No. 31158-9-III

Whitman County Superior Court No. 11-1-00074-0

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

STATE OF WASHINGTON,
Plaintiff-Appellee,
v.

TYLER MARKWART,
Defendant-Appellant.

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

The Honorable David Frazier, Judge

APPELLANT'S OPENING BRIEF

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3. The State engaged in outrageous governmental misconduct.

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Issues Pertaining to the Assignments of Error

1. Did the trial court err in precluding Markwart from presenting his medical marijuana affirmative defense as a matter of law?

2. Did the trial court err in failing to dismiss the charges where the police engaged in entrapment when, after Markwart met with the police and prosecutors and made it clear that he was complying with the law, the investigating Detective counterfeited medical marijuana documentation and recruited another student with pending charges and an undercover officer to present that documentation to Markwart?

3. Should these convictions be reversed because of outrageous governmental misconduct because the crime was created and instigated by

the Detective not to protect the public but rather out of an apparent animus towards medical marijuana providers?

4. Is the sentence clearly excessive because there was no meaningful difference between the effects of the first criminal act and the cumulative effects of subsequent acts?

5. Does the imposition of a $10,000 fine in this case violate the constitutional prohibition against excessive fines?

II. STATEMENT OF THE CASE

In February, 2011, the police learned that Markwart was a medical marijuana patient. He gave the police permission to enter and search his apartment. CP 4. Detective Scott Patrick admits:

> Markwart presented his Medical Marijuana paperwork to Pullman Police Officer Breshears, which appeared to be valid. According to Breshears two of the bedrooms in the apartment have been converted to be used as a growing area and the number of marijuana plants were within compliance with RCW 69.51A.Markwart's roommate, David E. Nichols, is also a qualifying patient. Breshears also said Markwart had a 12 gauge shotgun and a pistol in the apartment to protect his operation.

Id. See also CP 305-308.

In addition, the police learned that Markwart had given several interviews to local media and "had a meeting with the president of Washington State University regarding 'cannabis' research." CP 323.

Despite evidence that Markwart was not committing any crimes under Washington law, Detective Patrick was not satisfied. He wanted to perform a "controlled buy from Markwart. But WCPA Denis Tracy wanted to meet with Markwart first and determine what Markwart was actually doing." So Patrick called Markwart in for a meeting with Colfax County Prosecuting Attorney Denis Tracey and Deputy Prosecutor Bill Druffel. CP 5.

> The purpose of the meeting was to provide Markwart with a copy of RCW 69.51A and discuss what specifically he was doing as a care provider and director of Allele Seeds Research and determine if he was in compliance with the statute.

Id. According to Officer Patrick,

> The meeting lasted for over an hour and a variety of topics related to RCW 69.51A were discussed. It is my belief that Markwart was advised and understood what would constitute a violation of RCW 69.51A and subject him to arrest and prosecution.

Id.

It appears that no one believed Markwart had committed or was committing a crime because Patrick concluded by stating: "At the conclusion of the meeting I was directed by Druffel and Tracy to continue with the investigation." CP 4-5; *see also* 323. Patrick apparently still

believed that some of what Markwart said "was outside of what RCW 69.51A allows for." *Id.* at 99.[1]

Patrick recruited Christopher J. Turner, a student at WSU. He had been arrested for marijuana distribution. 12/12/11 RP 21. The arresting officer told him that if he could "give someone higher up the food chain, that it would, you know, help my odds, I guess, of reducing my sentence." Turner explained that: "I was kind of reluctant to offer somebody I knew, so you know, he said we had to find someone, anyone." *Id.* at 22. So Turner found Markwart's business online. He contacted Markwart and told him that he had received an authorization to use medical marijuana. In reality, Patrick made up a medical marijuana authorization, signed a phony doctor's name and gave it to Turner to show to Markwart. *Id.* at 26. Markwart sold him marijuana after reviewing the documentation. Patrick sent Turner back to complete two more buys. *Id.* at 34-36.

Patrick also sent fellow officer Aase to try to buy marijuana from Markwart. *Id.* at 75. Markwart refused to sell to Aase because, even though Aase had one of Patrick's counterfeit authorizations, he did not have his Washington State driver's license. *Id.* at 78.

