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No. 70300-5-I
(consolidated with 70301-3-I)

COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent.

v.

DENNIS M. CROWLEY, consolidated with JENNIFER M.

DETMERING, Petitioners.

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STATE OF WASHINGTON
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REPLY BRIEF

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TABLE OF CONTENTS

A. The Reis Decision is Contrary to the State Supreme Court Decisions in Hallin, Shelton Hotel, and Washington Federation. 2

B. The State’s Argument Directly Contradicts the Codified Intent of the Legislature as Provided in RCW 69.51A.005. 8

C. The state’s argument, that paying taxes and acquiring a business license proves Mr. Crowley was violating the Act, contradicts other state and local law. 9

D. The State Fails to Distinguish the Holding in Shupe. 11

E. In light of Shupe and Brown, the State’s Affidavits Fail to Establish Probable Cause. 13

TABLE OF AUTHORITIES

Cases

<u>Cole v. Harveyland, LLC</u> , 163 Wn.App. 199, 258 P.3d 70 (2011)	11
<u>Hallin v. Trent</u> , 94 Wn.2d 671, 619 P.2d 357 (1980)	3, 6
<u>Shelton Hotel Co. v. Bates</u> , 4 Wn.2d 498, 104 P.2d 478 (1940)	3, 6
<u>State of Washington v. William Michael Reis</u> , No. 69911-3-I (2014) 1, 3, 4	
<u>State v. Brown</u> , 166 Wn. App. 99, 269 P.3d 359 (2012)	11, 12
<u>State v. Helmka</u> , 86 Wn.2d 91, 92 542 P.2d 115 (1975)	13
<u>State v. Shupe</u> , 289 P.3d 741 (2012).....	11, 12
<u>Washington Federation of State Employees, AFL-CIO, Council 8, AFSCME v. State</u> , 101 Wn.2d 536, 682 P.2d 869 (1984).....	4, 5, 6

Statutes

RCW 69.51A.005.....	8
RCW 69.51A.005(1).....	8
RCW 69.51A.010(4).....	7
RCW 69.51A.040.....	2, 6
RCW 69.51A.040(1)(a)	7
RCW 69.51A.045.....	7
RCW 69.51A.047.....	7
RCW 69.51A.085.....	9, 12
RCW 69.51A.085(2).....	14
RCW 69.51A.085(b) and (c).....	14

RCW 69.51A.140..... 13

RCW 69.51A.140(1)..... 10

Other Authorities

Dept. of Rev. Special Notice (May 31, 2011)..... 10

E2SSB 5073, 2011 Wash. Laws ch. 181 2

Seattle Ordinance No. 123661 10

Shoreline Municipal Code, Chapt. 5.07..... 10

Constitutional Provisions

Const. art. 3, § 12 (amend. 62)..... 4

This petition presented two interrelated questions for review: (1) whether the Medical Cannabis Act (“Act”), found in chapter 69.51A RCW, legalizes medical cannabis under certain conditions, or whether it merely provides patients an affirmative defense; and (2) assuming the Act does legalize medical cannabis, whether the state’s affidavit to search KGB Collective established probable cause.

This Court, when it accepted review, linked this case with another petition, State of Washington v. William Michael Reis, No. 69911-3-I (2014). Reis also presented the first issue noted above. On March 31, 2014, the court issued a published decision in Reis. The decision held that as a result of the Governor’s veto of the state-wide patient registry provided in Section 901 of E2SSB 5073 (2011), the Act only provides patients an affirmative defense. Mr. Reis timely petitioned for review to the State Supreme Court, which is pending.

In light of this Court’s decision in Reis, the second issue presented for review is largely extraneous, in the sense that this Court’s determination in Reis likely puts an end to this matter. That said, Mr. Crowley respectfully requests this Court to reexamine the Reis decision.

A. The Reis Decision is Contrary to the State Supreme Court Decisions in Hallin, Shelton Hotel, and Washington Federation.

