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No. 41568-2-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM ANDREW KURTZ,

Defendant/Appellant.

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR..... 1

B. STATEMENT OF THE CASE..... 1

C. ARGUMENT..... 2

 1. Is *State v. Butler* wrongly decided and should this court overrule
 it? 2

 2. Assuming *Butler* is reversed, did Kurtz present some evidence of
 the common law defense?..... 8

 3. Under this Court’s reasoning in *State v. Bickle*, 153 Wash. App. 222,
 222 P. 3rd, 113 (2009), were the two offenses the same criminal conduct.
 9

D. CONCLUSION..... 10

TABLE OF AUTHORITIES

Cases

Seeley v. State, 132 Wn.2d 776, 940 P.2d 604 (1997)..... 4, 5, 7
State v. Bickle, 153 Wash. App. 222, 222 P. 3rd, 113 (2009) 9
State v. Cole, 74 Wn. App. 571, 874 P.2d 878 (1994)..... 3, 4, 7
State v. Diana, 24 Wn. App. 908, 604 P.2d 1312 (1979) 3, 4, 7
State v. Gocken, 127 Wash.2d 95, 107, 896 P.2d 1267(1995)..... 9
State v. Pittman, 88 Wn. App. 188, 943 P.2d 713 (1997)..... 4, 7
State v. Williams, 93 Wn. App. 340, 968 P.2d 26 (1998) 5, 6, 7, 8

Statutes

RCW 69.51A 5
RCW 69.51A.005 6

Constitutional Provisions

Const. art. I, § 9..... 9

A. ASSIGNMENTS OF ERROR

1. The trial court erred in prohibiting the defense from presenting a medical necessity defense.
2. The trial court erred in failing to treat possession of marijuana and manufacture of marijuana as the same criminal conduct?

Issues Pertaining to the Assignments of Error

1. Is *State v. Butler*, 126 Wn. App. 741, 109 P.3d 493 (2005) wrongly decided?
2. Did the trial court err in failing to treat possession of marijuana and manufacture of marijuana as the same criminal conduct?

B. STATEMENT OF THE CASE

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

On March 1, 2010, the police obtained a warrant to search Kurtz's house. Inside they found both processed and growing marijuana. RP 117 to 191.

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. Kurtz also submitted an offer of proof indicating that he would testify that he suffered from a progressive hereditary disorder. RP 207. He would have testified that he used marijuana to deal with his condition and that the marijuana he was growing was for this condition. Id.

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*, supra, prevented Kurtz from presenting the medical necessity defense. Id.

At sentencing, the trial court treated the two crimes and separate and distinct. C.P. 44-51. There was no request to treat the counts as the “same criminal conduct.” 11/24/10 RP 1-18.

This timely appeal followed. CP 52-60.

C. ARGUMENT

1. *Is State v. Butler wrongly decided and should this court overrule it?*

Division III of this Court 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.

This Division adopted the reasoning of *Diana* in 1994 in *State v. Cole*, 74 Wn. App. 571, 874 P.2d 878 (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. This 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, the Supreme 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.

Following *Seeley*, this Court decided *State v. Williams*, 93 Wn. App. 340, 968 P.2d 26 (1998). In that case, this Court determined that classification of marijuana as a Schedule I drug meant that it had “no accepted medical use.” *Id.* at 347. Thus, its use could never form the basis of a medical marijuana defense. *Id.*

In 1998, however, 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* decision and should have revived the medical necessity defense with regard to marijuana.

In 2005, however, this Court disagreed. In *State v. Butler*, 126 Wn. App. 741, 109 P.3d 493 (2005), this Court was asked to review a trial court order denying Butler funds for an expert regarding his use of medical marijuana. Citing *Williams*, this 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, this 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*, *supra*. The *Williams* court did not disagree. It simply held that after *Seeley*, no one could establish such a defense because the Legislature had determined that marijuana had no medicinal value.

The Medical Marijuana Act did not supercede the common law as described in *Diana, Cole and Pittman*. It actually reaffirmed the law by

making it clear *legislatively* that marijuana has medicinal value. Thus, it not only revived the common law, it provided another statutory defense that is entirely consistent with that common law.

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. The Initiative was drafted and passed before this Court decided *Williams*. Thus, the common law defense was alive and well at the time. The drafters could have referenced the common law and superceded it had they intended to do so. But, they did not.

In short, this Court should reverse its *Butler* decision and hold that the both the statutory and common law defenses co-exist.

2. *Assuming Butler is reversed, did Kurtz present some evidence of the common law defense?*

The State did not dispute in the trial court that Kurtz had sufficient evidence to go forward on the common law defense. The prosecutor did not dispute that: (1) Kurtz reasonably believed his use of marijuana was necessary to minimize his medical conditions; (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 was effective in minimizing the

effects of the disease. Kurtz submitted an offer of proof that demonstrated he had a qualified medical expert who would testify on his behalf.

Thus, the trial court erred in ordering that Kurtz was precluded from presenting this defense to the jury.

3. Under this Court's reasoning in State v. Bickle, 153 Wash. App. 222, 222 P. 3rd, 113 (2009), were the two offenses the same criminal conduct.

There was no objection to the To raise this issue on appeal, Kurtz must identify a constitutional error and show how the alleged error actually affected the defendant's rights at trial. *State v. Kirkman*, 159 Wash.2d at 926, 155 P.3d 125. This showing of actual prejudice is what makes the error “manifest,” allowing appellate review. *Id.* at 927, 155 P.3d 125.

The Fifth Amendment to the United States Constitution prohibits the government from putting any person in jeopardy twice for the same offense. See Const. art. I, § 9. This Court interprets the Washington Constitution's analogous double jeopardy clause in the same way that the United States Supreme Court interprets the Fifth Amendment. *State v. Gocken*, 127 Wash.2d 95, 107, 896 P.2d 1267(1995).

In *State v. Bickle*, supra, this Court held that, because the crimes of manufacturing marijuana and possessing marijuana “further” each other,

they are the same criminal conduct when they occur at the same time and place. Here, like Bickle, Kurtz both possessed and manufactured marijuana at his residence on the same date. And the victim in both offenses was the public.

Therefore, the principles of double jeopardy bar calculating Kurtz's offender score using both convictions.

D. CONCLUSION

For the reasons stated above, this Court should reverse and remand Kurtz's convictions for a new trial. In addition, this Court must reverse Kurtz's sentence and remand to the trial court for resentencing.

Respectfully submitted this 24th day of June, 2011.


Suzanne Lee Elliott, WSBA 12634
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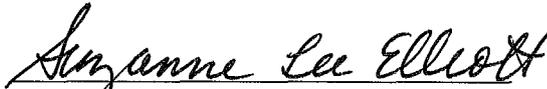
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I declare under penalty of perjury that on June 24, 2011, I placed a copy of this document in the U.S. Mail, postage prepaid, to:

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