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[1] Markwart was licensed and registered with the Department of Revenue. *Id.*

After Markwart's meeting with Aase, the police obtained a search warrant for his apartment. The police found bank records demonstrating that Markwart's bank account had no money between October 2010 and April 2011. *Id.* at 145. They found 20 to 32 marijuana plants. *Id.* at 146. Detective Patrick stated that each qualifying medical marijuana patient may have 15 plants and up to 24 ounces of marijuana. *Id.* at 150.

The State charged Markwart with 5 counts related to marijuana. In Count I, the State alleged that Markwart delivered marijuana between March 6, 2011 and April 19, 2011. In Count II, the State alleged that Markwart delivered marijuana between March 6, 2011 and April 19, 2011. In Count III, the State alleged that Markwart delivered marijuana between March 6 and April 19, 2011. In Count IV, the State alleged that Markwart possessed marijuana with the intent to deliver it between March 6 and April 19, 2011. In Count V, the State alleged that Markwart manufactured marijuana between March 6, 2011 and April 19, 2011. CP 13-17.[2]

Prior to trial, Markwart moved to dismiss two counts on the grounds that the police "entrapped" him. CP 27-28. Markwart was initially represented by a public defender. Several months before trial, however, Markwart asked to proceed pro se. 09/30/11 RP 1-3. Markwart

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[2] The State also charged Markwart with a weapons enhancement but this enhancement was dismissed at sentencing.

explained that he and his appointed counsel could not agree on how the case should proceed. *Id.* at 4. The judge then informed Markwart that he would have to follow the law just as any lawyer would. *Id.* at 5. Markwart explained that he had attended college. *Id.* He had never represented himself before. *Id.* at 7. The judge informed Markwart of the charges and potential maximum terms.

During pretrial motions, the State admitted that Markwart is a qualifying patient under Washington Medical Marijuana Act. 11/29/11 RP 33. The State also admitted that it was clear that Markwart, who was given permission to represent himself, was claiming that his actions were legal under the Act. Thus, the State moved pretrial to prohibit Markwart from raising that issue on three grounds. First, the prosecutor argued that Markwart could not be a designated provider for more than one other medical marijuana patient under any circumstances. *Id.* at 22. Second, he argued that the confidential informant used by the police presented medical marijuana documents that were counterfeited by the police and thus, were not on tamper resistant paper. Third, he argued that the medical marijuana documentation was signed by the detective masquerading as a doctor. The prosecutor conceded that the second two arguments were "very technical" violations and said that his "primary" argument was that Markwart could only be a "designate provider to one patient at one time."

11/29/11 RP 22. The State argued that at the time Markwart sold to the confidential informant and undercover deputy he had "over a dozen other purportedly qualifying patients that he was a designated provider for." *Id.* at 23. The State also argued that Markwart had more plants than he was authorized to possess under his own patient documentation. *Id.* at 35. Markwart argued that under the statute he could serve as a designated provider to more than one patient so long as he dealt only with one patient at a time. *Id.* at 30.

The trial judge concluded that Markwart could not claim that he was a designated provider of medical marijuana to anyone because he was a designated provider for more than one patient and because the documents presented to him by the confidential informant and the undercover officer were counterfeit. *Id.* at 63-65. The trial judge also gave an instruction that told the jury that it had ruled, as a matter of law, that Markwart was not entitled to raise the defense. CP 239.

The jury convicted Markwart as charged. CP 256-61.

After the jury returned its verdict, Markwart hired counsel and filed a motion for new trial. New counsel argued that Markwart was entitled to a new trial because Druffel, the trial prosecutor, and his superior, Tracy, were potential witnesses, yet they did not recuse *themselves from charging or prosecuting the case.* Defense counsel

pointed out that this meeting was part of the investigation but that no one gave Markwart his *Miranda* rights. Moreover, the prosecutors advised Markwart regarding his activities. RP 295. Prosecutor Tracy told Markwart that providing information or assisting patients' providers was not a violation of the law. RP 332. The Detective stated that Markwart was "advised and understood what constituted a violation of RCW 69.51A and subject him to arrest and prosecution." RP 332. New counsel argued that testimony regarding that meeting was relevant to Markwart's entrapment defense. RP 298. New counsel also argued that the trial court erred in failing to permit the jury to decide whether or not Markwart could prove his medical marijuana defense by a preponderance of the evidence. RP 304. Defense counsel also argued that, even though Markwart represented himself, he was still entitled to a fair trial. RP 300-24.

