69853-2

69853-2

NO. 69853-2-I

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

STATE OF WASHINGTON,

Appellant,

v.

ALEX BUCKINGHAM,

Respondent

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

The Honorable Thomas J. Wynne, Judge

BRIEF OF RESPONDENT

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A. STATEMENT OF ISSUES

Under the statutory amendments that became effective in 2011, the Medical Use of Marijuana Act (MUMA)[1] provides that certain activities, if performed in a manner consistent with MUMA, are no longer considered crimes. Police officers' observations suggesting that marijuana was being grown at the residence in question were, therefore, ambiguous as to whether a crime was being committed.

Did the trial court correctly conclude that the State failed to establish probable cause to issue a search warrant for the residence?

B. STATEMENT OF THE CASE

For the limited purpose of responding to the State's argument, the respondent accepts the Statement of the Case set forth in the Brief of Appellant (BOA). Additional facts helpful to this Court's analysis are included in the argument section below.

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[1] Chapter 69.51A RCW.

C. ARGUMENT IN RESPONSE

THE TRIAL COURT CORRECTLY CONCLUDED THAT THE AFFIDAVIT FOR SEARCH WARRANT FAILED TO ESTABLISH PROBABLE CAUSE TO SEARCH THE RESIDENCE.

The November 2011 search warrant affidavit[2] established that the police officers suspected there was growing marijuana at the residence. But they did not know how many plants were being grown or the status of the residents. They therefore did not know whether the grow operation was permitted under MUMA. The State thus fails to establish probable cause to believe a crime was being committed.

1. A court may not issue a warrant absent facts indicating a crime is "probably" being committed.

The Fourth Amendment provides, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." Washington Constitution article I, section 7, provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Generally, warrants provide the authority of law required by the constitution. State v. Morse, 156 Wn.2d 1, 7, 123 P.3d 832 (2005) (citing State v. Ladson, 138 Wn.2d 343, 350, 979 P.2d 833 (1999)).

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[2] BOA at App. B.

To justify the issuance of a warrant, the supporting affidavit must show probable cause. State v. Cole, 128 Wn.2d 262, 286, 906 P.2d 925 (1995). Probable cause requires the State to set forth facts establishing a reasonable inference that an accused is "probably" involved in criminal activity and that evidence of the crime can be found at the location to be searched. State v. Shupe, 172 Wn. App. 341, 289 P.3d 741 (2012) (quoting State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999)), review denied, 177 Wn.2d 1010 (2013). The trial court's assessment of probable cause is a legal conclusion that this Court reviews de novo. State v. Neth, 165 Wn.2d 177, 182, 196 P.3d 658 (2008).

2. Following 2011 MUMA amendments, the search warrant affidavit did not establish probable cause to believe a crime was being committed.

The State first argues this case is controlled by authority from the state Supreme Court. This argument should be rejected as the State's authority relies on a prior version of MUMA.

In State v. Fry, the Washington Supreme Court determined that authorization to possess medical marijuana under MUMA does not negate a finding of probable cause to search for marijuana. 168 Wn.2d 1, 6, 228 P.3d 1 (2010). There, the trial court denied a motion to suppress evidence obtained in a search of Fry's residence even though he presented officers a

medical marijuana authorization card before they sought the warrant. Id. at 4.

The Court concluded that probable cause existed despite the authorization card because MUMA did not decriminalize the use and possession of marijuana. The Court analogized the statutory affirmative defense to a claim of self-defense, which a police officer would not be required to evaluate before deciding to arrest an individual for assault. Rather than negating an element of the crime, MUMA established an affirmative defense to excuse the criminal act. Id. at 7-8 (outlining rationale of four-justice lead opinion).

The version of the statute considered by the Fry Court provided that

> [i]f charged with a violation of state law relating to marijuana, any qualifying patient who is engaged in the medical use of marijuana, or any designated primary caregiver who assists a qualifying patient 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*.

Former RCW 69.51A.040(2) (2007) (emphasis added). Thus, the officers had probable cause to search based on a reasonable inference that criminal activity was taking place. Id. at 8.

