

IN THE COURT OF APPEALS OF STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

Respondent,

v.

ROBERT R. DALTON

Appellant.

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MASON COUNTY
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ON APPEAL FROM THE SUPERIOR COURT OF THE STATE
WASHINGTON, MASON COUNTY

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

Issue Relating the Assignment of Error

1. The trial judge erred when she found that Mr. Dalton's pain was relieved by standard medical treatments and medications. Finding of Fact 6.
2. The trial judge erred in construing the phrase "unrelieved by standard medical treatments and medications" to mean that the patient had to use other controlled substances such as opiates rather than marijuana even if he was allergic to them, they had noxious side-effects, were addictive and prevented him from working.
3. The trial judge abused her discretion when she found that Dr. Orvald was not a credible witness.
4. The trial judge erred in finding Dalton guilty when he was reasonably relying on the authorization provided by his doctor.

Issues Pertaining to the Assignments of Error

1. Did the trial judge err as a matter of law when she construed the statute to deprive Dalton of a defense if there were any other medical treatment available even if those other treatments involved the use of addictive opiates to which he was allergic, prevented him from working and had noxious side affects?

2. Did the trial judge err when she appeared to find that Dr. Orvald was not credible?
3. Was Dalton permitted to reasonably rely on his statutorily and facially valid medical marijuana authorization and avoid conviction?

B. STATEMENT OF THE CASE

1. Procedural Facts

Robert Dalton was charged with manufacturing marijuana on his property in August 2007. CP 1-2. There were numerous pretrial hearings centering on Dalton's claim that his manufacture was not prohibited by law because he had a valid authorization to use medical marijuana under RCW 69.51A. Eventually, the only remaining issue in the case was whether Dalton suffered from a qualifying medical condition.¹

Dalton was convicted as charged. CP 432-35. Judgment and sentence were entered. CP 436-445. This timely appeal followed. CP 448-49.

2. Relevant Facts

There was no dispute that 1) Dalton was growing marijuana, 2) he had a medical marijuana authorization, 3) he presented the authorization to

¹ There was also a great deal of litigation about whether the marijuana he possessed exceeded a sixty-day supply but the judge never reached that issue. CP 434-35.

the police when they arrived, and 4) the authorization was signed by a medical doctor licensed to practice in Washington. CP 432-433.

Dalton testified that:

I was growing marijuana because I have a Washington State medical marijuana authorization to possess and grow marijuana for medical purposes.

9/11/08 RP 3. Dalton stated that he had severe deterioration in his spine and muscle spasms. *Id.* at 4. Marijuana controlled the pain in his spine and reduced his muscle spasms. *Id.*

He said he had used opiates but discontinued using them because he was allergic to them, they didn't work very well and at the proper dosage he became too incapacitated by the opiate to work. *Id.* at 6, 7. He also noted that opiates were very addictive. *Id.* at 6. He continued to use some other supplemental drugs periodically for the muscle spasms. *Id.*

Dalton had seen other doctors for his pain, including a neurosurgeon at Group Health. *Id.* at 7.

Dr. Thomas Orvald testified that he was a licensed medical doctor living in Yakima. 9/10/08 RP 63. He trained as a thoracic and cardiovascular surgeon. *Id.* At the time he treated Dalton, he was working for THCF Clinic in Bellevue on issues related to chronic pain. *Id.* at 66.

Orvald stated that patients at his clinic had to provide their previous medical records. *Id.* at 70. Then a nurse who performed a physical examination saw them. *Id.* at 71. The nurse also reviewed the medical records. Eventually, he would make a diagnosis. Dalton's medical records were admitted as Exhibit 22.

Orvald saw Dalton in 2005 and 2007. He diagnosed Dalton as suffering from "chronic pain related to trauma" and degenerative disc disease. RP 73-74. He noted that Dalton had previously been treated with opiates but that those had had significant side effects. RP 75. He said that marijuana did not have those side effects and relieved the pain. RP 80.

3. *The Trial Judge's Ruling*

The trial judge determined that Dalton failed to prove by a preponderance of the evidence that he was a qualifying patient. CP 434.