The State argued that Markwart had chosen to represent himself and the fact that he did a bad job of it was not grounds for a new trial. RP 324. The State argued that "there could be no entrapment" in this case. RP 326. The prosecutor said that the only thing "on the record" regarding the meeting with Markwart was "what Detective Patrick testified to." RP 326.

The trial court found that Markwart did a "miserable job" of representing himself. RP 335. He said:

> Most of the issues I have heard today, which are very valid issues that probably did effect his ability to have a fair trial and did effect his ability to have meritorious issues raised and argued to the jury were never brought before the Court, were not briefed, were not argued.

RP 335. The Court stated that Markwart failed to raise the issue of prosecutorial misconduct. RP 336. The Court did find that Markwart had raised the issue of entrapment but said that he had rejected that because the police were permitted to engage in a "ruse." RP 337.

The trial court stated that Markwart was "stuck with the record" he had made, that he could make his argument on appeal and denied the motion for new trial. RP 339.

At sentencing the Court imposed six months in jail and a $10,000 fine. CP 349-58. The judge imposed the fine "as a deterrent to efforts to exploit this law for personal financial gain." RP 375. This timely appeal followed. CP 359-71.

III. ARGUMENT

A. THIS COURT MUST REVERSE BECAUSE THE TRIAL COURT ERRED IN REFUSING TO PERMIT MARKWART TO RAISE ANY DEFENSES UNDER THE MEDICAL MARIJUANA ACT

Here, Markwart does not ask this Court to decide whether he has proved a medical use defense by a preponderance of the evidence. Instead, this Court must decide whether Markwart presented sufficient evidence to

allow the jury to consider his defense. In order to affirmatively defend a criminal prosecution for possessing or manufacturing marijuana, a defendant must show by a preponderance of evidence that he has met the requirements of the Act. *State v. Ginn*, 128 Wn. App. 872, 878, 117 P.3d 1155 (2005), *review denied*, 157 Wn.2d 1010, 139 P.3d 349 (2006). Preponderance of the evidence means that considering all the evidence, the proposition asserted must be more probably true than not true. *Ginn*, 128 Wn. App. at 878. At a hearing to determine whether a defendant may raise a medical marijuana affirmative defense, a defendant need only make a prima facie case to raise the defense. *State v. Adams*, 148 Wn. App. 231, 235, 198 P.3d 1057 (2009). Although a defendant must show by a preponderance of the evidence that he or she is entitled to the Act's defense, the trial court must take the evidence in the light most favorable to the defendant. *Adams*, 148 Wn. App. at 235; *See also, State v. Brown*, 166 Wn. App. 99, 104, 269 P.3d 359, 361 (2012).

In *State v. Otis*, 151 Wn. App. 572, 213 P.3d 613 (2009), the trial court erred when it granted the State's motion to preclude him from asserting a medical marijuana caregiver affirmative defense – that Otis was legally growing marijuana as a caregiver for a qualifying patient under the Washington State Medical Use of Marijuana Act (Act), chapter 69.51A RCW. Otis waived his right to a jury trial and elected to proceed

on a stipulated bench trial. Based on the stipulated facts, the trial court found Otis guilty of manufacture of marijuana. The Court of Appeals concluded that the trial court had erred because Otis had come forward with sufficient evidence to present the defense and reversed. That Court opined that:

> Although given evidence showing the extent of Otis's grow operation, it is unlikely that his affirmative defense will be successful; his documentation was sufficient to meet the prima facie threshold to allow him to present a medical marijuana primary caregiver defense under the statute.

Otis, 151 Wn. App. at 582. Notwithstanding that observation, however, the Court of Appeals reversed Otis's judgment and sentence and remanded for a new trial. *Id. See also, State v. Ginn*, supra (Ginn presented sufficient evidence to submit whether she was herself a "qualifying patient" to the jury; thus, the trial court's order excluding evidence of an affirmative defense of "qualifying patient" under the Act was error.)

Similarly, in *State v. May*, 100 Wn. App. 478, 480, 997 P.2d 956, 958, *review denied*, 142 Wn.2d 1004, 11 P.3d 825 (2000), the superior court erred when it refused to give Mr. May's proposed instruction regarding unwitting possession of a firearm. May's defense was the unlikely claim that the gun found at the scene belonged to his mother, who must have forgotten it when she visited him the night before the search.