In 2011, a year after the Supreme Court's decision in Fry, the Legislature made substantial changes to MUMA. The 2011 amendments

alter the protections afforded to patients, providers, and physicians. While the former statute categorized the protections as an affirmative defense, the new statute provides that "medical use of cannabis in accordance with the terms and conditions of this chapter *does not constitute a crime*." RCW 69.51A.040 (emphasis added); Laws of 2011, ch. 181, § 401 (eff. July 22, 2011).

Moreover, under RCW 69.51A.025,

> Nothing in this chapter or in the rules adopted to implement it precludes a qualifying patient or designated provider from engaging in the private, unlicensed, noncommercial production, possession, transportation, delivery, or administration of cannabis for medical use as authorized under RCW 69.51A.040.

Laws of 2011, ch. 181, § 413.[3]

The amended statute now provides an exception to the general prohibition on possession of controlled substances. To obtain a warrant, officers thus must show the exception does not apply. Without such a showing, the officer's observations do not establish probable cause to believe a crime has been committed.

Although there is no decision directly on point, the Supreme Court's decision in Neth is instructive. There, the Court determined plastic baggies often associated with drug distribution, a large sum of

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[3] RCW 69.51A.025 and .040 are attached to this brief as Appendices A and B.

money, and Neth's criminal history were insufficient to support a warrant to search his vehicle. Neth, 165 Wn.2d at 183-84. As the Court explained, evidence that is equally consistent with lawful and unlawful drug-related conduct does not provide probable cause to search. Id. at 185.

Here, the affidavit does not, for example, show that the residence contained more than the permitted number of plants under MUMA or mention whether the police attempted to ascertain whether a resident was an authorized provider or patient, despite evidence in the 2009 case of a qualifying patient associated with the house, and an officer's acknowledgment it could have been a medical marijuana grow. CP 21, 26-27, 59-60; see RCW 69.51A.040 (a qualifying patient or provider may possess no more than 15 plants or, if the person is both a qualifying patient and a provider for another patient, no more than twice that amount); see also RCW 69.51A.085 ("collective garden" may contain up to 45 plants).

The officers' observations are therefore analogous to the evidence deemed too ambiguous to support probable cause in Neth. The smell of growing marijuana may have indicated a crime was being committed. On the other hand, following the 2011 amendments, it may have been consistent with legally permissible activity. Under the rationale of Neth, the court correctly suppressed the evidence.

3. The decriminalization language retains its force in light of the governor's veto of the registry/licensing provisions in conflict with federal law, as well as provisions describing an affirmative defense.

The State nonetheless argues that the activity RCW 69.51A.040 purports to decriminalize remains criminal, albeit subject to an affirmative defense, in light of the Governor's veto of certain sections of the bill involving registry and licensing of patients, providers, and producers of cannabis. This argument should be rejected.

This Court reviews issues of statutory interpretation de novo. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). Of paramount importance in such analysis is the Legislature's intent in adopting the statute. Rental Housing Ass'n of Puget Sound v. City of Des Moines, 165 Wn.2d 525, 536, 199 P.3d 393 (2009).

In analyzing a statute, this Court looks first to its plain language. Armendariz, 160 Wn.2d at 110. Under the "plain meaning rule," this Court examines the language of the statute, other provisions of the same act, and related statutes. City of Seattle v. Allison, 148 Wn.2d 75, 81, 59 P.3d 85 (2002). This Court examines the statute as a whole. In re Detention of Williams, 147 Wn.2d 476, 490, 55 P.3d 597 (2002). If the plain language of the statute is unambiguous, this Court's inquiry ends, and the statute is

enforced "in accordance with its plain meaning." Armendariz, 160 Wn.2d at 110.

If, after this inquiry, the statute remains susceptible to more than one reasonable meaning, the statute is ambiguous. State v. Slattum, 173 Wn. App. 640, 649, 295 P.3d 788 (2013). In that case, this Court may resort to construction aids, including legislative history. State ex rel. Citizens Against Tolls v. Murphy, 151 Wn.2d 226, 242-43, 88 P.3d 375 (2004). "The spirit and intent of the statute should prevail over the literal letter of the law." Morris v. Blaker, 118 Wn.2d 133, 143, 821 P.2d 482 (1992). But the rule of lenity requires that, absent clear legislative intent to the contrary, a statute must be construed in the light most favorable to an accused. Slattum, 173 Wn. App. at 657-58. Finally, this Court attempts to interpret statutes to give effect to all language in the statute and to render no portion meaningless or superfluous. State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003).

