No. 31280-1-III

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

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

DANIEL KENNETH ELLIS,
Defendant/Appellant.

APPEAL FROM THE SPOKANE COUNTY SUPERIOR COURT
Honorable Salvatore F. Cozza, Judge

REPLY BRIEF OF APPELLANT

SUSAN MARIE GASCH
WSBA No. 16485
P. O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
Attorney for Appellant

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A. ARGUMENT IN REPLY

This case arises out of a marijuana grow operation that was discovered by officers of the Spokane Police Department. Washington State law permits the growing and use of marijuana, so long as certain requirements and limitations are met. This appeal raises the question whether state law enforcement officers can obtain a valid search warrant from a state judge to investigate a suspected marijuana grow when the officers have no reason to believe that the grow is illegal under state law.

This is an issue of first impression in Washington.[1]

A. After the 2011 amendments to RCW 69.51A, the proper use, possession and manufacture of medical cannabis is not a crime.

In its Brief of Respondent, the State entirely ignores, or at least disagrees with, the fact that the extensive 2011 amendments to Washington's medical marijuana statute, RCW 69.51A.040, resulted in a substantial change to the existing law.

[1] A federal judge suppressed evidence on similar facts. United States v. Jerad Kynaston, et al., CR 12-0016-WFN (EA. D. of Wash. May 2012) (Order is found at CP 31–34 and is also attached as Exhibit A).

Prior to July 2011, the lawful use of marijuana in compliance with RCW Chapter 69.51A was an affirmative defense to prosecution. However, RCW 69.51A was amended in July 2011 to provide that the use, possession and/or manufacture of marijuana in compliance with RCW 69.51A is no longer a criminal offense. *See* Laws 2011, Chapter 181 §§ 102, 401.

RCW 69.51A.040 now reads:

> The medical use of cannabis in accordance with the terms and conditions of this chapter does not constitute a crime and a qualifying patient or designated provider in compliance with the terms and conditions of this chapter may not be arrested, prosecuted, or subject to other criminal sanctions or civil consequences, for possession, manufacture, or delivery of, or for possession with intent to manufacture or deliver, cannabis under state law, or have real or personal property seized or forfeited for possession, manufacture, or delivery of, or for possession with intent to manufacture or deliver, cannabis under state law, and investigating peace officers and law enforcement agencies may not be held civilly liable for failure to seize cannabis in this circumstance, if:
>
> (1)(a) The qualifying patient or designated provider possesses no more than fifteen cannabis plants and:
>
> (i) No more than twenty-four ounces of useable cannabis;
>
> (ii) No more cannabis product than what could reasonably be produced with no more than twenty-four ounces of useable cannabis; or
>
> (iii) A combination of useable cannabis and cannabis product that does not exceed a combined total representing possession and processing of no more than twenty-four ounces of useable cannabis. …

RCW 69.51A.040(1)(a) (emphasis added).

Thus, under Washington law as it has existed since July 22, 2011, it is not a crime for a person to use, possess, or manufacture marijuana if such use, possession, and/or manufacturing is done in compliance with the terms and conditions of RCW 69.51A. Therefore, in order to establish probable cause to believe that a person has committed or is committing the crime of unlawful use, possession or manufacturing of marijuana under Washington law, it is not enough to merely show that the person used, possessed or manufactured marijuana. Instead, probable cause can be established only by showing that such use, possession or manufacturing failed to comply with the terms and conditions of RCW 69.51A.

B. The 2011 amendments to RCW 69.51A convert what had been an affirmative defense to an exception to the general controlled substances statute.

The new statute clearly states that, "[t]he medical use of cannabis in accordance with the terms and conditions of this chapter does not constitute a crime … ." RCW 69.51A.040 (2012). The statute provides an exception to the general controlled substances statute which makes possession, use, and manufacture of marijuana a crime. RCW 69.50.401 (2012). Thus to obtain a warrant, officers must show probable cause that the criteria of the medical marijuana exception have not been met. When

enacting RCW 69.51A.040, the Washington Legislature included a statement of intent making clear that the purpose of the 2011 amendments to RCW 69.51A was to protect medical cannabis users and their designated providers from criminal prosecution in the first instance, rather than being required to assert their lawful use of medical cannabis as an affirmative defense, which can arise only after arrest and prosecution has taken place. RCW 69.51A.005(2)(a) explains:

> Purpose and Intent:
>
> > 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.