Id. Nonetheless, the Court of Appeals reversed and remanded for a new trial.

1. The Manufacturing Charge

On this count, the State argued that Markwart could not present the designated provider defense because Markwart was a designated provider for more than one person. The trial judge erroneously accepted this argument.

In *State v. Shupe*, 172 Wn. App. 341, 289 P.3d 741 (2012), *petition for review pending*, this Court rejected this interpretation of the statute. This Court held that Shupe established a medical marijuana defense to charges of manufacture of marijuana under the Medical Use of Marijuana Act, because he served only one medical marijuana patient at a time, he never delivered marijuana to an individual who did not have documentation, the dispensary took copies of each patient's medical marijuana patient documentation to keep for its records, and the receipts from the dispensary showed the time to the minute as to when each patient was served. Here, the evidence was that Markwart served only one patient at a time. Thus, he was entitled to have the jury instructed on the medical marijuana defense on all five counts.

Moreover, by the time of Markwart's trial, the legislature had made it clear that "collective gardens" were legal. *See* RCW 69.51A.085.

Thus, Markwart could work collectively with others to produce medical marijuana. Such a provision is retroactive because it was intended to decriminalize what might otherwise be considered criminal conduct.

> When the Legislature modifies the elements of a crime, it refines its description of the behavior that constitutes the crime. This does not make defendants convicted of the earlier crime any less culpable; instead, it clarifies the evidence required to prove the crime.
>
> On the other hand, when the Legislature downgrades an entire crime, it has judged the specific criminal conduct less culpable. By reclassifying a crime without substantially altering its elements, the Legislature concludes the criminal conduct at issue deserves more lenient treatment. The reclassification of a crime is no mere refinement of elements, but rather a fundamental reappraisal of the value of punishment.

State v. Wiley, 124 Wn.2d 679, 687-88, 880 P.2d 983, 987 (1994).

When it comes to collective marijuana gardens, the Legislature had reassessed the culpability of criminal conduct before Markwart's trial and determined that collective gardens were permissible. The trial court was required to give that change in law retroactive effect and apply it in Markwart's case.

2. The Three Controlled Buys

Again, to the extent the judge determined that Markwart could not be a provider to more than one individual, this Court must reverse under *Shupe*.

At the time of Markwart's claim that he was a medical marijuana patient and provider was controlled by the 2010 version of RCW 69.51A. That statute provided that the patient:

> (a) Is a patient of a health care professional;
>
> (b) Has been diagnosed by that health care professional as having a terminal or debilitating medical condition;
>
> (c) Is a resident of the state of Washington at the time of such diagnosis;
>
> (d) Has been advised by that health care professional about the risks and benefits of the medical use of marijuana; and
>
> (e) Has been advised by that health care pr(4) "Qualifying patient" means a person who:
>
> confessional that they may benefit from the medical use of marijuana.

RCW 69.51A.010(4). The statute also provided that:

> (1) "Designated provider" means a person who:
>
> (a) Is eighteen years of age or older;
>
> (b) Has been designated in writing by a patient to serve as a designated provider under this chapter;
>
> (c) Is prohibited from consuming marijuana obtained for the personal, medical use of the patient for whom the individual is acting as designated provider; and
>
> (d) Is the designated provider to only one patient at any one time.

The statute goes on to state that:

> (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.

The trial court reasoned that Markwart could not claim that he was a designated provider for the confidential informant because the police had forged the informant's authorization. But nothing in the statute required Markwart to insure that the confidential informant's documentation was on tamper resistant paper. Nothing in the statute required that Markwart insure that the doctor signing the authorization forged by Officer Patrick did not exist. Valid documentation is required to be presented only when the qualifying patient or designated provider is questioned by the police. RCW 69.51A.040. Thus, the trial court erred as a matter of law in preventing Markwart from presenting this defense to the jury.

But, in any event, the trial court failed to review the evidence in a light most favorable to Markwart as required by the cases cited above. There was an argument that Markwart was entitled to be a provider for more than one patient so long as he did not provide to more than one patient at a time. Arguably, there is no requirement in the statute that the patient must present his authorization to his provider on tamper resistant

paper. Arguably, there is no requirement that Markwart confirm that the doctor who signed the bottom of the authorization is a validly licensed Washington doctor. And finally, Markwart should have been given the opportunity to argue that providers may reasonably rely on the documentation presented by the patient. The jury – not the judge – would then determine whether Markwart's actions were unreasonable.