As discussed in prior briefing, the legislature significantly amended the state's medical cannabis laws in 2011.¹ This legislation was subject to a partial governor veto. Relevant to this matter, such vetoed sections included Section 901, which required the Department of Health to develop a secure, state-wide patient registry for all individuals authorized to use medical cannabis.² As a result of the Governor's veto, no such registry exists.

Even though no such registry exists, RCW 69.51A.040 still references Section 901. See generally, RCW 69.51A.040(3) ("The qualifying patient or designated provider [must] keep[] a copy of his or her proof of registration with the registry established in *section 901 of this act . . . posted prominently next to any cannabis plants.") Because the Act references the vetoed Section 901, this Court held that registry is still a prevailing term and condition of the Act. In other words, the possession of medical cannabis is legal only if a patient registers with the Department of Health. Because no such registry exists, the possession of cannabis is a crime (although the patient may assert an affirmative defense at trial).

¹ E2SSB 5073, 2011 Wash. Laws ch. 181; CP 53-81

² See CP 74-76 (vetoed copy of Section 901).

This position is contrary to established case law on the meaning and legal effect of vetoed legislation. Contrary to the Reis holding, any references to Section 901 within the Act were effectively removed by the partial veto. “The Governor’s veto of a portion of a measure, if the veto is not overridden, removes the vetoed material from the legislation as effectively as though it had never been considered by the legislature.” Hallin v. Trent, 94 Wn.2d 671, 677, 619 P.2d 357 (1980) (emphasis added). “In exercising the veto power, the governor acts as a part of the legislative bodies, and the act is to be considered now just as it would have been if the vetoed provisions had never been written into the bill at any stage of the proceedings.” Id. at 678; Shelton Hotel Co. v. Bates, 4 Wn.2d 498, 506, 104 P.2d 478 (1940).

Even though this Court quotes from both the Shelton Hotel and Hallin decisions, the Reis opinion fails to appreciate how those decisions apply here. Pursuant to Hallin and Shelton Hotel, the Act must “be considered now just as it would have been if [Section 901] *had never been written into the bill.*” Hallin, 94 Wn.2d at 678 (emphasis added).

Continuing to impose the state registry as a controlling term and condition of the Act writes Section 901 back into the bill.

No meaning should be taken from the fact that the partial veto did not strike out the language relating to the state registry in the legislation

not vetoed. Pursuant to the state Constitution, article III, section 12, the governor may only veto entire sections of nonappropriation bills, not portions of sections. Const. art. 3, § 12 (amend. 62). As a result, any remaining references to Section 901 are “incidentally vetoed” and “manifestly obsolete.” Washington Federation of State Employees, AFL-CIO, Council 8, AFSCME v. State, 101 Wn.2d 536, 682 P.2d 869 (1984).

This Court, in Reis, held that the Washington Federation decision quoted above was distinguishable because, in that case, references to the vetoed section could be removed “without changing the meaning of the sections of the legislation not vetoed.” To the contrary, Washington Federation is on point.

The veto in Washington Federation and the veto at issue here are almost identical in their significance to the legislation that was not vetoed. Washington Federation concerned a bill which significantly amended the state’s civil service laws to permit a state employee’s performance to be considered in matters of compensation, reduction in force, and reemployment. Washington Federation, 101 Wn.2d at 538. The governor vetoed Section 30 of the bill, which required the legislature’s future approval of subsequent rules enacted by the Department of Personnel and the Higher Education Personnel Board in regard to implementing the act. Id. The bill specifically provided that the rules could not become effective

until after approval by the legislature. Id. If the legislature failed to adopt the resolution, numerous sections of the bill would also be null and void. Id. at 551.

Thus, in both cases, the vetoed sections imposed a condition in the law. In Washington Federation the vetoed condition was that the legislature must approve the rules. In this case, the vetoed condition was that a patient must register with the Department of Health. Likewise, in both cases, the original legislation imposed punitive measures for noncompliance with the vetoed condition. In Washington Federation the punitive measure was that sections of the law were null and void. In this case, the punitive measure was the loss of arrest protection for patients, and in turn, merely an affirmative defense to be asserted at trial.

