

87078-1

No. 41568-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

WILLIAM KURTZ

Appellant.

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

The Honorable, Judge Carol Murphy  
Cause No. 10-1-00914-4

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BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether State v. Butler was wrongly decided and should this Court overrule it.

2. Whether the two offenses constitute the same criminal conduct.

B. STATEMENT OF THE CASE.

The State accepts the appellant's statement of the case.

C. ARGUMENT.

1. State v. Butler was not wrongly decided and this Court should not overrule its own ruling.

A challenge to the trial court's determination of whether a defense exists as a question of law is reviewed de novo. State v. Fry, 168 Wn.2d 1, 228 P.3d 1 (2010). The common law defense of medical necessity has three parts:

- (a) The harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and
- (b) Neither the Code nor other law defining the offense provides exceptions or defense dealing with the specific situation involved; and
- (c) A legislative purpose to exclude the justification claimed does not otherwise plainly appear.

State v. Diana, 24 Wn. App. 908, 914, 604 P.2d 1312 (1979). In

State v. Butler, 126 Wn. App. 741, 109 P.3d 493 (2005), this Court

held that the Medical Use of Marijuana Act superseded the medical necessity defense, if such defense existed.

The appellant asks this Court to overturn its ruling in Butler. The appellant argues that the Medical Use of Marijuana Act and the common law medical necessity defense are co-existing. However, the appellant's argument is misplaced because the common law medical necessity defense does not exist.

In Williams, this Court determined that an implied assumption to the common law medical necessity defense is that marijuana has accepted medical uses. Williams, 93 Wn. App. at 346, 968 P.2d 26. In Seeley v. State, 132 Wn.2d 776, 805-06, 940 P.2d 604 (1997), the Washington Supreme Court determined that our state constitution vested in the Legislature the task of determining whether there is an accepted medical use for particular drugs. In Williams, this Court, looking to the holding in Seeley, concluded that because marijuana is a Schedule I drug, the medical necessity defense did not exist. Williams, 93 Wn. App. at 347, 968 P.2d 26.<sup>1</sup> In reaching its decision<sup>2</sup>, this Court reasoned:

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<sup>1</sup> This Court held in Williams that the ruling in Seeley, by implication, overrules both State v. Diana, 24 Wn. App. 908, 604 P.2d 1312 (1979) (recognizing the existence of medical necessity defense) and State v. Cole, 74 Wn. App. 571, 874 P.2d 878 (1994) (adoption of the ruling in Diana).

“Because the debate over medical treatment belongs in the political arena, it makes no sense for the courts to fashion a defense whereby jurors weigh experts’ testimony on the medical uses of Schedule I drug. Otherwise, each trial would become a battlefield of experts. But the Legislature has designated the battlefield as the Board of Pharmacy. The Washington Constitution has not enabled each individual to be the final arbiter of the medicine he is entitled to take—it is the Legislature that has been authorized to make laws to regulate the sale of medicines and drugs.”

Id.

The appellant argues that the passing of the Medical Use of Marijuana Act suggests the existence of the medical necessity defense. However, the language in the Act states otherwise. When the Legislature enacted the statute, it specifically stated that it did not have the purpose or intent to “establish the medical necessity or medical appropriateness of cannabis for treating terminal or debilitating medical conditions. RCW 69.51A.005 (3). Additionally, after the passing of the Medical Use of Marijuana Act, this Court’s ruling in Williams was appealed to the Washington Supreme Court. However, the Washington Supreme Court declined to review. State v. Williams, 138 Wn.2d 1002, 984 P.2d 1034 (1999). Thus, this Court’s Williams rationale, analysis and

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<sup>2</sup> When reaching its decision, this Court took into consideration the recent passing of initiative, No. 692 that legalized the use of marijuana for medical purposes under certain conditions.

holding that the medical necessity defense does not exist remain good law.

2. The State concedes that the two criminal offenses were the same criminal conduct.

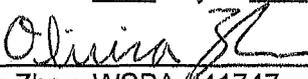
Offender score computations are reviewed de novo. State v. Roche, 75 Wn. App. 500, 513, 878 P.2d 497 (1994). A challenge to an offender score calculation is a sentencing error that can be raised for the first time on appeal. State v. Anderson, 92 Wn. App. 54, 61, 960 P.2d 975 (1998).

The State agrees with the appellant that manufacturing marijuana and unlawful possession of marijuana are the same criminal conduct for sentencing purposes. Thus, the appellant's offender score should have been "0" during sentencing.

#### D. CONCLUSION.

For the above stated reasons, the State respectfully requests this court to affirm its prior holding in Butler and affirm the trial court's denial of the common law medical necessity defense. Additionally, the State requests the case be remanded for resentencing based on an offender score of zero.

Respectfully submitted this 20 day of September, 2011.

  
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Attorney for Respondent

**THURSTON COUNTY PROSECUTOR**

**September 20, 2011 - 3:30 PM**

**Transmittal Letter**

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Case Name:

Court of Appeals Case Number: 41568-2

Designation of Clerk's Papers                      Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: \_\_\_\_

Answer/Reply to Motion: \_\_\_\_

■ Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Other: \_\_\_\_\_

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