The operative language in Buckingham's case is this: "The medical use of cannabis in accordance with the terms and conditions of this chapter does not constitute a crime." RCW 69.51A.040. In addition, RCW 69.51A.025 provides that "[n]othing in this chapter . . . precludes a qualifying patient or designated provider from engaging in the private, unlicensed, noncommercial production, possession, transportation, delivery, or administration of cannabis for medical use . . . ." The earlier

versions of the statute contained no such language. Laws of 2007, ch. 371 § 5; 1999 c 2 § 5 (Initiative Measure No. 692, approved November 3, 1998). In enacting the amendments, the Legislature expressed its intent to decriminalize the medical use and provision of cannabis. RCW 69.51A.005(2) ("Purpose and Intent"); Laws of 2011, ch. 181, § 102.[4]

RCW 69.51A.025 and .040 plainly indicate the Legislature's intention to decriminalize the use, delivery, and production of marijuana for medical use under certain circumstances. This language is consistent with the Legislature's intent in adopting the amendments. RCW 69.51A.005(2). Although the State would read this language out of MUMA, it is not affected by the Governor's veto of other portions of the statute.

Citing general authority for the proposition that a veto may affect this Court's reading of the plain meaning of a statute,[5] the State seeks to delete the operative language of RCW 69.51A.025 and .040 and negate the Legislature's express intent based on the Governor's veto of other sections of the legislation. This State's position conflicts with the rule that all portions of a statute should be given meaning. J.P., 149 Wn.2d at 450. And as the State acknowledges, the Governor's veto was based on concerns that

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[4] RCW 69.51A.005 is attached to this brief as Appendix C.

[5] BOA at 10 (citing Shelton Hotel Co. v. Bates, 4 Wn.2d 498, 104 P.2d 478 (1940) (legislative intent does not trump plain language post-veto)).

registration- and licensing-related activities could place state employees at risk of federal prosecution. BOA at 10; Id. at App. C, p. 43. The Governor also took care to veto other provisions she believed were "associated with or dependent upon these licensing sections." See, e.g., Laws of 2011, ch. 181, § 101 (legislative declaration and intent section, mentioning registry); § 201 (definitions section including registry-related definitions); § 410 (provision limiting refusal of and eviction from housing based on cannabis use, vetoed based on potential conflict with federal law); §§ 601-11 (provisions relating to licensing of producers and processors); §§ 701-05 (provisions relating to licensing of dispensers); §§ 801-08 (miscellaneous provisions applying to producers, processors and dispensers, including prohibition on advertising and establishment of civil penalties); § 901 (requiring state departments of health and agriculture to create registration system); § 1104 (provision requiring legislative review of statutes if medical marijuana authorized by federal statute vetoed based on connection to licensing provision); § 1201 (licensing of and affirmative defense for preexisting dispensaries).[6]

[6] The Governor also vetoed § 407, creating an affirmative defense for non-residents authorized under another state's scheme, because that section "would not require these other state or territorial laws to meet the same standards for health care professional authorization as required by Washington law." BOA at App. C p. 43.

But as the above summaries indicate, the Governor did not veto the language decriminalizing the medical use of marijuana. As such, provisions relating to such decriminalization were passed into law. Indeed, the Governor's "explanation of partial veto" reiterates her support of the original initiative and 2007 amendments expanding the availability of medical marijuana. The Governor's statement goes on to reassure that "[q]ualifying patients or their designated providers may grow cannabis for the patient's use or participated in a collective garden *without fear of state criminal prosecutions*." (Emphasis added.) BOA App. C at 42. The Governor's veto of the registration requirements thus does not support the State's argument.

