69911-3

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No. 69911-3-I

COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent.

v.

WILLIAM MICHAEL REIS, Petitioner.

REPLY BRIEF

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A. Argument

This petition concerns the issue of whether the Medical Use of Cannabis Act (the "Act"), provided in chapter 69.51A RCW, legalizes the possession of medical cannabis under certain circumstances, or whether it merely provides qualifying patients an affirmative defense.

As previously argued, in 2011, the legislature amended the Act to state that the possession of cannabis "in accordance with the terms and conditions of this chapter does not constitute a crime." RCW 69.51A.040). Pursuant to this language, an individual may legally possess cannabis. Thus, possession, in and of itself, is not evidence of a crime, and therefore, law enforcement may not arrest individuals or search their home based solely on such activity. Something more is required; specifically, probable cause that the individual is in violation of the terms and conditions of the Act.

Here, the affidavit to search Reis' residence presented evidence that Reis was in possession of a small number of cannabis plants, but no evidence was presented that Mr. Reis's possession was criminal—i.e., in violation of the Act—therefore, the search was improper.

The state, in its response, spends considerable time arguing that a search warrant affidavit need not defeat affirmative defenses. To clarify, Mr. Reis does not dispute this rule, and acknowledges that if the Act

merely provides an affirmative defense, the court's inquiry would end. State v. Fry, 168 Wn.2d 1, 6, 228 P.3d 1 (2010) ("An affirmative defense does not per se legalize an activity and does not negate probable cause that a crime has been committed.").

In the remainder of its response, starting at page 9, the state argues that the Act continues to provide only an affirmative defense, despite the 2011 amendment to the Act. The state's position is supported by three arguments. First, the state argues that under the Act, legalized possession is conditional on a patient registering with the state-wide registry, which was vetoed by the governor. Absent the registry, the state claims "the concept of legal medicinal use became impossible." Resp Br at 14. Second, the state argues that interpreting the Act to legalize medical cannabis, despite the governor's veto of the state registry, imposes insurmountable challenges upon law enforcement, and is therefore unreasonable. Third, the state argues that interpreting the Act to legalize medical cannabis ignores related statutory provisions; specifically, the Uniform Controlled Substances Act (chapter 69.50 RCW) and 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 17. Each of these arguments are addressed below.

It is worth reminding the court, that Reis contends (as argued in the opening brief) that the plain and unambiguous language of the Act legalizes qualifying possession. On the other hand, assuming, in *arguendo*, that the Act presents an ambiguity, the applicable rules of statutory construction necessitate the same interpretation. In response to this second argument, the state's brief is largely silent and does not respond to Reis' assertions that RCW 69.51A.040 is a remedial statute and that the 2011 amendments to the Act resulted in a material change in wording, evidencing an intent by the legislature to change the law.

1. The Governor's Veto Of Section 901 Removed Any Reference To The Registry, And Likewise, Removed Registration As A "Term and Condition" Of The Medical Use of Cannabis Act.

The state argues that Reis' interpretation of the statute "ignores the language saying that 'medical use of cannabis in accordance with the terms and conditions of this chapter does not constitute a crime.'" Resp Br at 17. This argument confuses the legal effect of the governor's veto.

Contrary to the state's arguments, the governor's veto removed the registry, and any reference to the registry, which consequently, removed registration as a term and condition of the Act. "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."[1] Any remaining references to the registry are "incidentally vetoed" and "manifestly obsolete."[2] Said another way, registry with the Department of Health was removed as a "term and condition" of the chapter upon the governor's veto.

As noted above, the state argues this interpretation ignores "reference to the surrounding language and related statutory provisions." Resp Br at 15. To the contrary, this interpretation gives meaning to prevailing terms and conditions of the entire Act, which includes the following statements:

> [T]he legislature intends that . . . 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 . . . .[3]
>
> [T]he legislature intends that . . . Persons who act as designated providers to such patients shall also not be arrested, prosecuted, or subject to other criminal sanctions . . . .[4]
>
> 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 . . . .[5]

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[1] Hallin v. Trent, 94 Wn.2d 671, 677, 619 P.2d 357 (1980).

