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68644-5

NO. 68644-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

JOHN C. YOUNG,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

(1) When questioned by police officers, the defendant failed to present them with any documentation supporting his claim that he was a qualified user of medical marijuana. Under the statute in force at the time of the crime, can the defendant establish the affirmative defense for medical marijuana users?

(2) A subsequent statutory amendment allows medical marijuana users to establish a defense at trial, even if they did not present documentation to law enforcement officers. Does this amendment apply retroactively to decriminalize conduct that was violated Washington law prior to the amendment?

(3) The defendant's physician provided a written statement authorizing him to use medical marijuana for a specified time period. Did this statement continue to be "valid documentation" after the time period expired?

II. STATEMENT OF THE CASE

The defendant was convicted at a bench trial on agreed documentary evidence. CP 29-30. This evidence showed the following:

On August 11, 2010, the defendant (appellant), John C. Young, was stopped for a traffic violation. When approached by

the officer, the defendant volunteered that his license was suspended. After confirming that information, the officer arrested him for driving while license suspended. CP 34.

The officer noticed an odor of burnt marijuana on the defendant's person. After advising him of his rights, he asked the defendant if he smoked marijuana. The defendant said that he did and that he had a medical marijuana card. The defendant also said that he had around 40 grams of marijuana in his vehicle. CP 34.

After being advised of his Miranda warnings, YOUNG advised that he had roughly 40 grams of marijuana in the vehicle that he had just purchased from his supplier for \$350.000. YOUNG further advised that he had a "Prescription" from a Doctor for the medicinal use of marijuana. . . YOUNG was unable to provide the required "Recommendation letter" (or a copy thereof) from a Health Care Provider. . .

Police impounded the vehicle and obtained a search warrant. The search found a plastic container containing 46.7 grams of marijuana. CP 35.

The defendant was charged with possession of over 40 grams of marijuana. CP 76. He subsequently produced three documents authorizing him to possess medical marijuana. The first was issued on August 9, 2009. By its own terms, this authorization expired on August 9, 2010 (two days before the defendant's arrest).

CP. 39. A second authorization document was issued by a different physician on September 23, 2010 (six weeks after the arrest) and expired a year later. CP 40. A third was issued on September 16, 2011, and likewise expired a year later. CP 41.

The court found that the defendant has possessed over 40 grams of marijuana. Although he claimed to have medical authorization, he was unable to present it to the officer when asked. Also, his authorization had expired before the date of arrest. Based on these findings, the court concluded that the defendant had failed to prove his compliance with the medical marijuana statute. It therefore found him guilty. CP 25-28 (attached as Appendix A).

III. ARGUMENT

A. BECAUSE THE DEFENDANT FAILED TO PRESENT DOCUMENTATION TO LAW ENFORCEMENT OFFICERS WHO QUESTIONED HIM, HE DID NOT SATISFY THE AFFIRMATIVE DEFENSE FOR LAWFUL USE OF MEDICAL MARIJUANA.

1. Under The Law In Effect At The Time Of The Crime, The Existence Of Valid Documentation Did Not Establish A Defense, If The Defendant Failed To Present It To Law Enforcement Officers Who Questioned Him.

The trial court found that “[t]he defendant was unable to present authorization to [the investigating officer] when asked.” CP 26. Based in this finding, the court concluded that the defendant had failed to establish that he had complied with the medical

marijuana statute. CP 27. As no error has been assigned to the trial court's findings, they are verities on appeal. This court's review is limited to determining whether the findings support the conclusions of law. Conclusions of law are reviewed de novo. State v. A.M., 163 Wn. App. 414, 419 ¶ 10, 260 P.3d 229 (2011).

At the time of the defendant's crime, the affirmative defense for medical marijuana users was set out in RCW 69.51A.040, as amended by Laws of 2007, ch. 371, § 5.

(2) If charged with a violation of state law relating to marijuana, any qualifying patient who is engaged in the medical use of marijuana ... will be deemed to have established an affirmative defense to such charges by proof of his or her compliance with the requirements provided in this chapter...

