

ORIGINAL

No. 37705-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

EARL OTIS,

Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLALLAM COUNTY

The Honorable Judges George L. Wood, Ken Williams, S. Brooke Taylor
and Gary Sund, *Pro Tem*
Cause No. 07-1-00108-4

BRIEF OF RESPONDENT

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Rules

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A. APPELLANT’S ASSIGNMENTS OF ERROR

1. Defendant claims the trial court erred in refusing to allow him to present a medical marijuana defense.
2. Defendant claims the trial court violated his constitutional right to due process.
3. Defendant claims the trial court violated his constitutional right to compulsory process.
4. Defendant claims that the trial court violated his constitutional right to present a defense.
5. Defendant claims the trial court erred by finding that “[t]he parties agree that the statement dated October 20, 2005 and allegedly signed by Mr. King’s treating physician, Dr. Robert Rakita, does not completely conform to the statutory definition.” Memorandum Opinion and Order re Motion in Limine dated 12-31-07. Supp CP.
6. Defendant claims that the trial court erred by finding that “[t]he documentation provided to law enforcement by the defendant, while in writing, did not conform to the statute and, by itself, is insufficient to raise the affirmative defense provided under the Medical Use of Marijuana Act.” Memorandum Opinion and Order re Motion in Limine dated 12-31-07. Supp CP.
7. Defendant claims that the trial court erred by ruling that Dr. Rakita’s note did not qualify as “valid documentation” under the medical marijuana act.
8. Defendant claims that the trial court erred by concluding that “valid documentation must be in possession of the caregiver in advance of questioning or request by law enforcement and must be presented to law enforcement at the time of request. The documentation cannot be provided after the fact as proposed herein by the Defendants.”

Opinion and Order re Motion in Limine dated 12-31-07.
Supp CP.

9. Defendant claims that the trial court erred by granting the state's motion in Limine to preclude him from presenting a medical marijuana defense.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court should have allowed the defendant to present his affirmative defense to a jury. Assignments of Error Nos. 1-9.
2. Whether Dr. Rakita's statement was sufficient for defendant to raise an affirmative defense under the medical marijuana act. Assignments of Error Nos. 1-9.
3. Whether defendant presented valid documentation to law enforcement in a timely manner. Assignments of Error Nos. 1-9.

C. STATEMENT OF THE CASE

Pursuant to RAP 10.3(b), the State accepts defendant's recitation of the procedural and substantive facts set forth in his opening brief at pages 3 through 5.

D. ARGUMENT

It is well settled law that the law in effect at the time of the offense controls. RCW 10.01.040; RCW 9.94A.345; *State v. Kane*, 101 Wn.App. 607, 611, *citing State v. Lorenzy*, 59 Wn. 308, 309, 109 P. 1064 (1910), *State v. Zornes*, 78 Wn.2d 9, 12, 475 P.2d 109, (1970), *overruled by*

implication on other grounds in United States v. Batchelder, 442 U.S.

114, 99 .Ct. 2198, 60 L.Ed.2d 755 (1978).

1. THE DEFENDANT DID NOT MEET THE QUALIFICATIONS FOR AN AFFIRMATIVE DEFENSE AS A PRIMARY CAREGIVER BECAUSE HE DID NOT HAVE VALID DOCUMENTATION.

RCW 69.51A.010 (2) defines who may qualify as a primary caregiver for an individual using medical marijuana. Under this section, a primary care giver is defined as a person who:

- (a) Is eighteen years of age or older;
- (b) Is responsible for the housing, health or care of the patient;
- (c) Has been designated in writing by a patient to perform the duties of primary caregiver under this chapter.

A qualifying patient is defined in RCW 69.51A.010 (3) as someone who:

- (a) Is a patient of a physician licensed under chapter 18.71 or 18.57 RCW;
- (b) Has been diagnosed by that physician 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 physician about the risks and benefits of the medical use of marijuana;
- (e) Has been advised by that physician that they may benefit from the medical use of marijuana.