[2] Washington Federation of State Employees, AFL-CIO, Council 8, AFSCME v. State, 101 Wn.2d 536, 544, 682 P.2d 869 (1984).

[3] RCW 69.51A.005(2)(a).

[4] RCW 69.51A.005(2)(b).

[5] RCW 69.51A.040.

In its argument, the state overlooks the fact that its interpretation of the Act—to merely provide patients with an affirmative defense—ignores (using the state's own words) "the surrounding language and related statutory provisions." In that, under the state's interpretation, the language quoted above is effectively disregarded.

In addition, concern expressed by the state, that Reis's interpretation is unreasonable because it ignores other affirmative defenses, is unfounded. The registry was vetoed by the governor, and thus, references to the registry are likewise obsolete. Therefore, the affirmative defense established in RCW 69.51A.043, for failing to register, is removed "as though it had never been considered by the legislature."[6] 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."[7]

Furthermore, there is a level of absurdity in the state's argument. Patients are effectively trapped in a paradox of contradictory regulations—a patient must comply with terms and conditions of the Act, which are impossible to comply with. This "Catch-22" interpretation of our state's criminal statues is not permissible.

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[6] Hallin, 94 Wn.2d at 677.
[7] Shelton Hotel Co. v. Bates, 4 Wn.2d 498, 500, 104 P.2d 478 (1940).

2. The State's Attempt to Disregard Kurtz Overlooks The Importance Of The Court's Statements

In State v. Kurtz, No. 87078-1, Slip op. (Wash.S.Ct., filed Sept. 19, 2013), the State Supreme Court concluded, without equivocation, that the Act legalizes medical cannabis possession.[8] The state attempts to disregard this conclusion by characterizing the statements as a "passing reference to legislative intent." Resp Br at 21. But this attempt to disregard Kurtz is misguided.

At issue in Kurtz was whether the Act continues to allow for the common law medical necessity defense to cannabis prosecution. The Court held that the medical necessity defense remains an available defense to cannabis prosecution, and that the Act does not abrogate the common law.

In attempting to disregard Kurtz, the state claims the court had "no occasion to decide the precise meaning of the statute, i.e., whether it decriminalized medical marijuana possession." This argument overlooks the court's own analysis. According to the court, the question of whether the Act legalized qualifying cannabis use was influential to its decision.

[8] Id. at 4, n 3 ("The legislature has since amended the statute to state that such a use 'does not constitute a crime.'") (citing RCW 69.51A.040); Id. at 11 ("Moreover, in 2011 the legislature amended the Act making qualifying marijuana use a legal use, not simply an affirmative defense."); Id. ("The 2011 amendment legalizing qualifying marijuana use strongly suggests that the Act was not intended to abrogate or supplant the common law necessity defense.").

Id. at 11 ("The 2011 amendment legalizing qualifying marijuana use strongly suggests that the Act was not intended to abrogate or supplant the common law necessity defense.").

More importantly, the Kurtz decision touches upon the absurdity of the state's argument. If, after quoting extensively from the Act, the court fails to appreciate the "precise" meaning of the statute, what chance does the public have in discerning its "precise" meaning, and therefore, appreciating which actions expose them to criminal liability? The policy underlying the rule of lenity is to "place the burden squarely on the Legislature to clearly and unequivocally warn people of the actions that expose them to liability for penalties and what those penalties are."

In its attempt to disregard the rule of lenity, the state claims Mr. Reis' interpretation of RCW 69.51A.040 is unreasonable. Resp Br at 19. Presumably, the state then argues the court's conclusions in Kurtz were likewise unreasonable.