In her written findings she found that:

Mr. Dalton's pain was relieved by standard medical treatments and medications. He has used and continues to use prescription muscle relaxants to relieve the spasms that cause pain. However, he preferred to supplement that regime with marijuana than the standard pain medications he had tried.

RP 433.

In her oral ruling, the trial judge made it clear that she did not credit Dr. Orvald's diagnosis or approval of the medical marijuana. She stated that:

What is pertinent is that he is intimately involved with establishing clinics in Washington and Oregon States to medically dispense marijuana. He was enthusiastic about the use of marijuana and he felt it was underutilized by traditional medicines. His bias is clearly in favor of the use of marijuana.

9/19/10 RP 16. She noted that Dr. Orvald saw 41-42 patients a day and “roughly 85 percent are granted a medical use marijuana card.” *Id.* She was critical of the fact that Dr. Orvald’s nurse did the physical examination. She also noted that:

In contrast to Dr. Orvald’s recommendation of medical use of marijuana, I note that one of Mr. Dalton’s prior physicians rejected the notion of medical marijuana when Mr. Dalton asked about it. Undeterred, Mr. Dalton sought out a second opinion from Dr. Orvald. These concerns I have expressed taint Dr. Orvald’s conclusion that Mr. Dalton is a qualifying patient.

RP 16.² The court concluded that because opiates could relieve Mr. Dalton’s pain, even though they had side effects unacceptable to Mr. Dalton or Dr. Orvald, Dalton did not have “pain unrelieved by standard medical treatments and medications.” *Id.*

The Court found that because Dalton was not a qualifying patient he was not allowed to have marijuana at all. Therefore, she did not reach the 60-day supply issue. RP 433-34.

² The Court also noted that other doctors recommended physical therapy and a “precise regimen of aerobic and weight training exercises” but that “there was no testimony that Mr. Dalton fully complied with any of these directions.” *Id.* at 16

C. ARGUMENT

1. The Trial Judge Erred as a Matter of Fact and Law when She Found that Mr. Dalton's Pain was Relieved by Standard Medical Treatments and Medications

By passing Initiative 692 (I-692), the Medical Marijuana Act, the people of Washington intended that:

[q]ualifying patients with terminal or debilitating illnesses who, in the judgment of their physicians, would benefit from the medical use of marijuana, shall not be found guilty of a crime under state law for their possession and limited use of marijuana.

RCW 69.51A.005.

A “qualifying patient” is a person 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; and
- (e) Has been advised by that physician that they may benefit from the medical use of marijuana.

RCW 69.51A.010(3). A “terminal or debilitating condition” includes:

Intractable pain, limited for the purpose of this chapter to mean pain unrelieved by standard medical treatments and medications.

RCW 69.51A.010(4)(b).

In this case, the judge erroneously found that that Dalton's pain was relieved by standard medical treatments. As a matter of fact, Dalton did testify that his pain was lessened by the opiates but that the pain was substituted with other equally onerous consequences including the prospect of addiction, noxious side affects and the inability to work. This testimony was unrebutted. Relief is defined as diminishing easing all of the consequences of the pain, not just replacing the pain with other physical and emotional distress.

Mr. Dalton's unchallenged testimony was also that he was allergic to opiates. Thus, as a matter of reasonable medical practice, his symptoms could not be relieved by "standard medical treatments and medications" because he could not take those drugs.

The Act standard does not define "standard medical treatments" either. The State did not present any expert evidence on this issue. But, the testimony of Dr. Orvald suggested that the many doctors prescribe powerful, potentially addictive opiates that are, ironically, also controlled substances.³

³ Had Dr. Orvald prescribed opiates, Mr. Dalton would have had a complete defense under RCW 69.50.4013, which permits possession of controlled substances with a valid prescription.

Furthermore, the judge's strained interpretation of the Act's ambiguous requirements runs counter to the stated purpose of the Act. Former RCW 69.51A.005 (1999) sets forth the purpose and intent of the Act:

The people of Washington State find that some patients with terminal or debilitating illnesses, under their physician's care, may benefit from the medical use of marijuana....