(3) A qualifying patient, if eighteen years of age or older, ... shall:

(a) Meet all criteria for status as a qualifying patient ...;

(b) Possess no more marijuana than is necessary for the patient's personal, medical use, not exceeding the amount necessary for a sixty-day supply; and

(c) Present his or her valid documentation to any law enforcement official who questions the patient ... regarding his or her medical use of marijuana.¹

¹ Similar requirements are now set out in RCW 69.51A.043, enacted by Laws of 2011, ch. 181, § 402. As discussed below, the current statute also creates an affirmative defense for persons who do not present valid documentation to investigating officers. RCW 69.51A.047, enacted by Laws of 2011, ch. 181 § 406. Additionally, the 2011 statute changed the name to "medical cannabis."

Under the plain language of this statute, a medical marijuana user is required to present valid documentation to any law enforcement officer who questions him. If he fails to present the documentation, he cannot prove his compliance with the requirements of the statute. Consequently, he cannot establish the statutory defense. If a statute's meaning is plain on its face, the court must give effect to that plain meaning. State v. Jacobs, 154 Wn.2d 596, 600 ¶ 7, 115 P.3d 281 (2005).

The defendant nonetheless argues that it is sufficient to present valid documentation at the time of trial. In support of this claim, he cites State v. Fry, 168 Wn.2d 1, 228 P.3d 1 (2010). The relevant portion of the opinion deals with the validity of a search warrant. Police had questioned the defendant about a suspected marijuana grow. He presented what appeared to be valid documentation. Police nonetheless obtained a search warrant and seized evidence of the grow. Id. at 1 ¶¶ 4-6. (It was ultimately discovered that the defendant was not a validly-authorized user, because his medical condition was not one for which marijuana can be used. Id. at 11-12 ¶ 26.)

In upholding the search warrant, the lead opinion reasoned as follows:

Under the Act, a person “charged with a violation of state law relating to marijuana ... will be deemed to have established an affirmative defense to such charges by proof of his or her compliance with the requirements provided in this chapter.” Former RCW 69.51A.040(1). One of the requirements is that a qualifying patient “[p]resent his or her valid documentation to any law enforcement official who questions the patient regarding his or her medical use of marijuana” (presentment requirement). Former RCW 69.51A.040(2)(c).

An amici brief calls our attention to the “presentment” requirement in the Act. It is argued that if the presentment requirement is to have meaning, presentation of a patient's authorization must establish lawful possession of marijuana, and thereby the absence of criminal activity that would provide probable cause for a search or seizure.

The presentment requirement must be read in context. It is only triggered when someone is “charged with a violation.” Former RCW 69.51A.040(1). A person who meets the presentment requirement (and all other requirements) will “be deemed to have established an affirmative defense.” Additionally, the requirements, taken together, do not indicate that the Act created more than an affirmative defense.

Id. at 9 ¶¶ 18-20 (footnote omitted).

Contrary to the defendant’s arguments, this portion of the lead opinion does not say that the statutory requirement of presentment can always be satisfied after charging. Rather, it says that even *if* valid documentation is presented to law enforcement officers, that fact only establishes an affirmative defense. Since the

defense is only available after charging, it did not defeat probable cause. Id. at 10 ¶ 22.

In any event, the lead opinion has minimal precedential value, since it was signed by only four justices. A concurring opinion, signed by four other justices, concurred with the lead opinion “in result only,” without setting out any reasoning. Id. at 20 ¶ 44 (Chambers, J., concurring). A dissenting justice argued that the search warrant was invalid. Id. at 20-23 ¶¶ 45-51 (Sanders, J., dissenting). Thus, a majority of the court *disagreed* with the lead opinion. “A plurality has little precedential value and is not binding.” State v. Johnson, 173 Wn.2d 895, 904 ¶ 6, 270 P.3d 591 (2012). The lead opinion in Fry does not change the clear requirements of former RCW 69.51A.040(3)(c).