3. The State's Concerns Regarding Challenges Imposed On Law Enforcement Are Irrelevant and Overstated

The state repeatedly argues that the Act must be construed to only provide an affirmative defense because the opposing interpretation presents insurmountable challenges to law enforcement. This argument is flawed for numerous reasons. First, there is no authority for the

proposition that the court shall construe criminal statutes in the manner which most eases the job of law enforcement. To the contrary, the opposite is true. "Where two possible constructions are permissible, the rule of lenity requires us to construe the statute strictly against the State in favor of the accused."[9]

Moreover, the state's concerns regarding law enforcement are overstated. To remind the court, under the Act, possession of cannabis, by a single qualifying patient, does not constitute a crime when:

- A patient possesses no more than 15 cannabis plants and 24 ounces of useable cannabis;[10]
- The patient keeps a copy of his or her contact information next to any cannabis plants;[11]
- Law enforcement does not possess evidence that the patient converted cannabis produced for his or her own medical use to the qualifying patient's personal, nonmedical use or benefit;[12]
- The patient has been diagnosed by a health care professional as having a terminal or debilitating medical condition;[13]

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[9] State v. Gore, 101 Wn.2d 481, 485-86, 681 P.2d 227 (1984).
[10] RCW 69.51A.040(1)(a).
[11] RCW 69.51A.040(3).
[12] RCW 69.51A.040(4).
[13] RCW 69.51A.010(3)(b).

- The patient was a resident of Washington at the time of such diagnosis;[14]
- The patient was advised by a health care professional about the risks and benefits of the medical use of cannabis and that they may benefit from such use; and[15]
- The patient has valid documentation of such authorization.[16]

The state claims, absent a state-wide patient registry, "officers cannot know by normal investigative techniques" whether possession complies with terms and conditions noted above. The state further claims, "It would be impossible for police to know where to begin their investigation, because they would have no idea who treated a patient for medical problems, if anyone." Resp Br at 8.

To the contrary, police have an indefinite number of "normal investigative techniques" at their disposal. For example, if an illicit grow is suspected, officers can question suspects, and request a copy of their authorization; conduct surveillance; question neighbors about possible illicit activity, like short traffic stays or acquisitions by minors; stage a control buy without a medical authorization; and pull power records, to

[14] RCW 69.51A.010(3)(c).
[15] RCW 69.51A.010(3)(d)-(e).
[16] RCW 69.51A.010(5).

determine the size of the grow operation or whether the suspect is bypassing the property's electrical system.

Moreover, under RCW 69.51A.047, if an officer questions a patient regarding his or her medical use of cannabis, and the patient fails to present his or her authorization, the patient is limited to an affirmative defense. As a result, an officer can quickly rule out compliance with the Act by questioning a patient regarding his or her medical authorization to use cannabis. The state's excessive concerns over medical privacy imposing an impossibility for law enforcement are unfounded.

4. The State Misconstrues the Uniform Controlled Substances Act, And RCW 69.50.506, In Its Effort To Argue RCW 69.51A.040 Only Provides Patients An Affirmative Defense.

The state argues that the Act must be interpreted similar to how the State's Uniform Controlled Substances Act (chapter 69.50 RCW) treats prescription drugs. In so arguing, the state erroneously implies that a patient may be arrested for possession of a controlled substance acquired pursuant to a valid prescription, even when there is no evidence that such possession was unlawful. Resp Br at 19.

This argument misconstrues the Uniform Controlled Substances Act and RCW 69.50.506(a). Contrary to the state's argument, the Uniform Controlled Substances Act requires law enforcement to show probable cause that a controlled substance is being used, manufactured, or

distributed "in violation of the provisions of this chapter." RCW 69.50.509. Similarly here, law enforcement must show probable cause that possession of medical cannabis is in violation of the Medical Use of Cannabis Act.

Furthermore, in citing to RCW 69.50.506, the state confuses the legal effect of per se legalization and an affirmative defense. The two cases cited by the state, to support its interpretation of RCW 69.50.506, concern the affirmative defense of unwitting possession. State v. Bradshaw, 152 Wn.2d 528, 538, 98 P.3d 1190 (2004); State v. Staley, 123 Wn.2d 794, 799, 872 P.2d 502 (1994). To be clear, unwitting possession is not at issue here, nor any other affirmative defense.

Here, the court is concerned with the validity of a search warrant, and whether it was supported by probable cause. Because an individual may legally grow cannabis under certain circumstances, this activity, in and of itself, is not evidence of a crime.