RCW 69.51A.005(2)(a) (emphasis added).

The foregoing statement leaves little doubt that the Legislature intended that the use of cannabis for medical purposes in compliance with RCW 69.51A.040 would not expose a qualified person to arrest, prosecution, or any other criminal sanction, so long as they complied with the statutory requirements. Therefore, the use, possession, or

manufacturing of cannabis constitutes a crime in the State of Washington only when it does not comply with the terms of the statute.

This legislative intent is further supported by RCW 69.51A.045, entitled "Possession of cannabis exceeding lawful amount – Affirmative Defense," which creates an affirmative defense for possession of cannabis for medical use even when the amount possessed exceeds the decriminalized amounts listed in RCW 69.51A.040.

It is apparent the drafters intended the medical use of cannabis to be decriminalized by RCW 69.51A.040 and did *not* intend RCW 69.51A.040 to simply remain an affirmative defense as argued by the State. Brief of Respondent, p. 4.

C. Omission of the medical marijuana statute or any assertion that the grow violated the statute is fatal to the warrant as the warrant then does not show probable cause of a crime.

The State responds that State v. Fry, 168 Wn.2d 1, 228 P.3d 1 (2010) "remains 'good law' ". Brief of Respondent, p. 4. There, the court held that the affirmative defense provided under the former statute does not per se legalize an activity and therefore does not negate probable cause

that a crime has been committed. The Fry case was decided before the 2011 amendment to RCW 69.51A.040, which is at issue here. In Fry—unlike in this case—there was no contention that the facts, including the information and smell of marijuana, did not support a finding of probable cause to search the Fry's residence. Instead, Fry contended the probable cause was negated once he produced the medical marijuana authorization. The court rejected this argument. Fry, 168 Wn.2d at 6, 10.

Here, unlike in Fry, the contention is squarely before this Court: the facts—most notably the smell of marijuana—did not support a finding of probable cause to search Mr. Ellis' residence. To obtain the warrant, the officers failed to show probable cause that the criteria of the medical marijuana exception to the general controlled substances statute had not been met. The search warrant was not valid where there was not probable cause of a crime.

The State further counters that mere detection of the odor of marijuana by itself provides sufficient evidence to constitute probable cause justifying a search, citing State v. Olson, 73 Wn. App. 348, 356, 869 P.2d 110 (1994). Brief of Respondent, p. 3. However, Olsen has no continued viability in light of the 2011 amendments to RCW 69.51A, which create an exception to the general controlled substances statute.

B. CONCLUSION

It is undisputed that while the affidavit supporting the warrant included evidence of a marijuana grow, there was no mention of the medical marijuana statute or any assertion that the grow violated the medical marijuana statute. For the reasons stated here and in the initial brief of appellant, this omission is fatal to the warrant as the warrant then does not show probable cause of a crime. Thus, the subsequent search and fruits of that search are inadmissible as fruits of the poisonous tree. State v. Kennedy, 107 Wn.2d 1, 4, 726 P.2d 445 (1986) (citing Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963)). The conviction for second degree unlawful possession of a firearm must be reversed.

Respectfully submitted on June 17, 2013.

s/Susan Marie Gasch, WSBA
Gasch Law Office
P.O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
FAX: None
gaschlaw@msn.com

PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on June 17, 2013, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of reply brief of appellant and Exhibit A:

Daniel Kenneth Ellis
13410 East Rich Avenue
Spokane Valley WA 99216

E-mail: kowens@spokanecounty.org
Mark E. Lindsey
Deputy Prosecuting Attorneys
1100 West Mallon Avenue
Spokane WA 99260-2043

_____
s/Susan Marie Gasch, WSBA #16485

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

JERAD JOHN KYNASTON (1),
SAMUEL MICHAEL DOYLE (2),
BRICE CHRISTIAN DAVIS (5),
JAYDE DILLON EVANS (6),
TYLER SCOTT MCKINLEY (7),

Defendants.