The defendant also cites the decisions of Division Three in State v. Adams, 148 Wn. App. 231, 198 P.3d 1057 (2009); and State v. Hanson, 138 Wn. App. 322, 157 P.3d 438 (2007). Both of those cases involved searches carried out in the suspects’ absence. In each case, police never asked the suspect to produce documentation. The court held that absent such a request, the suspect’s failure to produce documentation did not defeat the affirmative defense. In each case, the court made it clear that the

result would have been different if police had asked for the documents but the suspects had not provided them:

[The defendant] obtained the required documents well in advance of his arrest, but was never asked to provide them. Had officers shown any interest in obtaining the documents or assisted [him] in retrieving them, and [he] had been unwilling or unable to do so, then he would not have satisfied the requirements of the statute. But that is not the case here.

Adams, 148 Wn. App. at 238 ¶ 21.

Had [the defendant] been present on the day of this raid and had he been asked to present valid documentation, he would not have been able to do so and would not, then, have satisfied the requirements of the statute. But that did not happen here.

Hanson, 138 Wn. App. at 327 ¶ 12.

This situation is exactly what occurred in the present case. Police questioned the defendant about documentation, but he was unable to produce any. CP 35. Under Adams, Hanson, and the clear language of former RCW 69.51A.040(3)(c), this means that he failed to prove the affirmative defense.

2. A Statutory Amendment Altering A Substantive Defense Does Not Apply Retroactively To Eliminate The Penalty For A Previously-Committed Crime.

For the first time on appeal, the defendant attempts to rely on a statute that was enacted after commission of the crime:

A qualifying patient or designated provider who ... does not present his or her valid documentation to a

peace officer who questions the patient or provider regarding his or her medical use of cannabis but is in compliance with all other terms and conditions of this chapter may establish an affirmative defense to charges of violations of state law relating to cannabis through proof at trial, by a preponderance of the evidence, that he or she was a validly authorized qualifying patient or designated provider at the time of the officer's questioning.

RCW 69.51A.047, enacted by Laws of 2011, ch. 181, § 406. This statute took effect on July 22, 2011. It has no impact on the prosecution of a crime committed on August 11, 2010.

RCW 10.01.140 sets out a "savings provision" for criminal statutes that are amended:

Whenever any criminal or penal statute shall be amended or repealed, all offenses committed ... while it was in force shall be punished ... as if it were in force, notwithstanding such amendment or repeal, unless a contrary intention is expressly declared in the amendatory or repealing act, and every such amendatory or repealing statute shall be so construed as to save all criminal and penal proceedings ... pending at the time of its enactment, unless a contrary intention is expressly declared therein.

Nothing in the 2011 amendments to the medical marijuana statute expresses any intention to apply its provisions retroactively.

RCW 10.01.040 applies to substantive changes in the law, not procedural ones. State v. Pilatos, 159 Wn.2d 459, 472 ¶ 20, 150 P.3d 1130 (2007). "Substantive amendments change either the elements of the offense, the severity of the punishment, or what

evidence can be used to prove the offense.” State v. Calhoun, 163 Wn. App. 153, 154, 257 P.3d 693 (2011), review denied, 173 Wn.2d 1018 (2012).

RCW 69.51A.047 did not change the elements of the offense, but it did change the elements of a defense. Prior to the enactment of that provision, a person who possessed marijuana was guilty of a crime if he failed to present valid documentation when questioned by a law enforcement officer. After that enactment, such a person is not guilty if he can prove the existence of a valid medical authorization at trial. This change affects the substance of the crime, not merely the procedure. Consequently, under RCW 10.01.140, this enactment does not affect the prosecution for a crime committed before its effective date.

The crime committed by the defendant in 2010 did not cease to be a crime when the legislature enacted a new defense in 2011. The trial court correctly concluded that under former RCW 69.51A.140, the defendant failed to establish the affirmative defense to the crime of possessing marijuana.

B. IF THE DEFENDANT'S PHYSICIAN DECIDES TO AUTHORIZE USE OF MEDICAL MARIJUANA FOR A LIMITED TIME, THE DEFENDANT IS NOT ENTITLED TO IGNORE THAT LIMITATION.

