d 348, 356, 816 P.2d 7 (1991); *see Biggs v. Vail*, 119 Wn.2d 129, 134, 830 P.2d 350 (1992) (if statutory meaning is clear from plain and unambiguous language, that meaning must be accepted by the court). In determining intent from the language of the statute, the court focuses on the language as the average informed voter voting on the

initiative would read it. *State v. Brown*, 139 Wn.2d 20, 28, 983 P.2d 608 (1999); *Senate Republican Campaign Comm.*, 133 Wn.2d at 243.

Butler, Diana and *Seeley* had all been decided before the Initiative was passed in 1998. But nothing in the Initiative states that it is intended to overrule those cases. Thus, this Court cannot conclude that that is what the voters intended. If one reviews the *Diana* decision, it is clear that all the voters did was confirm the common law – not abolish it. The Initiative tracks and supplements these elements and, thus, is not “repugnant” to the common law. Thus, the two defenses can co-exist.

D. THE MEDICAL NECESSITY DEFENSE WOULD APPLY TO MR. KURTZ

The State does not dispute that Kurtz had testimony to support his medical necessity defense. But the State concludes by arguing that the common law defense requires Kurtz to show that “no other law provides exceptions or defenses” dealing with his specific situation. This argument is found on page 14 of the State’s supplemental brief and there is no citation to support it on that page. The argument appears to have come from a citation on page 12 where the State references elements found in the Model Penal Code and referred to in *State v. Diana*. But those elements are *not* the common law elements of medical necessity in

Washington as ultimately described in *Diana*. Thus, Kurtz is not required to show that “no other law” provides him with a defense.

**III.
CONCLUSION**

There is simply no reason why the statutory defense and common law defense cannot and do not co-exist. There is nothing in the statute that indicates the Initiative was designed to preempt the field. Thus, the common law defense was alive and well at the time.

DATED this 17 day of July 2012.

Respectfully submitted,


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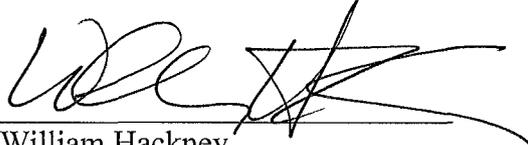
CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by First Class United States Mail, postage prepaid, one copy of this brief on the following:

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