

68644-5

68644-5

No. 68644-5-I

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

STATE OF WASHINGTON,
Plaintiff-Appellee,

v.

JOHN C. YOUNG,
Defendant-Appellant.

RECEIVED
APPELLANT'S REPLY BRIEF
NOV 20 11 2:40

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

The Honorable Ellen Fair, Judge

APPELLANT'S REPLY BRIEF

Suzanne Lee Elliott
Attorney for Appellant
1300 Hoge Building
705 Second Avenue
Seattle, WA 98104
(206) 623-0291

TABLE OF CONTENTS

I. REPLY ARGUMENT1

 A. RCW 69.51A.047 WAS NOT A CHANGE IN THE LAW1

 B. ANY STATUTORY AMENDMENT THAT HAS A
 “DECRIMINALIZING” EFFECT IS ALWAYS
 RETROACTIVE.....2

 C. THE 2011 LEGISLATIVE AMENDMENTS DO EXPRESS AN
 INTENT THAT THE PROVISIONS BE APPLIED
 RETROACTIVELY.....3

II. CONCLUSION5

TABLE OF AUTHORITIES

Cases

<i>State v. Adams</i> , 148 Wn. App. 231, 198 P.3d 1057 (2009)	1, 2
<i>State v. Fry</i> , 168 Wn.2d 1, 228 P.3d 1 (2010)	1, 2
<i>State v. Grant</i> , 89 Wn.2d 678, 575 P.2d 210 (1978).....	5
<i>State v. Hanson</i> , 138 Wn. App. 322, 157 P.3d 438 (2007).....	1, 2
<i>State v. Ross</i> , 152 Wn.2d 220, 95 P.3d 1225 (2004).....	4
<i>State v. Wiley</i> , 124 Wn.2d 679, 880 P.2d 983 (1994)	3
<i>State v. Zornes</i> , 78 Wn.2d 9, 475 P.2d 109 (1970)	4
<i>Teague v. Lane</i> , 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334, <i>reh'g denied</i> , 490 U.S. 1031, 109 S.Ct. 1771, 104 L.Ed.2d 206 (1989).....	3

Statutes

RCW 69.51A.005 (1999).....	1
Rcw 69.51A.047	1
RCW 70.96A.010.....	5

Other Authorities

2011 Wash. Legis. Serv. Ch. 181 (S.S.S.B. 5073).....	4
--	---

I.
REPLY ARGUMENT

A. RCW 69.51A.047 WAS NOT A CHANGE IN THE LAW

RCW 69.51A.047 simply clarified the previous iteration of the statute and the case law. Former RCW 69.51A.005 (1999) stated 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. Any person meeting the requirements appropriate to his or her status under this chapter shall be considered to have engaged in activities permitted by this chapter and shall not be penalized in any manner, or denied any right or privilege, for such actions.

(Emphasis added). The state Supreme Court has stated: “The presentment requirement must be read in context. It is only triggered when someone is ‘charged with a violation.’” *State v. Fry*, 168 Wn.2d 1, 9, 228 P.3d 1 (2010). Here, Young was arrested by the officer on August 10, 2010, but he was not “charged with” a crime until June 15, 2011. He was not required to present his documentation until that time. *See also, State v. Adams*, 148 Wn. App. 231, 198 P.3d 1057 (2009) (defendant was not required to carry at all times his authorizing documentation); *State v. Hanson*, 138 Wn. App. 322, 157 P.3d 438 (2007) (Defendant presented valid documentation that he was a qualifying patient, under the Medical

Marijuana Act, even though defendant obtained an authorization form from his physician the day after his marijuana plants were seized by police).

In 2010, the case law provided that Young could not be deprived of the defense simply because he did not have his paperwork with him at the time of his arrest. During consideration of the 2011 bill, the Governor stated:

I realize the value that medical marijuana has for patients and support the voter-approved initiative. I also agree with the intent of the Legislature to clarify ambiguity surrounding search and arrest as well as concerns around dispensaries and access. We need to create a system that works.

Washington Governor's Message, 4/21/2011. Thus, it is clear that RCW 69.51A.047 simply clarified the holdings in *Fry*, *Adams* and *Hanson* – the previous court decisions discussing the presentment issue.