Nevertheless, this Court determined Washington Federation is distinguishable because in that case, reference to Section 30, and the requirement for legislative approval of the rules, had “no practical effect on the intended functioning of the statute.” To the contrary, “by vetoing section 30, the Governor altered the legislative scheme from one in which the Legislature reserved to itself the final decision to implement the act, to one in which the executive branch suddenly had that power.” Id. at 551 (Rosellini, J. dissenting). As noted by Justice Rosellini, the partial veto in

Washington Federation had a significant and practical effect on the intended functioning of the statute.

Thus, Washington Federation is relevant and controlling. Under Washington Federation, when the condition precedent was removed by veto, the consequence for failing to comply was also removed. Similarly here, when the registry was removed, the consequence for failing to register was also removed. Hence, the plain language of RCW 69.51A.040 legalizes the possession of cannabis under certain circumstances, and such circumstances do not include registering with the Department of Health pursuant to Section 901. The court is not permitted to “speculate as to what the legislature intended, had it foreseen the veto . . . courts may not engage in such conjecture.”³

It is ironic that the state in its briefing argues that Mr. Crowley, “Ignores the language stating that ‘medical use of cannabis *in accordance with the terms and conditions of this chapter* does not constitute a crime.’” Resp. Br. at 33. If the registry was vetoed, it cannot continue to serve as an enforceable *term and condition* of the chapter. Under Hallin and Shelton Hotel, “the act is to be considered now just as it would have been if the vetoed provisions had never been written into the bill.”⁴ Which raises the question: If established case law instructs us to remove the

³ Shelton Hotel, 4 Wn.2d at 500.

⁴ Hallin, 94 Wn.2d at 678; Shelton Hotel, 4 Wn.2d at 506.

vetoed material, how can compliance with the vetoed provisions be a legally enforceable term and condition of the Act?

The answer is simple. The veto removed the registry and any reference to the registry. Thus, it is not a crime for a patient to use, possess, and distributed medical cannabis so long as such activity complies with the prevailing—or *non*-vetoed—terms and conditions of the Act.

This reading of the Act does not “ignore the existence” of “other affirmative defenses in .045 and .047,” nor does it “render those provisions meaningless if medical marijuana was truly decriminalized.” Resp. Br. at 33. These claims by the state are baseless and contrary to the express language of the law. The affirmative defense in .045 is provided to individual qualified patients who possess, as an individual, more than 15 plants. RCW 69.51A.045. Likewise, the affirmative defense in .047 is provided to qualified patients who fail to show a questioning peace officer his or her medical authorization. RCW 69.51A.047. Both of these provisions are relevant and meaningful, as they relate to *non*-vetoed terms and conditions of the Act. See RCW 69.51A.040(1)(a) (limiting an individual to 15 plants and 24 ounces of useable cannabis); See RCW 69.51A.010(4) (requiring a qualified patient to have a valid medical authorization issued by a health care professional).

To be clear, Mr. Crowley is not arguing that the Act decriminalizes marijuana in any and all circumstances, only under certain conditions as provided for in the Act, which includes, among other things, a valid medical authorization, but which does not include registration with the Department of Health.

B. The State’s Argument Directly Contradicts the Codified Intent of the Legislature as Provided in RCW 69.51A.005.

In all of the state’s argument with regard to legislative intent, it fails to acknowledge the legislative intent that was actually codified in the Act itself. This express and unambiguous intent, provided in RCW 69.51A.005, is based in compassion and concern for the individuals the state is not trying to vilify and prosecute. RCW 69.51A.005(1) states:

Humanitarian compassion necessitates that the decision to use cannabis by patients with terminal or debilitating medical conditions is a personal, individual decision, based upon their health care professional's professional medical judgment and discretion. (2) Therefore, the legislature intends that: (a) *Qualifying patients with terminal or debilitating medical conditions* who, in the judgment of their health care professionals, may benefit from the medical use of cannabis, *shall not be arrested, prosecuted, or subject to other criminal sanctions or civil consequences under state law based solely on their medical use of cannabis*, notwithstanding any other provision of law.