The State next argues that MUMA's post-2011 retention of affirmative defenses trumps the decriminalization language. BOA at 11-13. Chapter 69.51A RCW does not qualify its post-2011 decriminalization language with a provision such as "medical use of cannabis by an unregistered user limits the user to arguing an affirmative defense." Chapter 69.51A RCW nonetheless retains two affirmative defenses. The second, RCW 69.51A.045, is of little relevance here, as it involves a necessity defense, that the qualifying patient requires more than the amount permitted by statute.

The first, RCW 69.51A.043, provides that an unregistered patient or provider may raise an affirmative defense at trial. But as the trial court

found, this section does not address whether there is, at the outset, probable cause to believe a crime is being committed. RP 19. As set forth above, however, under Neth an affidavit that does not establish, for example, that the marijuana is beyond the legally permissible amount, does not establish probable cause to believe a crime is being committed.

In any event, RCW 69.51.043 does not conflict with the decriminalization aspects RCW 69.51A.040 and .025. Construed consistently with those provisions, it may be viewed as a second means of protection for authorized patients and providers. J.P., 149 Wn.2d at 450.

Should this Court find, however, that the veto of the registry provision renders MUMA's decriminalization language ambiguous, the language must be interpreted against the State. See RCW 69.51A.005(2) (statement of legislative intent in adopting the amendments); see also Slattum, 173 Wn. App. at 657-58 (because the word "imprisonment" in statute providing for state-funded post-conviction DNA testing is ambiguous, the rule of lenity required this Court to construe this statute strictly against the State).

Finally, as the trial court noted, the removal of the registry requirements made it harder, although not impossible, for law enforcement to do its job. But this Court cannot rewrite statutes based on public policy concerns. This situation is, moreover, not a novel one. Certain substances

may be possessed only with a prescription. But an officer observing an individual consume a known controlled substance would not have probable cause to arrest that individual even if the individual was not displaying that prescription. More is required. Cf. State v. Gonzales, 46 Wn. App. 388, 400-01, 731 P.2d 1101 (1986) (police had probable cause to believe that capsules and a pill found in a clear vial were controlled substances because they observed drug paraphernalia and a marijuana pipe in defendant's residence).

Under the 2011 amendments to MUMA, observations suggesting some amount of marijuana is being grown are insufficient to support that a crime is "probably" being committed. As in the example above, more evidence is required.

D. CONCLUSION

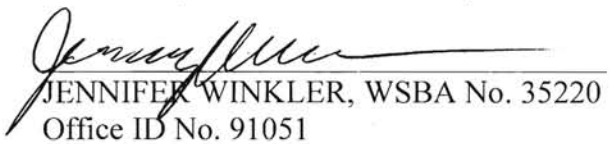
The trial court correctly suppressed the evidence in this case because the complaint for search warrant does not establish a crime was "probably" being committed.

If this court disagrees, however, the case must be remanded for litigation of the remaining arguments supporting Buckingham's motion to suppress evidence. CP 16-62.

DATED this 3rd day of September, 2013.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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APPENDIX A

Effective: July 22, 2011

West's Revised Code of Washington Annotated Currentness
Title 69. Food, Drugs, Cosmetics, and Poisons (Refs & Annos)
Chapter 69.51A. Medical Marijuana (Refs & Annos)
69.51A.025. Construction of chapter--Compliance with RCW 69.51A.040

Nothing in this chapter or in the rules adopted to implement it precludes a qualifying patient or designated provider from engaging in the private, unlicensed, noncommercial production, possession, transportation, delivery, or administration of cannabis for medical use as authorized under RCW 69.51A.040.

CREDIT(S)

[2011 c 181 § 413, eff. July 22, 2011.]

West's RCWA 69.51A.025, WA ST 69.51A.025

Current with 2013 Legislation effective through August 1, 2013

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APPENDIX B

Effective: July 22, 2011

West's Revised Code of Washington Annotated Currentness
Title 69. Food, Drugs, Cosmetics, and Poisons (Refs & Annos)
Chapter 69.51A. Medical Marijuana (Refs & Annos)

➞➞ 69.51A.040. Compliance with chapter--Qualifying patients and designated providers not subject to penalties--Law enforcement not subject to liability

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.