3. The Attempted Delivery Count

The State convinced the judge to prohibit the defense on this count on both of the flawed rationales argued above. Thus, this count must also be reversed and remanded for a trial during which the jury is properly instructed.

B. THE TRIAL COURT ERRED AS A MATTER OF LAW IN REJECTING MARKWART'S CLAIM THAT THE POLICE ENGAGED IN ENTRAPMENT

Washington courts have long recognized the existence of the common law defense of entrapment which occurs where:

> the accused is lured or induced by an officer of the law or some other person, a decoy or informer, to commit a crime which he had no intention of committing. Such defense is not available where the criminal intent originates in the mind of the accused and the police officers, through decoys and informers, merely afford the accused an opportunity to commit the offense.

State v. Lively, 130 Wn.2d 1, 9, 921 P.2d 1035, 1039 (1996) (citations omitted).

In 1975, the Washington Legislature adopted a statutory definition of entrapment which provides:

> (1) In any prosecution for a crime, it is a defense that:
>
> (a) The criminal design originated in the mind of law enforcement officials, or any person acting under their direction, and
>
> (b) The actor was lured or induced to commit a crime which the actor had not otherwise intended to commit.
>
> (2) The defense of entrapment is not established by a showing only that law enforcement officials merely afforded the actor an opportunity to commit a crime.

RCW 9A.16.070. The defendant must "demonstrate that he was tricked or induced into committing the crime by acts of trickery by law enforcement agents." Second, he must demonstrate that he would not otherwise have committed the crime. *Lively*, 130 Wn.2d at 10. "Inducement," such as might support an entrapment defense, is government conduct which creates a substantial risk that an undisposed person or otherwise law-abiding citizen will commit an offense. *State v. Hansen*, 69 Wn. App. 750, 764 n.9, 850 P.2d 571, *review granted in part by State v. Stegall*, 122 Wn.2d 1016, 863 P.2d 1352 (1993), *rev'd on other grounds sub nom.*, 124 Wn.2d 719, 881 P.2d 979 (1994).

First, the judge got it wrong as a matter of law. The question of trickery is relevant to the issue of entrapment. While the police can use trickery and a ruse when investigating ongoing criminal activities, they cannot use a ruse to lure a defendant into unknowingly committing a crime. There is at least an argument that that is what the police did here. The evidence was that Markwart was doing everything in his power to comply with the law. He even voluntarily attended a meeting with the investigating detective and two prosecuting attorneys which, according to the Detective, was to help Markwart understand and comply with the law.

But law enforcement was not happy. Detective Patrick conceived a way to trick Markwart into violating what even the trial prosecutor agreed were "technical" aspects of the law. The "crime," such as it was, arose entirely in the mind of the Detective, who appears to be hostile to the Medical Marijuana Act. All of the evidence was that Markwart was devoted to the cause of medical marijuana. He made every effort to comply with the statutes and, in fact, actually refused to sell to Officer Aase. It was only after meeting with Markwart and determining that he was actually trying to comply with the law that the Detective forged documents that would trick Markwart into violating the law.

Where the trial court has failed to give the instruction, the *appropriate standard of review in such cases is whether, considering the*

evidence in the light most favorable to the State, a rational trier of fact could have found that the defendant failed to prove the defense by a preponderance of the evidence. *Lively*, 130 Wn.2d at 17. Here, a rational trier of fact could have concluded that Detective Patrick simply wanted to trick Markwart into violating the law so he could arrest him and prevent further distribution of medical marijuana – a perfectly legal activity.

C. THE STATE ENGAGED IN OUTRAGEOUS GOVERNMENTAL MISCONDUCT

Charges must be dismissed when the conduct of the State was so outrageous that it violated the defendant's right of due process under the Fifth and Fourteenth Amendments of the federal Constitution. This constitutional error may be raised for the first time on appeal, particularly where the error affects fundamental aspects of due process. *Lively*, 130 Wn.2d at 18-19.