To qualify for the affirmative defense as a primary caregiver under RCW 69.51A.040 (4) a primary caregiver must:

- (a) Meet all criteria for status as a primary caregiver to a qualifying patient;
- (b) Possess, in combination with and as an agent for the

qualifying patient, no more marijuana than is necessary for the patient's personal, medical use, not exceeding the amount necessary for a sixty-day supply;

- (c) Present a copy of the qualifying patient's valid documentation required by this chapter, as well as evidence of designation to act as primary caregiver by the patient, to any law enforcement official requesting such information;
- (d) Be prohibited from consuming marijuana obtained for the personal, medical use of the patient for whom the individual is acting as primary caregiver; and
- (e) Be the primary caregiver to only one patient at any one time.

"Valid documentation" is defined under RCW 69.51A.010 (5)(a) as a "statement signed by a qualifying patient's physician, or a copy of the qualifying patient's pertinent medical records, which states that, in the physician's professional opinion, the potential benefits of the medical use of marijuana would *likely outweigh the health risks* for a particular qualifying patient." (Emphasis added). The wording for the "valid documentation" must strictly adhere to the language set forth in the statute. In the case of *State v. Shepherd*, 110 Wn. App. 544, 552, 41 P.3d 1235 (2002), *review denied* 147 Wn.2d, 1017, 56 P.3d 992 (2002), a physician provided an "Authorization to Possess Marijuana for Medical Purposes in Washington State" stating:

I have diagnosed and am treating the above named patient for a terminal illness or debilitating condition as defined in RCW 69.51A.010 (should the conditions be listed, a check list? I think not as it

may be seen as violating physician-patient confidentiality).

I have advised the above named patient about the potential risks and benefits of the medical use of marijuana. I have assessed the above named patient's medical history and medical condition. It is my medical opinion that the potential benefits of the medical use of marijuana *may outweigh the health risks* for this patient. (Emphasis added). Id. at 547.

The court found the language “may outweigh the health risks for this patient” to be insufficient to meet the requirements RCW 69.51A.040 (4) (c) for an affirmative defense.

The required proof is tantamount to the level of certainty required of expert opinions in courts. And a well-developed body of law in this state sets out the requirements for admission of professional opinions when the expert must express an opinion on a "more likely than not" basis . . . For example, medical opinion testimony that an accident caused a physical condition must be based on a more probable than not, or more likely than not, causal relationship . . . Likewise in the criminal case, expert testimony on a person's mental status is not admissible unless the expert's opinion is based on reasonable medical certainty, which is the equivalent of more likely than not. There are legal consequences that attach to these scientific opinions. And therefore a level of medical certainty is required. Id. at 551.

There is no doubt that Mr. King satisfied the requirements of a “qualifying patient.” RCW 69.51A.010(3). On March 10, 2007 law

enforcement executed a search warrant at the residence occupied by the defendant. The co-defendant in the instant case provided law enforcement with two signed documents. The first document was dated November 14, 2005 signed by Ronald King designating the co-defendant as a primary caregiver. The second document was dated October 20, 2005 from Dr. Rakita. There was no language in the second document, stating that in Dr. Rakita's professional opinion, the potential benefits of the medical use of marijuana would likely outweigh the health risks for Mr. King. It is not enough, as Dr. Rakita did here, to simply say, "Mr. King should be able to use marijuana for appetite stimulation. He has tried Marinol but it is not effective for him and he has lost weight." CP 60.

Following an order for an offer of proof, CP 83. defendant and co-defendant provided a letter from Dr. Rakita dated December 21, 2007 stating:

To Whom it May Concern

RE: Ronald King

Mr. King has been a patient of mine, off and on, since 2000. A question has been raised regarding his use of marijuana for medical purposes. As can be seen from his medical records, we had discussed this on multiple occasions in 2000, and again in 2005. He indicated that this was very helpful to improve his appetite and reduce his nausea. For him, the medical benefits outweighed the risks. CP 66.

Washington courts have narrowly interpreted the requirement to present valid documentation upon the request of law enforcement. In *State v. Butler*, 126 Wn.App. 741, 750-51, 109 P.3d 493 (2005), this court held that “(i) in order to render his marijuana possession legal under the Act, he needed to obtain and to possess this required documentation from his personal physician **in advance** of law enforcement’s questioning his medical use and possession. (Emphasis added).