(b) If a person is both a qualifying patient and a designated provider for another qualifying patient, the person may possess no more than twice the amounts described in (a) of this subsection, whether the plants, useable cannabis, and cannabis product are possessed individually or in combination between the qualifying patient and his or her designated provider;

(2) The qualifying patient or designated provider presents his or her proof of registration with the department of health, to any peace officer who questions the patient or provider regarding his or her medical use of can- nabis;

(3) The qualifying patient or designated provider keeps a copy of his or her proof of registration with the re-

gistry established in *section 901 of this act and the qualifying patient or designated provider's contact information posted prominently next to any cannabis plants, cannabis products, or useable cannabis located at his or her residence;

(4) The investigating peace officer does not possess evidence that:

(a) The designated provider has converted cannabis produced or obtained for the qualifying patient for his or her own personal use or benefit; or

(b) The qualifying patient has converted cannabis produced or obtained for his or her own medical use to the qualifying patient's personal, nonmedical use or benefit;

(5) The investigating peace officer does not possess evidence that the designated provider has served as a designated provider to more than one qualifying patient within a fifteen-day period; and

(6) The investigating peace officer has not observed evidence of any of the circumstances identified in *section 901(4) of this act.

CREDIT(S)

[2011 c 181 § 401, eff. July 22, 2011; 2007 c 371 § 5, eff. July 22, 2007; 1999 c 2 § 5 (Initiative Measure No. 692, approved November 3, 1998).]

West's RCWA 69.51A.040, WA ST 69.51A.040

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APPENDIX C

C

Effective: July 22, 2011

West's Revised Code of Washington Annotated Currentness
Title 69. Food, Drugs, Cosmetics, and Poisons (Refs & Annos)
Chapter 69.51A. Medical Marijuana (Refs & Annos)
➞➞ 69.51A.005. Purpose and intent

(1) The legislature finds that:

(a) There is medical evidence that some patients with terminal or debilitating medical conditions may, under their health care professional's care, benefit from the medical use of cannabis. Some of the conditions for which cannabis appears to be beneficial include, but are not limited to:

(i) Nausea, vomiting, and cachexia associated with cancer, HIV-positive status, AIDS, hepatitis C, anorexia, and their treatments;

(ii) Severe muscle spasms associated with multiple sclerosis, epilepsy, and other seizure and spasticity dis- orders;

(iii) Acute or chronic glaucoma;

(iv) Crohn's disease; and

(v) Some forms of intractable pain.

(b) 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;

(b) Persons who act as designated providers to such patients shall also not be arrested, prosecuted, or subject to other criminal sanctions or civil consequences under state law, notwithstanding any other provision of law, based solely on their assisting with the medical use of cannabis; and

(c) Health care professionals shall also not be arrested, prosecuted, or subject to other criminal sanctions or civil consequences under state law for the proper authorization of medical use of cannabis by qualifying patients for whom, in the health care professional's professional judgment, the medical use of cannabis may prove beneficial.

(3) Nothing in this chapter establishes the medical necessity or medical appropriateness of cannabis for treating terminal or debilitating medical conditions as defined in RCW 69.51A.010.

(4) Nothing in this chapter diminishes the authority of correctional agencies and departments, including local governments or jails, to establish a procedure for determining when the use of cannabis would impact community safety or the effective supervision of those on active supervision for a criminal conviction, nor does it create the right to any accommodation of any medical use of cannabis in any correctional facility or jail.

CREDIT(S)

[2011 c 181 § 102, eff. July 22, 2011; 2010 c 284 § 1, eff. June 10, 2010; 2007 c 371 § 2, eff. July 22, 2007; 1999 c 2 § 2 (Initiative Measure No. 692, approved November 3, 1998).]

West's RCWA 69.51A.005, WA ST 69.51A.005

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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
vs.	)	COA NO. 69853-2-I
	)	
ALEX BUCKINGHAM,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 3RD DAY OF SEPTEMEBER, 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF RESPONDENT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE
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Diane.Kremenich@co.snohomish.wa.us

[X] ALEX BUCKINGHAM
5978 DEER STREET
WEST RICHLAND, WA 99353

SIGNED IN SEATTLE WASHINGTON, THIS 3RD DAY OF SEPTEMBER, 2013.

X Patrick Mayovsky