Whether the State has engaged in outrageous conduct is a matter of law, not a question for the jury. *Id.* at 19, citing *United States v. Dudden*, 65 F.3d 1461, 1466-67 (9th Cir. 1995), and *State v. Hohensee*, 650 S.W.2d 268, 272 (Mo.App. 1982) (citing federal cases). In evaluating whether the State's conduct violated due process, the court focused on the State's behavior and not the defendant's predisposition. In *Lively*, the Court set out the several factors which courts consider when determining whether

police conduct offends due process: 1) whether the police conduct instigated a crime or merely infiltrated ongoing criminal activity, 2) whether the defendant's reluctance to commit a crime was overcome by pleas of sympathy, promises of excessive profits, or persistent solicitation, 3) whether the government controls the criminal activity or simply allows for the criminal activity to occur, 4) whether the police motive was to prevent crime or protect the public, and 5) whether the government conduct itself amounted to criminal activity or conduct "repugnant to a sense of justice."

The evidence in this case was that Detective Patrick instigated the crime. Markwart was not violating the law. Detective Patrick counterfeited documents to create an illegality out of whole cloth.

Markwart was clearly reluctant to commit any crimes. He actually met with the Detective and two prosecutors to avoid engaging in any illegality. Apparently, he naively believed that the Detective and prosecutors were dealing with him in good faith.

The Detective controlled and manipulated the criminal activity. He even created a second set of counterfeit documents. When Markwart refused to provide any marijuana to the undercover officer who did not present any valid identification, the State still charged Markwart with attempted delivery!

It is pretty clear that the Detective's motive was not to prevent crime. Until he counterfeited the documents, he had absolutely no evidence that Markwart was engaging in criminal activity. If the State had such evidence, the officer would have arrested Markwart when he appeared for the meeting with the prosecutors. In fact, he had to continue his investigation (at the direction of the prosecutors) by counterfeiting documents and using another unfortunate student as an informant in order to create a crime for which he could arrest Markwart. It appears that the Detective simply did not like Markwart's vocal support of Medical Marijuana. After all, according to the prosecutor, the investigation only started after Markwart's very public statements in support of cannabis.

The Detective engaged in illegal conduct. It is a class C felony to fraudulently produce any record purporting to be, or tamper with the content of any record for the purpose of having it accepted as, valid documentation under RCW 69.51A.010(32)(a), or to backdate such documentation to a time earlier than its actual date of execution. RCW 69.51A.060(7).

The Governmental conduct here was repugnant to a sense of justice. The medical use of cannabis in accordance with Washington law 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 or prosecuted. RCW 69.51A.040. In this case the police and prosecutors in Whitman County violated both the spirit and the letter of the law. It is pretty clear that they do not agree with the statute, but both police and the prosecutor are sworn to uphold the law. It is repugnant when they use trickery (and a student desperate to avoid his own criminal prosecution), to arrest and prosecute Markwart – a man who was doing everything he could to comply with the law.

D. THE SENTENCE IS CLEARLY EXCESSIVE

The court found that Markwart had an offender score of 4. CP 349-58. The standard range for each count was 6 to 18 months. The trial court imposed 6 months on each count to run concurrently. This sentence was clearly excessive because counts two and three should have "merged" into count one in light of the "multiple offense" policy and former RCW 9.94A.400, now RCW 9.94A.589.2.

Under the multiple offense doctrine, a sentence is clearly excessive if there is no meaningful difference between the effects of the first criminal act and the cumulative effects of subsequent acts. *State v. Sanchez*, 69 Wn. App. 255, 261, 848 P.2d 208, *review denied*, 122 Wn.2d 1007, 859 P.2d 604 (1993). We review the trial court's application of the doctrine for abuse of discretion. *State v. McCollum*, 88 Wn. App. 977, 985, 947 P.2d 1235 (1997), *review denied*, 137 Wn.2d 1035, 980 P.2d

1285 (1999). Multiple sentences for repeat deliveries of a controlled substance may be clearly excessive if the sales were initiated and controlled by investigators, involved the same substance and the same buyer and same seller. In *Sanchez* the court said that in analyzing RCW 9.94A.390(1)(g), the sentencing court does not focus on the effects of the first buy because those effects would have occurred even if the first buy had been the sole offense, and even if the multiple offense policy had been totally inapplicable. Instead, the court must focus on the difference between (a) the effects of the first buy alone and (b) the cumulative effects of all three buys. It is this difference, if any, that the multiple offense policy is designed to take into account. If it can be shown that this difference is nonexistent, trivial or trifling, the multiple offense policy should not operate; rather, the sentencing judge should be permitted to give an exceptional sentence downward on grounds that the "operation of the multiple offense policy ... results in a presumptive sentence that is clearly excessive." RCW 9.94A.390(1)(g).