The people find that humanitarian compassion necessitates that the decision to authorize the medical use of marijuana by patients with terminal or debilitating illnesses is a personal, individual decision, based upon their physician's professional medical judgment and discretion.

Therefore, the people of the state of Washington intend that:

Qualifying patients with terminal or debilitating illnesses who, in the judgment of their physicians, would benefit from the medical use of marijuana, shall not be found guilty of a crime under state law for their possession and limited use of marijuana;

Persons who act as primary caregivers to such patients shall also not be found guilty of a crime under state law for assisting with the medical use of marijuana.

“A fundamental rule of statutory construction is that the court must interpret legislation consistently with its stated goals.” *Tunstall v. Bergeson*, 141 Wash.2d 201, 211, 5 P.3d 691 (2000) (citing *Weyerhaeuser Co. v. Tri*, 117 Wash.2d 128, 140, 814 P.2d 629 (1991)), *cert. denied*, 532 U.S. 920, 121 S.Ct. 1356, 149 L.Ed.2d 286 (2001). To ascertain legislative

intent, we look to the statute's declaration of purpose. *Donohoe v. State*, 135 Wash. App. 824, 844, 142 P.3d 654 (2006).

Consistent with the Act's stated purpose, and the State's failure to present any countervailing evidence on the issue, Mr. Dalton should not be required to take opiates instead of marijuana if he is allergic to them, they have noxious side effects and then render him unable to work. The intent of the Act simply does not require that kind of narrow and unreasonably restrictive interpretation. Here, the judge simply ignored the stated purpose of compassion and its statement that the use of medical marijuana is a personal, individual decision, based upon their physician's professional medical judgment and discretion.

2. The Trial Judge Abused Her Discretion in Finding that Dr. Orvald was Not Credible

The trial judge based her decision that Dr. Orvald was not credible on the belief that he favored the use of marijuana for pain relief over the use of opiates. This was an abuse of discretion.

Dr. Orvald gave a lucid, expert opinion on the risks, side-effects and dangers of opiates. This testimony was un rebutted. He explained that the use of medical marijuana did not present the same kind of health risks. This testimony was also un rebutted. Thus, his "bias" in favor of medical

marijuana was based upon his expertise as a physician. That hardly makes him “incredible.”

The use of a paraprofessional to perform the patient’s initial examination is a common practice in the medical profession. Moreover, unlike many doctors, he did not rely on the patient’s recitation of his medical history. Instead, he requires patients to provide actual copies of their previous medical records.

Doctors are permitted, by virtue of their education and license, to determine which medication is the safest for their patients. Surely the trial judge would not find a doctor “incredible” if he examined a patient found the patient had high blood pressure and recommended prescription medication as opposed to simply “diet and exercise.”

In addition, the judge’s ruling violates RCW 69.51A.030. That statute states:

A physician licensed under chapter 18.71 or 18.57 RCW shall be excepted from the state’s criminal laws and shall not be penalized in any manner, or denied any right or privilege, for:

- (1) Advising a qualifying patient about the risks and benefits of medical use of marijuana or that the qualifying patient may benefit from the medical use of marijuana where such use is within a professional standard of care or in the individual physician’s medical judgment; or
- (2) Providing a qualifying patient with valid documentation, based upon the physician’s assessment

of the qualifying patient's medical history and current medical condition, that the medical use of marijuana may benefit a particular qualifying patient.

Here, the judge penalized Dr. Orvald by finding him incredible simply because he advised Mr. Dalton on the use of medical marijuana and provided him with a valid authorization.

In this case, the defense was correct when it argued that the trial judge was simply second-guessing Mr. Dalton's chosen physician rather than impartially examining Dr. Orvald's unrebutted testimony.

3. Dalton Reasonably Relied Upon His Physician's Authorization that He was A Qualified Patient

Under the Medical Use of Marijuana Act, Washingtonians who believe they will benefit from medical marijuana must consult with a licensed doctor and receive authorization. RCW 69.51A.040(2).⁴ This Court should not allow these patients, all of who suffer from serious medical problems, to be punished when their doctor has erroneously authorized their use of medical marijuana.