In *State v. Hanson*, 138 Wn.App. 322, 327-28, 157 P.3d 438 (2007) police raided the defendant’s hotel room when he was not present and discovered a supply of marijuana. The defendant obtained valid documentation from a physician and presented it law enforcement the next day. The Court held that since the defendant was first questioned when he went to the police station the day after the raid and provided valid documentation, he satisfied the provision of the Medical Marijuana Act. *However, the court stated, “(h)ad Mr. Hanson been present on the day of the raid and had he been asked to present valid documentation, he would not have been able to do so and would not, then, have satisfied the requirements of the statute.”* Id. at 327. (Emphasis added).

Both the *Butler* and *Hanson* courts interpreted the statute to require the valid documentation be presented to law enforcement at the time of the initial contact and prior to charges being filed.

In the instant case, the alleged “valid documentation” dated December 21, 2007 was obtained nine months after defendant and co-defendant were questioned by law enforcement and does not cure the inadequate 2005 statement by Dr. Rakita. The requirements of the statute were clearly not met.

In May, 2007 the statute was amended to change the language required by the patient’s physician from “likely outweigh the health risks, Former 69.51A.010(5)(a) to “may benefit from the medical use of marijuana”, current 69.51A.010(5)(a). The 1999 statute applied in the instant case and Dr. Rakita’s October 2005 authorization came nowhere near meeting the requirements of the statute. Furthermore, providing valid documentation approximately nine months after the fact did not cure the inadequacy of Dr. Rakita’s 2005 authorization.

In a Memorandum Opinion and Order, CP 60, the trial court stated that RCW 69.51A.010(5)(a) is unambiguous with regard to the form of the documentation and held that the documentation provided to law enforcement in the instant case did not conform to the statute and, by

itself, was insufficient to raise the affirmative defense provided under the Medical Marijuana Act. *Id.* at page 4. The statute is clear that valid documentation must be in possession of the caregiver in advance of questioning or request by law enforcement and must be presented to law enforcement at the time of request. The documentation cannot be provided after the fact. *Id.* at page 5. The letter from Dr. Rakita dated December 21, 2007 did not cure the first document dated October 20, 2005. On October 20, 2005 the defendant did not comply with the requirement of valid documentation pursuant to RCW 69.51A.040 (4) and was therefore precluded from using medical use of marijuana as an affirmative defense.

In order for a qualifying caregiver to assert the affirmative defense as set forth in RCW 69.51A.040 (4), the caregiver shall:

- (a) Meet all criteria for status as a primary caregiver to a qualifying patient;
- (b) Possess, in combination with and as an agent for the qualifying patient, no more marijuana than is necessary for the patient's personal, medical use, **not exceeding the amount necessary for a sixty-day supply**; (Emphasis added).
- (c) Present a copy of the qualifying patient's valid documentation required by this chapter, as well as evidence of designation to act as primary caregiver by the patient, to any law enforcement official requesting such information;
- (d) Be prohibited from consuming marijuana obtained for the personal, medical use of the patient for whom the individual is acting as primary caregiver; and

(e) Be the primary caregiver to only one patient at any one time.

In regards to the 60 day supply addressed in subsection (b), it has been commented that: “And while there is nothing in the Act requires the doctor to disclose the patient’s particular illness, there must, nonetheless, be some statement as to how much [medical marijuana] he or she needs.” *State v. Shepard*, 110 Wn. App at 552. In the current case, there is no statement as to how much marijuana would be necessary for a sixty day supply. In fact, it appears incredulous that 75 marijuana plants were necessary for “appetite stimulation, even over a 60 day period.”

Defendant implies in his opening brief at page 18: “Even if Dr. Rakita’s note did not technically qualify as ‘valid documentation’, Mr. Otis was ultimately able to produce ‘valid documentation.’” That this court should determine that the 2007 amendments to the 1999 Medical Marijuana Act are retrospective because the amendments are curative rather than substantive.

A curative amendment is one that “clarifies or technically corrects an ambiguous statute.” *F. D. Processing*, 119Wn.2d 452, 461, 832 P.2d 1303 (1992). Former RCW 69.51A, the Medical Marijuana Act, was unambiguous before the Legislature amended it; therefore, instead of

clarifying the law, the Legislature simply changed the law. The amendment was not curative.