B. ANY STATUTORY AMENDMENT THAT HAS A “DECRIMINALIZING” EFFECT IS ALWAYS RETROACTIVE

The State cites to cases that set out the rules for the retroactive application of legislation that changes the elements of the offense. But:

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).¹

Assuming that RCW 69.51A.047 is not a clarification of the previous decisions of the appellate courts, the Legislature has reassessed the culpability of criminal conduct and this Court should give that change in law retroactive effect.

C. THE 2011 LEGISLATIVE AMENDMENTS DO EXPRESS AN INTENT THAT THE PROVISIONS BE APPLIED RETROACTIVELY

To avoid application of the savings clause referenced by the State in its brief, the Supreme Court has not required that the legislature explicitly state its intent that amendments repealing portions of criminal and penal statutes apply retroactively to pending prosecutions for crimes committed before the amendments' effective date. Instead, "such intent

¹ This same rule is true as to procedural changes in the law as well. In *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334, *reh'g denied*, 490 U.S. 1031, 109 S.Ct. 1771, 104 L.Ed.2d 206 (1989), the Supreme Court held that a new rule will apply retroactively if it "places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Id.* at 311 (citation and internal quotation marks omitted). Here the amendment decriminalizes Mr. Young's conduct.

need only be expressed in ‘words that fairly convey that intention.’” *State v. Ross*, 152 Wn.2d 220, 238, 95 P.3d 1225, 1234 (2004).

The 2011 Legislation was amended to reaffirm that:

(a) Qualifying patients with terminal or debilitating illnesses medical conditions who, in the judgment of their health care professionals, may benefit from the medical use of marijuana cannabis, shall not be found guilty of a crime under state law for their possession and limited use of marijuana 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 . . .

2011 Wash. Legis. Serv. Ch. 181 (S.S.S.B. 5073). This language reaffirms the Legislature’s intent to provide the broadest possible defense to a criminal charge to any patient. If this Court reads the statute in the matter suggested by the State, the class of persons for whom the defense is available is limited.

This language is similar to the language that the Supreme Court concluded conveyed the Legislature’s intent that amendments to the criminal code be applied retroactively to pending cases. In *State v. Zornes*, 78 Wn.2d 9, 475 P.2d 109 (1970), the Court reasoned that the language “the provisions of this chapter shall not ever be applicable to any form of cannabis” evidenced the intent that “[i]f the provisions of the uniform narcotics acts are not ‘ever’ to be applied to cannabis, then they are not to be applied in any case, whether pending or arising in the future.”

Id. at 11, 13-14. Similarly, in *State v. Grant*, 89 Wn.2d 678, 575 P.2d 210

(1978), the Court held that:

intoxicated persons may not be subjected to criminal prosecution solely because of their consumption of alcoholic beverages” [was] an express declaration of a legislative intention that no person shall go to trial on such a charge after the effective date of the act, and [was] sufficient to overcome the presumption of [the savings clause].

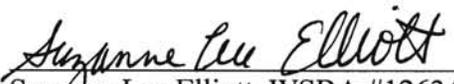
Id. at 684 (quoting RCW 70.96A.010). If these two statements express an intent for retroactive application of the statute, surely the language of the Medical Marijuana Act does as well.

II. CONCLUSION

This Court should reverse Young’s conviction for felony possession of marijuana.

DATED this 27 day of December, 2012.

Respectfully submitted,


Suzanne Lee Elliott, WSBA #12634
Attorney for John C. Young

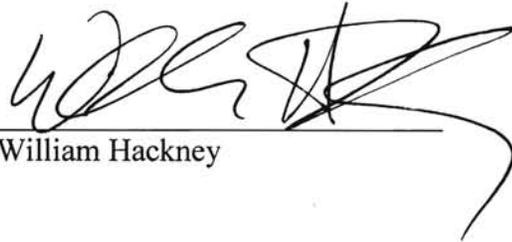
CERTIFICATE OF SERVICE

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:

Snohomish County Prosecutor's Office
Appellate Unit
3000 Rockefeller Avenue, M/S 504
Everett, WA 98201

Mr. John C. Young
7532 – 49th Drive NE
Marysville, WA 98271

27 Dec 2012
Date


William Hackney