> Because the difference between the first buy and all three buys was trivial or trifling, the sentencing judge was permitted to use RCW 9.94A.390(1)(g) in order to reconcile (1) the absence of additional effects from the second and third buys with (2) the multiple offense policy of RCW 9.94A.400(1)(a). Thus, the sentencing judge did not err when he imposed a sentence greater than the standard range for one delivery, but less than the standard range for three deliveries.

Sanchez, 69 Wn. App. at 261-62. *See also, State v. Fitch*, 78 Wn. App. 546, 897 P.2d 424 (1995); *State v. Hortman*, 76 Wn. App. 454, 886 P.2d 234 (1994), *review denied*, 126 Wn.2d 1025, 896 P.2d 64 (1995).

In this case, the difference between the first buy, viewed alone, and all three buys, viewed cumulatively, was trivial or trifling. All three buys were initiated and controlled by the police. All three involved the same buyer, the same seller, and no one else. All three occurred within a one-month span of time. All three involved small amounts of drugs – that the defendant believed he was properly providing under the Medical Marijuana Act. The second and third buys by Chris Turner had no apparent purpose other than to increase Markwart's presumptive sentence.

This Court should find that Markwart's criminal history was only a 2, which would reduce the bottom of the standard range to 4 months in jail.

E. IMPOSITION OF A $10,000 FINE IS UNCONSTITUTIONAL BECAUSE IT IS EXCESSIVE

The Supreme Court has indicated that, under the Eighth Amendment's prohibition against excessive fines, a determination of "punishment" for excessive fines purposes is conceptually distinct from other purposes. *See United States v. Ursery*, 518 U.S. 267, 282-83, 116 S.Ct. 2135, 135 L.Ed.2d 549 (1996) (highlighting the difference between

punishment under the Double Jeopardy Clause and the Excessive Fines Clause); *see also Hudson v. United States*, 522 U.S. 93, 102-03, 118 S.Ct. 488, 139 L.Ed.2d 450 (1997). In the seminal case of *Austin v. United States*, 509 U.S. 602, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993), the Court considered an excessive fines challenge to a civil forfeiture statute. According to the Court in *Austin*, "'a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, ...'" *Id.* at 610. Consequently, if the fine here served the purpose of retribution or deterrence, it is subject to Eighth Amendment scrutiny. *See also, State v. WWJ Corp.*, 138 Wn.2d 595, 603-04, 980 P.2d 1257, 1261 (1999).

The *WWJ Corp.* case, also applied the "excessive" test established in *United States v. Bajakajian*, 524 U.S. 321, 118 S.Ct. 2028, 141 L.Ed.2d 314 (1998). Under the *Bajakajian* test, "a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense." *Id.* at 334. In *Bajakajian*, the Supreme Court held that the criminal forfeiture of $357,144, pursuant to 18 U.S.C. § 982(a)(1) and 31 U.S.C. § 5316, violated the Excessive Fines Clause where the defendant's criminal violation was "unrelated to any other illegal activities" and the money subject to forfeiture was not the proceeds of illegal activity. *Id.* at 338-40.

Here, the Court's imposition of the $10,000 fine was clearly punitive.

And the fine was unrelated to any other criminal activity. At trial, the State seized Markwart's bank statements, which demonstrated that he and his company had deposited no money between October 2010 and April 2011. Moreover, any money Markwart will pay towards his fine will not come from illegal activities. It appears that his mother had to post the $10,000 so that Markwart, who the trial court found indigent for purposes of the trial and appeal, could remain out of jail while this Court considers his appeal.

Moreover, the amount of the fine is excessive. Even though the judge stated that he believed Markwart was in the medical marijuana business to make money, the only four arguably illegal sales he made netted him less than $1,000. There is no other evidence that he was violating the law. When a person complies with the Medical Marijuana Act, he or she can "make money." Thus, the imposition of this very punitive fine – which would indebt Markwart to the county for years – was excessive.

IV. CONCLUSION

This Court must reverse.

DATED this 10th day of May, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by First Class United States Mail, postage prepaid, one copy of this brief on the following:

Whitman County Prosecutor
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I further certify that on the date listed below, I served by Email one copy of this brief on the following:

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10 May 2013
Date

William Hackney