The Supreme Court has recently held that a party who reasonably relies on an authorization that appears legitimate will not face criminal liability when it is later learned that the authorization was erroneous. *State*

⁴ There is no requirement that the authorization specify the condition with which the patient has been diagnosed. RCW 69.51A.010(5)(a).

v. Minor, 162 Wash.2d 796, 174 P.3d 1162 (2008). In *Minor*, the defendant was convicted of residential burglary, but the juvenile sentencing court failed to check the appropriate paragraph indicating that the defendant could not possess firearms. *Id.* at 800-01. Several years later, the defendant was convicted in juvenile court with two counts of unlawful possession of a firearm in the first degree. *Id.* at 799. The Court of Appeals affirmed because it found that the young man had not shown any reliance on the mistake or prejudice resulting from the trial court's affirmative acts. *Id.* at 800. The Court reversed, concluding that the failure to check this paragraph "affirmatively represented to [the defendant] the firearm prohibition did not apply to him." *Id.* at 804.

Criminal defendants have long been able to defend charges on the basis of reliance upon misleading governmental conduct, *see Raley v. Ohio*, 360 U.S. 423, 438-39, 79 S.Ct. 1257, 3 L.Ed.2d 1344 (1959) (convictions overturned where an "agent of the State" was "active[ly] misleading"); *United States v. Clegg*, 846 F.2d 1221 (9th Cir. 1988) (reasonable reliance defense available to defendant charged with illegally providing weapons to Afghan rebels), but courts have also expanded the contours of this defense to authorizations from quasi-government actors such as federally licensed firearms dealers. *See United States v. Tallmadge*, 829 F.2d 767 (9th Cir. 1987) (conviction for illegal possession

of firearms overturned after defendant was misled by firearms dealer and his defense attorney).

This “misleading governmental conduct” defense is closely related to the estoppel defense. To defend on these grounds, a defendant must show more than that they were “subjective[ly] misled, and that the crime resulted from [their] mistaken belief.” *United States v. Lansing*, 424 F.2d 225, 227 (9th Cir. 1970). In addition, the defendant must show that their reliance on the inaccurate information was objectively reasonable under the particular facts of the case. *State v. Locati*, 111 Wash. App. 222, 227, 43 P.3d 1288 (2002). The *Locati* court described some of the factors in this reasonableness analysis as including (1) the authority of the source providing the misleading information, and (2) whether the defendant received inconsistent information from the same or different source. *Id.* at 228. The defendant in *Locati* was unable to assert the reasonable reliance defense because, although he had received permission from his community corrections officer that he could own a firearm, his reliance on these assurances became “untenable when ... two police officers warned Mr. Locati in no uncertain terms that he was mistaken, that he could not possess firearms, and, therefore, had to ‘get rid of’ his guns.” *Id.*

Applying these reasonableness factors to this case, Dalton received authorization to use medical marijuana from a source – his state-licensed

doctor – that any patient would reasonably assume had authority to grant authorization. Unlike the defendant in *Locati*, Dalton never received any inconsistent information that may have led him to believe that his condition was not covered by the Act. Thus, Dalton’s reliance was objectively reasonable.

Here, assuming the trial judge can second-guess Dr. Orvald, Dalton was affirmatively misled by his doctor’s authorization to use medical marijuana. Although his doctor was not a direct government actor, the *Tallmadge* court allowed for the reasonable reliance defense where the defendant relied on advice from a federally licensed firearms dealer. Similarly, Dalton’s doctor was licensed by the state of Washington to practice medicine and authorize the medical use of marijuana. Therefore, this Court should refuse to hold Dalton criminally liable because he reasonably relied on an authorization that was later found to be erroneous, through no fault of his own. A ruling to the contrary will send the message to Washington’s medical marijuana users that they can no longer reasonably rely upon their doctor’s authorization, but instead must verify through independent sources that they are indeed a “qualifying patient,” an onerous task indeed.