NO. CR-12-0016-WFN

ORDER

A second pretrial conference and motion hearing was held May 31, 2012. The Defendants were present and represented as set out in the table below:

Defendant	Custody	Counsel
Jerad John Kynaston (1)	√	Robert R. Fischer
Samuel Michael Doyle (2)	√	George P. Trejo, Jr.
Brice Christian Davis (5)	No	Mark C. Prothero for David M. Miller
Jayde Dillon Evans (6)	No	Nicolas V. Vieth
Tyler Scott McKinley (7)	No	Richard D. Wall

Assistant United States Attorney Russell Smoot represented the Government.

The Court addressed Defendants' Motion to Suppress Evidence (ECF No. 157) and other pending pretrial motions. The Court heard argument on the Motion to Suppress from Mr. Wall and Mr. Trejo on behalf of Defendants as well as Mr. Smoot on behalf of the Government.

ANALYSIS

In July of 2011, the Washington State Legislature amended the medical marijuana statute converting what had been an affirmative defense to an exception to the general controlled substances statute. The amendment decriminalizes the possession, use, and manufacture of medical marijuana, so long as certain criteria are met. While the old statute makes explicit reference to an affirmative defense, the new statute clearly states that, "[t]he medical use of cannabis in accordance with the terms and conditions of this chapter does not constitute a crime . . . ." WASH. REV. CODE § 69.51A.040 (2012). This statute provides an exception to the general controlled substances statute which makes possession, use, and manufacture of marijuana a crime. WASH. REV. CODE § 69.~~69~~.50.401 (2012). Thus to obtain a warrant, officers must show probable cause that the criteria of the medical marijuana exception have not been met. State officers cannot obtain a valid state search warrant where there is not probable cause of a state crime. *United States v. $186,416.00 in U.S. Currency*, 590 F.3d 942, 948 (9th Cir. 2010) (finding that because the evidence supporting the grow did not show probable cause of a crime in California law, even though it was illegal federally and was prosecuted federally, the search warrant had to be quashed).

Contrary to the Government's assertion, a state crime has not been committed simply by possessing or manufacturing marijuana in Washington. If the person complies with the medical marijuana statute, they have not committed a state crime. The Government's briefing suggests that despite the clear language decriminalizing medical marijuana, law enforcement officers may still arrest those possessing or manufacturing medical marijuana due to the choice of the phrase "*may not* be arrested, prosecuted, or subject to other criminal sanctions" rather than shall not (emphasis added). This tortured reading of the statute contradicts the plain language of the statute making it internally inconsistent. Alternatively, the Government argues that Washington's controlled substances provision should be viewed exclusively *without reference to the medical marijuana exception*. Essentially, the Government proposes

treating the medical marijuana exception as a type of affirmative defense despite the drastic rewriting of the law. The Court finds that the statute is clear on its face and that the medical marijuana exception and the general controlled substance statute must be read together in a manner that gives effect to both.

It is uncontested that while the affidavit supporting the warrant included evidence of a marijuana grow, there was no mention of the medical marijuana statute or an assertion that the grow violated the medical marijuana statute. This omission is fatal to the warrant as the warrant then does not show probable cause of a crime. The good faith exception cannot rescue the warrant as the three month old law was clear and the officers should have been aware of its requirements. Thus, all fruits of the search shall be suppressed. The parties agree this includes all physical evidence obtained during the search as well as any statements that were derived as a fruit of the poisonous tree.

The Court has reviewed the file and Motions and is fully informed. This Order is entered to memorialize and supplement the oral rulings of the Court. Accordingly,

IT IS ORDERED that:

1. The Defendants' Motion to Suppress Evidence, filed May 7, 2012, **ECF No. 157**, is **GRANTED**.

2. Defendants' Motion to Continue Pretrial and Trial, filed May 11, 2012, **ECF No. 166**, is **DENIED with a right to renew**.

3. Defendants' Motion for Disclosure of 404 Evidence, filed May 11, 2012, **ECF No. 170**, is **GRANTED**.

4. Defendants' Motion to File Additional Motions, filed May 11, 2012, **ECF No. 171**, is **GRANTED**.

5. The jury trial date of **June 25, 2012 at 9:00 a.m., in Spokane**, Washington is **CONFIRMED**.

The District Court Executive is directed to file this Order and provide copies to counsel.

DATED this 31st day of May, 2012.

s/ Wm. Fremming Nielsen
WM. FREMMING NIELSEN
SENIOR UNITED STATES DISTRICT JUDGE

05-31-12