As an alternate ground for convicting the defendant, the trial court concluded that the defendant could not rely on an expired authorization. CP 27. This conclusion as well was correct.

To establish the affirmative defense, the defendant must show that he presented "valid documentation." Former RCW 69.51A.043(3)(c).

"Valid documentation" means ... [a] statement signed by a qualifying patient's physician, or a copy of the qualifying patient's pertinent medical records, which states that, in the physician's professional opinion, the patient may benefit from the medical use of marijuana. . .

RCW 69.51A.010(5)(a), as amended by Laws of 2007, ch. 371, § 3.²

In this case, the physician stated that in his opinion, the potential benefits of marijuana may outweigh the health risks for the patient. He chose, however, to place an expiration date on this opinion: "This recommendation expires on 08/09/2010." CP 39.

² The 2010 legislature amended this definition to require that the statement be written on tamper-resistant paper. Laws of 2010, ch. 284, § 2. This amendment does not, however, apply to documentation obtained prior to June 10, 2010, the effective date of the act. *Id.* § 5. Since the documentation in this case was issued on August 9, 2009, it is governed by the requirements of the 2007 statute.

The physician thus did not opine that the defendant could benefit from marijuana for the remainder of his life, but only for a period of one year. Since that period had expired when the defendant was questioned, he no longer had any statement from a qualified medical professional that he could still benefit from the use of marijuana. As a result, he had no “valid documentation” that satisfied statutory requirements.

The defendant essentially argues that the time limit established by his own physician should be ignored. The people and the legislature have made it clear, however, that use of marijuana should be based on the professional judgment of a physician or other qualified health care professional:

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 health care professional's professional medical judgment and discretion.

RCW 69.51A.005, as amended by Laws of 2010, ch. 284, § 1.³

A physician might believe that a particular patient could benefit from using marijuana for a short time, perhaps only a few days or weeks. Under the defendant's argument, however, the

³ Similar findings are set out in Laws of 2007, ch. 371, § 1 and Laws of 2011, ch. 181, § 102.

physician's written statement of that opinion would allow the patient to use marijuana for the rest of his life, long after the medical need had terminated. The physician's "professional medical judgment and discretion" would then be ignored. Such a result would be absurd and contrary to the statutory purpose.

If a statute is ambiguous, it is construed in the manner that best fulfills the legislative purpose. Seattle v. St. John, 166 Wn.2d 941, 946 ¶ 5, 215 P.3d 194 (2009). The "rule of lenity" only applies if there is no contrary legislative intent. State v. Jacobs, 154 Wn.2d 596, 601 ¶ 7, 115 P.3d 281 (2005). Because the purpose of the medical marijuana statute is to respect physicians' professional judgments, it should not be construed in a manner that ignores those judgments.

The defendant points out that the Legislature later attempted to amend the statute to provide an expiration date for "valid documentation." Laws of 2011, ch. 181, § 201(32)(b) (vetoed). This amendment would have limited physician's professional judgments, by making documentation valid "for up to one year." The amendment did not take effect because it was vetoed by the governor (for reasons unrelated to this particular subdivision).

In the present case, the State is not asserting any arbitrary time limit. Rather, the time limit on a physician's authorization is purely within the physician's own judgment. Authorization can be valid for a day, a year, or a lifetime, as the issuing physician sees fit. The patient's ability to use marijuana is controlled only whatever limit the physician chooses to set.

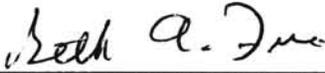
The defendant also points out that after he was arrested, he obtained a new authorization for a later period. This is irrelevant. A defendant must possess valid documentation when he is questioned by law enforcement. If he does not, he cannot create it later. Hanson, 138 Wn. App. at 327-28 ¶ 11-14. At the time that the defendant was questioned by law enforcement, there was no documentation in existence showing that he could, *at that time*, benefit from the medical use of marijuana. Consequently, he failed to prove the affirmative defense for medical use of marijuana.