The reasonable reliance defense has well-recognized corollaries in other areas of the law. For example, a defendant charged with criminal

trespass may defend on such grounds where they “*reasonably believed* that the owner of the premises ... would have licensed him to enter or remain.” RCW 9A.52.080 (emphasis added); *see also State v. Montague*, 10 Wash. App. 911, 916-20, 521 P.2d 64 (1974), *review denied*, 84 Wash.2d 1004, -- P.2d -- (1974) (discussion of “reasonable belief” defense in burglary case). A person accused of theft has a defense if she appropriated the subject property or service openly and avowedly under a claim of title made in good faith, even if the claim is untenable. RCW 9A.56.020(1)(a); *State v. Mora*, 110 Wash. App. 850, 43 P.3d 38, *review denied*, 147 Wash.2d 1021, 60 P.3d 92 (2002). Similarly, a person is not guilty of possession of a controlled substance if the possession is unwitting. This unwitting possession defense requires the defendant to show by a preponderance of the evidence that he did not know the substance was in his possession or he did not know the nature of the substance. *State v. Olinger*, 130 Wash. App. 22, 26, 121 P.3d 724 (2005), *review denied*, 157 Wash.2d 1009, 139 P.3d 350 (2006) (*citing* 11 Wash. Pattern Jury Instructions: Criminal 52.01 (2d ed. 1994)). The unwitting possession defense is a “judicially created affirmative defense that may excuse the defendant’s behavior, notwithstanding the defendant’s violation of the letter of the statute.” *State v. Rowell*, 138 Wash. App. 780, 785, 158 P.3d 1248 (2007), *review denied*, 163 Wash.2d 1013, 180 P.3d 1291

(2008) (citing *State v. Buford*, 93 Wash. App. 149, 151-52, 967 P.2d 548 (1998)). In each of these contexts, those charged with crimes are not held criminally liable because they lack the requisite culpable mental state.

4. *This Case is Distinguishable from State v. Tracy and State v. Fry,*

This case can be distinguished from the Court's most recent consideration of the Medical Use of Marijuana Act. In *State v. Tracy*, 158 Wash.2d 683, 147 P.3d 559 (2006), the defendant had received a valid California medical marijuana card to help ease her chronic pain from a hip deformity, migraine headaches, and a series of corrective surgeries for various intestinal conditions. *Tracy*, 158 Wash.2d at 687. Sharon Tracy had also received authorization from an Oregon doctor who agreed that she could benefit from medical marijuana. *Id.* at 686. When she was charged in Washington with unlawful possession and manufacture of marijuana, Tracy sought to assert the compassionate use defense. *Id.* After analyzing the statutory language of the Act, this Court affirmed the Court of Appeals' decision that Tracy was not a qualifying patient because she had not received authorization from a doctor licensed in Washington. *Id.* at 690.

There is a significant distinction, however, between the requirement that a patient seeking to avail herself of Washington's

medical marijuana law obtain authorization from a Washington licensed doctor and the suggestion that a patient may be held criminally responsible for that doctor's mistake in authorizing the medical use of marijuana. It is reasonable to expect that a medical marijuana patient would question whether an authorization from an out-of-state doctor would be recognized in Washington; the political debate over various states legalizing the medical use of marijuana continues to receive extensive media coverage, and it is widely understood that not all states have approved medical marijuana laws. On the other hand, it is unreasonable to expect a patient such as Mr. Dalton to question whether he qualified as a patient after a doctor licensed in the state in which he resided had examined and diagnosed him, and then issued him medical authorization to use marijuana.

Moreover, this case is distinguishable from *State v. Fry*, 168 Wash.2d 1, -- P.3d -- (2010). In *Fry*, the doctor listed "severe anxiety, rage, depression related to childhood" as the debilitating medical condition. But those conditions are not listed in the statute. See RCW 69.51A.010(4). By contrast, Mr. Dalton's condition is listed in the statute. The Act specifically states that medical marijuana is appropriate for "intractable pain, limited for the purpose of this chapter to mean pain unrelieved by standard medical treatments and medications." RCW

69.51A.010(b). Thus, it was reasonable for Mr. Dalton to rely on his doctor when his doctor diagnosed him as suffering from a condition specifically listed in the statute.

D. CONCLUSION

Respectfully submitted this 6th day of May, 2010.



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Certificate of Service by Mail

I declare under penalty of perjury that on May 6, 2010, I placed a copy of this document in the U.S. Mail, postage prepaid, to:

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