Moreover, the state's discussion on statutes within the Uniform Controlled Substances Act disregards the express terms of the Medical Use of Cannabis Act, which repeatedly states that qualifying possession "does not constitute a crime,"[17] and that patients "shall not be arrested, prosecuted, or subject to other criminal sanctions . . . based solely on their

[17] RCW 69.51A.040.

medical use of cannabis."[18] Imposing a burden of proof upon the patient, to prove legal possession after arrest, as implied in the state's brief, is directly contrary to the language cited above.

5. Assuming The Medical Use of Cannabis Act Legalizes Qualifying Medical Possession, The State, By Failing To Present an Argument To The Contrary, Appears To Concede That the Search Warrant Affidavit Was Unlawful.

In its final argument, the state claims the search warrant affidavit established probable cause. However, the state conditions its argument on the conclusion that "Detective Calabrese was not required to disprove the affirmative defense that Reis was a qualifying patient or designated provider complying with all the terms and conditions of RCW 69.51A." Resp Br at 23. By conditioning its argument on this conclusion, the state fails to make any effort to address the issue before the court—whether the affidavit was sufficient assuming the Act legalizes possession of medical cannabis.

By failing to present an argument, the state presumably concedes that the search warrant affidavit was sufficiently lacking, should the court hold that the Act legalizes the possession of cannabis in certain circumstances.

Furthermore, on numerous occasions throughout its response, the state claims Detective Calabrese "concluded that Reis was growing a

[18] RCW 69.51A.005(2)(a).

significant amount of marijuana." Resp Br at 2 (emphasis added); see also Resp Br at 22 ("There is no real dispute in this case about whether there was probable cause to believe that Reis was growing a significant amount of marijuana at his home.")

This characterization, regarding the size of Mr. Reis' grow, is unsupported by the factual record. Nowhere does Detective Calabrese imply that the suspected grow was "significant" in size. To the contrary, the officer witnessed Mr. Reis tending to small number of plants on his back deck; the search uncovered only six plants on the deck. CP 6. There was no evidence that the grow operation exceeded the fifteen plant limit under RCW 69.51A.040(1). Nor was there evidence that Mr. Reis was not a qualified patient or designated provider under RCW 69.51A.010(1), (4). Similarly, the officers failed to garner power records, which may have indicated the size and scope of the garden.

Absent Officer Calabrese's observations of Mr. Reis tending to cannabis plants on his back deck, the facts and circumstances to support probable are limited to Mr. Reis's criminal history, which "falls short of probable cause to search."[19]

[19] State v. Neth, 165 Wn.2d 177, 185-86, 196 P.3d 658 (2008) (citing State v. Clark, 143 Wn.2d 731, 749, 24 P.3d 1006 (2001); State v. Hobart, 94 Wn.2d 437, 446, 617 P.2d 429 (1980)).

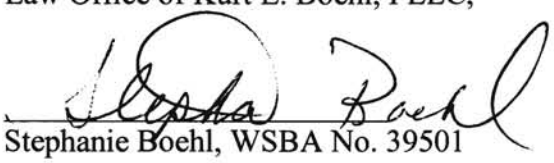
In summary, pursuant to Washington's medical cannabis laws, law enforcement is required to show probable cause that an individual in possession of cannabis is also in violation of the terms and conditions of Chapter 69.51A RCW. That was not done here. Absent this showing, Mr. Reis' activity—tending to a small number of cannabis plants on his back deck—did not establish probable cause that a crime was being committed. The warrant was therefore unlawful.

B. Conclusion

In conclusion, Mr. Reis respectfully requests 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 28 day of October, 2013

Law Office of Kurt E. Boehl, PLLC,



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CERTIFICATE OF SERVICE

I certify that on October 28, 2013, I served via U.S. certified mail a copy of the foregoing Reply Brief, in *State of Washington v. Reis*, Court of Appeals, Division I, No. 69911-3-I, to the following:

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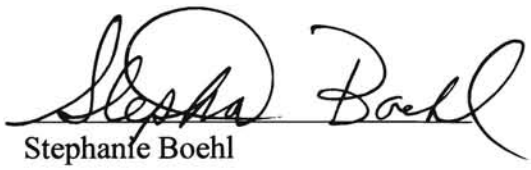

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