IV. CONCLUSION

The judgment and sentence should be affirmed.

Respectfully submitted on December 13, 2012.

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SNOHOMISH CO. WASH



SUPERIOR COURT OF WASHINGTON
FOR SNOHOMISH COUNTY

THE STATE OF WASHINGTON,

Plaintiff,

v.

YOUNG, JOHN C.

Defendant.

No. 11-1-01294-2

FINDINGS OF FACT AND
CONCLUSIONS OF LAW REGARDING
POSSESSION OF MARIJUANA
OVER 40 GRAMS

On 2/13/2012, a bench trial on agreed documentary evidence was held on the charge of Possession of Marijuana Over 40 Grams. The court considered the agreed documentary evidence and the arguments and memoranda of counsel. The court applied the standard that the state must prove all elements beyond a reasonable doubt. There was also an affirmative defense raised in this case that the defendant lawfully possessed the marijuana pursuant to RCW 69.51A. The court applied the standard that the affirmative defense must be established by a preponderance of the evidence. Being fully advised, the court now enters the following findings of fact and conclusions of law:

I. FINDINGS OF FACT

On August 11th, 2010, Officer Tilleson of the Tulalip Police Department stopped a black Toyota 4Runner on the Tulalip Reservation in the State of Washington for a seatbelt violation. The defendant, John C. Young, was driving and admitted to having a suspended driver's

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license. After he arrested the defendant and read him his *Miranda* rights, Officer Tilleson noticed the smell of burnt marijuana. The defendant admitted to having approximately forty grams of marijuana in the vehicle and stated that he had medical authorization to possess it. The defendant, however, was unable to present authorization to Officer Tilleson when asked. The defendant stated that the marijuana was in his backpack, behind the driver's seat.

Officer Tilleson obtained a search warrant for the vehicle and when he executed it the day after the original stop, he located a black backpack behind the driver's seat. That backpack contained a large plastic container that had in it a large amount of a green leafy substance that Officer Tilleson recognized based on his training and experience as marijuana. The marijuana weighed 46.7 grams without packaging.

The defendant, through his defense attorney, later provided the prosecution with copies of multiple medical marijuana authorization cards. The first was issued on August 9, 2009 and had an expiration date of August 9, 2010. The second was issued on September 23, 2010 and had an expiration date of September 23, 2011. The third was issued on September 16, 2011 and had an expiration date of September 16, 2012.

II. CONCLUSIONS OF LAW

Based on the agreed documentary evidence, the state has proven each of the elements of the crime beyond a reasonable doubt. The question then becomes twofold: has the defense made a prima facie showing to allow the presentment of the affirmative defense, and has the defense established by a preponderance of the evidence that the defendant lawfully possessed the marijuana.

The defendant has made a prima facie case and must be allowed to present the affirmative defense. He is a State of Washington resident, over the age of eighteen and was

seen by a doctor authorized to practice in Washington. That doctor signed an authorization advising the defendant of the risks and benefits of using cannabis. The defendant had that qualifying condition on the date of violation.

The defendant, however, cannot establish by a preponderance of the evidence that he complied with requirements of the medical marijuana statute. RCW 69.51A.040(2)(c) states that in order to establish the affirmative defense, a defendant must present his or her valid documentation to any law enforcement official who questions the patient or provider regarding his or her medical use of marijuana. The defendant was unable to do so in this case. The case law presented by the defendant to urge the court to overlook this requirement is all factually distinguishable from the case at bar. The defendant has not met the presentment requirement in this case.

Secondarily, the defendant did not possess an authorization on the date of violation that was not expired. A physician can put an expiration date on a prescription or authorization, and the inference is that it is because the physician would want to re-evaluate the patient.

The defendant has not established the affirmative defense by a preponderance of the evidence, and is found Guilty of the crime of Possession of a Controlled Substance- Marijuana Over Forty Grams.

DONE IN OPEN COURT this 29 day of March, 2012.



JUDGE

Presented by:



CHRISTOPHER K. SEDGEWICK, #37800
Deputy Prosecuting Attorney