(Emphasis added).

Before we start reading the tea leaves regarding the governor's veto message and engaging in conjecture as to what the legislature may have intended if they foresaw the veto, we must stop and give meaning and credence to the intent that is actually codified in the Act. That intent was to *not* arrest qualified patients. If we are to *not* arrest patients, the Act must actually legalize medical cannabis, as opposed to providing only an affirmative defense. As the state acknowledges and maintains in its briefing, an affirmative defense does not provide arrest protection.

C. The state's argument, that paying taxes and acquiring a business license proves Mr. Crowley was violating the Act, contradicts other state and local law.

This state's contradictions regarding medical cannabis has confused and angered honest, sick, qualified patients. At a time when recreational users and growers are getting the endorsement and blessing of lawmakers and law enforcement, qualified patients are being prosecuted for acquiring and distributing medical cannabis to other qualified patients in a collective model under RCW 69.51A.085.

Here, the evidence in the search warrant Affidavits gave every indication that the defendants and other participating patients made a concerted effort to comply with state law, including acquiring a state and local business license, paying taxes, and meticulously verifying authorizations of all participating patients. CP 7-8, 38, 41.

In a bizarre twist, the state now uses those facts to incriminate Mr. Crowley and claim that paying taxes and acquiring a business license violate the terms and conditions of the Act. Contrary to the state's claims, numerous municipalities require collective gardens to acquire a business license. See Seattle Ordinance No. 123661 and Shoreline Municipal Code, Chapt. 5.07 (both of these municipal code provisions were attached to Mr. Crowley's Answer to the State's Motion to Modify, filed with the court on June 28, 2013).

Moreover, the Act itself encourages such measures. See RCW 69.51A.140(1) (instructing cities to adopt and enforce zoning requirements, business licensing requirements, health and safety requirements, and business taxes). And the state, by way of the Department of Revenue, has sent collective gardens numerous notices stating that sales tax was due and owing on any monetary transaction, even those that were a donation between participating collective garden patients. See Dept. of Rev. Special Notice (May 31, 2011).

Thus, the state's interpretation of the Act, as not permitting a patient or collective to pay taxes or acquire a business license, contradicts with statements and policies issued by other state departments and local authorities. This contradiction is unfairly prejudicial and extremely confusing to the patients our laws were created to protect. The state and

law enforcement may not use evidence Mr. Crowley and Ms. Detmering were paying taxes and acquiring a business license, as probable cause they were violating the terms and conditions of the Act, when other law expressly requires such activity.

D. The State Fails to Distinguish the Holding in Shupe.

The state's attempt to disregard the importance of Shupe is grounded on its claims that Shupe's interpretation of similar statutory language is dicta. State v. Shupe, 289 P.3d 741 (2012). This claim relies on reasoning provided in the dissenting opinion of Shupe. As this Court recently noted, "the meaning of a majority opinion is not found in a dissenting opinion." Cole v. Harveyland, LLC, 163 Wn.App. 199, 258 P.3d 70 (2011).

In addition, the state's argument to disregard Shupe contradicts another similar decision, State v. Brown, 166 Wn. App. 99, 269 P.3d 359 (2012). In Brown, the defendant was a designated provider to a total of three individuals. Similar to Shupe, at the time our state's medical cannabis laws restricted a "designated provider to only one patient at any one time." Brown, 166 Wn.App. at 102-103 (quoting former RCW 69.51A.010(1) (2007)). Despite evidence that Mr. Brown was a designated provider to three individuals, the court held in Mr. Brown's favor, deciding that he was wrongly denied the opportunity to assert the medical

cannabis affirmative defense at trial. In so holding, the court relied largely on the rule of lenity, stating that any ambiguity in the statute must be resolved in the defendant's favor. Id. at 105.