A remedial change is one that relates to practice, procedures, or remedies, and does not affect a substantive or vested right. *F. D. Processing*, 119 Wn.2d at 462-63. The Medical Marijuana Act, as amended in 2007, is simply an improvement over a previously existing condition of the law. In the instant case, the amendment to the Medical Marijuana Act does not provide a means to enforce a right or redress an injury. Rather, the amendment merely reflected a legislative choice to modify a substantive right, i.e., a choice to modify the right to assist a qualified patient in the medical use of marijuana.

An amended statute generally applies as of the amendment's effective date. *State v. T.K.*, 139 Wn.2d 320, 327, 987 P.2d 63 (1999). A statute is presumed to operate prospectively unless the Legislature indicates that it is to operate retroactively. *Landgraf V. USI Film Prods.*, 511 U.S. 244, 264-66, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994); *State v. McClendon*, 131 Wn.2d 853, 861, 935 P.2d 1334, cert denied, 522 U.S. 1027, 118 S.Ct. 624, 139 L.Ed.2d 605 (1997).

Courts disfavor retroactivity. *In re Estate of Burns*, 131 Wn.2d 104, 110, 928 P.2d 1094 (1997). "The presumption of prospectivity can

be overcome if (1) the Legislature explicitly provides for retroactivity, Landgraf, 511 U.S. at 270, 278; (2) the amendment is “curative,” *F. D. Food Processing*, 119 Wn.2d at 461-62; or (3) the statute is “remedial,” *State v. McClendon*, 131 Wn.2d at 861”. *State v. T.K.*, 139 Wn.2d at 332.

Even if the 2007 amendments at issue here are remedial, a statute will not be applied retroactively if it affects a substantive or vested right. *McClendon*, 131 Wn.2d at 861. In the instant case, defendant had a right to act as a primary caregiver, former RCW 69.51A.010(5)(a) if he met the requirements of the statute. Pursuant to the amended 2007 statute, defendant had a right to act as a designated provider, current RCW 69.51A.010(5)(a) if he met the requirements of the statute. The law that applies to the instant case is former RCW 69.51A.010(5)(a) not the amended statute.

The requirements of the amended statute are less onerous on a designated provider than they were for a primary caregiver under the former statute. This is a substantive change. In addition, the Department of Health was required to adopt rules defining the quantity of marijuana that could reasonably be presumed to be a sixty-day supply for qualifying patients. This is also a substantive change. Furthermore, under the current statute, the attending physician of the qualifying patient is under a

less onerous obligation to provide valid documentation. Under the former statute, the attending physician was required to provide documentation that “the benefits of the medical use of marijuana would likely outweigh the health risks for the qualifying patient”. Under the current statute the attending physician need only provide documentation that the qualifying patient “may benefit from the medical use of marijuana”. This too is a substantive change. No later statute can divest a person of the rights established under the former statute. The amendments to the statute are not remedial, they are substantive; the amendments changed the law rather than clarified it. The statute is not retroactive.

There is absolutely nothing in the Legislative history evidencing retroactivity and the statute must, therefore, be applied prospectively.

Defendant claims that Dr. Rakita’s 2005 statement “implies” that Mr. King may benefit from the medical use of marijuana. That is not good enough. The statute is interpreted narrowly and implications are not sufficient.

E. CONCLUSION

Based on the foregoing, the State respectfully asks this Court to affirm defendant's conviction.

DATED this 7th day of October, at Port Angeles, Washington.

Respectfully submitted,



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Deputy Prosecuting Attorney
Attorney for Respondent

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

STATE OF WASHINGTON,
Respondent,
vs.
EARL OTIS,
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NO. 37705-5-II

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STATE OF WASHINGTON)
: ss.
County of Clallam)

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The undersigned, being first duly sworn, on oath deposes and says:

That the affiant is a citizen of the United States and over the age of eighteen years, that on the 10th day of October, 2008, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope containing a copy of the *Brief of Respondent*, addressed as follows:

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Doreen Hamrick
Doreen Hamrick

SUBSCRIBED AND SWORN TO before me this 10th day of October, 2008

Ann Marie Monger
(PRINTED NAME:) Ann Marie Monger
NOTARY PUBLIC in and for the State of Washington
Residing at Port Angeles, Washington
My commission expires: 10/21/2008