Similarly, here, any ambiguity in the collective garden statute (RCW 69.51A.085), regarding the extended length of time required of patients participating in a collective garden or the number of collectives that may aggregate within an access point, must be resolved in the defendant's favor.

The court in Brown further concluded that although Mr. Brown possessed designated provider forms for more than one patient, and although he provided medical cannabis to more than one person over an extended period of time, the evidence was inconclusive to determine that he violated the law restricting him to serve as a “designated provider to only one patient at any one time.” Id. at 103 (emphasis added).

Pursuant to Brown and Shupe, it is not a violation of the terms and conditions of the Act for qualified patients to participate in a collective garden—by paying for their respective share of overhead costs in the growing and processing of medical cannabis—and subsequently discontinue any further participation. Participation may be something less than perpetuity—patients may find that cannabis is unsuccessful at alleviating the pain or loss of appetite associated with their medical

condition, they may acquire medical cannabis through other means, they may move, or, regrettably, they may die. The affidavits failed to take any of these scenarios into consideration, relying instead, on suspicion and belief on who may or may not be participating at any time. See State v. Helmka, 86 Wn.2d 91, 92 542 P.2d 115 (1975) (A basis for probable cause that is based solely on suspicion and belief is legally insufficient.).

E. In light of Shupe and Brown, the State's Affidavits Fail to Establish Probable Cause.

Finally, the state belabors the point that KGB was operating as an “unregulated” dispensary. However, evidence in the Affidavits point to the contrary. Pursuant to the Affidavits, numerous checks and balances were in place that confirmed membership and the identity and authorizations of qualified patients. Furthermore, whether the state believes that collective gardens operate as “de facto unregulated dispensaries” is beside the point. This subjective view of the law does not allow for an unwarranted and illegal search of those operations.

More importantly, collective gardens are not unregulated, they track membership, they are limited in quantity and size, and they must comply with other local laws and ordinances. See RCW 69.51A.140 (“Cities and towns may adopt and enforce any of the following pertaining to the production, processing, or dispensing of [marijuana] or [marijuana]

products within their jurisdiction: Zoning requirements, business licensing requirements, health and safety requirements, and business taxes.”)

Finally, as already discussed in Mr. Crowley’s opening brief, the Act expressly allows for patients to donate marijuana to other patients participating in the collective. See RCW 69.51A.085(2) (defining a collective garden to mean “qualifying patients . . . supplying the resources required to produce and process cannabis for medical use such as . . . cannabis plants, seeds, and cuttings”). Thus, the fact that patients at KGB Collective indicated that participating qualified patients could donate medical cannabis was not in any way a violation of the Act. Nor was evidence that there may have been 51 strains on site. The law expressly allows for this many strains within a collective. See RCW 69.51A.085(b) and (c) (permitting a single collective to possess 45 plants *and* 72 ounces of useable cannabis.)

In its search warrant affidavit, law enforcement is required to show probable cause that possession of cannabis violates the terms and conditions of the Act. That was not done here. Absent this showing, the warrant was unlawful. Mr. Crowley and Ms. Detmering respectfully request that this court reverse the trial court’s order denying Mr. Reis’ motion to suppress evidence, and remand the matter for dismissal.

Respectfully submitted this 15th day of May 2014

Respectfully submitted this 15th day of May 2014

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A handwritten signature in black ink, appearing to read 'Stephanie Boehl', written over a horizontal line.

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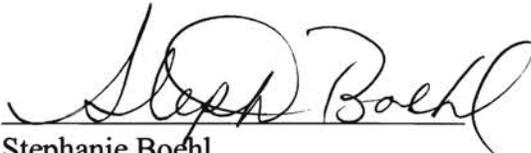
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I certify that on May 15, 2014 I mailed via certified US Mail a copy of the foregoing Reply Brief to Respondent's counsel and counsel for Jennifer Detmering, addressed as follows:

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