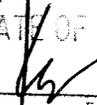


FILED
COURT OF APPEALS
DIVISION II

NO. 38460-4-II

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

10 SEP -3 PM 12:27
STATE OF WASHINGTON

BY  DEPUTY

STATE OF WASHINGTON,

Respondent,

v.

ROBERT DALTON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 07-1-01234-4

BRIEF OF RESPONDENT

RUSSELL D. HAUGE
Prosecuting Attorney

JEREMY A. MORRIS
Deputy Prosecuting Attorney

614 Division Street
Port Orchard, WA 98366
(360) 337-7174

SERVICE

Suzanne Elliott
Ste. 1300, 705 2nd Ave
Seattle, WA 98104

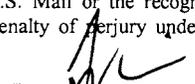
This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED September 3, 2010, Port Orchard, WA 
Original AND ONE COPY filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

I. COUNTERSTATEMENT OF THE ISSUES.....1

II. STATEMENT OF THE CASE.....1

III. ARGUMENT.....13

 A. THE TRIAL COURT DID NOT ERR IN CONCLUDING THAT DALTON HAD NOT CARRIED HIS BURDEN OF PROVING THE AFFIRMATIVE DEFENSE OF THE MEDICAL USE OF MARIJUANA BECAUSE SUBSTANTIAL EVIDENCE SUPPORTED THE TRIAL COURT’S FINDING THAT DALTON HAD FAILED TO SHOW THAT HE WAS A QUALIFYING PATIENT UNDER THE ACT.....13

IV. CONCLUSION.....24

TABLE OF AUTHORITIES
CASES

Brewer v. Copeland, 86 Wn. 2d 58, 542 P.2d 445 (1975).....14

Rognrust v. Seto, 2 Wn. App. 215, 467 P.2d 204 (1970).....14

State v. Aase, 121 Wn. App. 558, 89 P.3d 721 (2004)14

State v. Cord, 103 Wn. 2d 361, 693 P.2d 81 (1985).....14

State v. Fry, 142 Wn. App. 456, 174 P.3d 1258 (2008)10

State v. Fry, 168 Wn. 2d 1, 228 P.3d 1 (2010) 15, 18-20, 23, 24

State v. Hendrickson, 46 Wn. App. 184, 730 P.2d 88 (1986).....14

State v. Stevenson, 128 Wn. App. 179, 114 P.3d 699 (2005) ..13, 14

State v. Teal, 152 Wn. 2d 333, 96 P.3d 974 (2004).....15

State v. Walton, 64 Wn. App. 410, 824 P.2d 533 (1992).....14

Swenson v. Lowe, 5 Wn. App. 186, 486 P.2d 1120 (1971).....14

In re Watson, 25 Wn. App. 508, 610 P.2d 367 (1979)14

STATUTES

Former RCW 69.51A.005.....23

RCW 69.51A.0101, 2, 15

RCW 69.51A.0402

I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the Trial Court erred in concluding that Dalton had not carried his burden of proving the affirmative defense of the medical use of marijuana when substantial evidence supported the trial court's finding that Dalton had failed to show that he was a qualifying patient under the Act?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Robert Dalton was charged by amended information filed in Kitsap County Superior Court with one count of Manufacture of Marijuana. CP 384.¹ Dalton waived his right to a jury trial and was convicted following a bench trial, and the trial court imposed a standard range sentence. CP 383, 432, 436. This appeal followed.

B. FACTS

Both in the trial court and on appeal, Dalton has conceded that he was growing marijuana. See App.'s Br. at 2-3, RP (9/11/08) at 3. The only issue below, therefore, was whether the medical marijuana defense applied.

The Medical Use of Marijuana Act found in RCW 69.51A establishes an affirmative defense for the medical use of marijuana in certain situations. Specifically, the act provides that "qualifying patient" who is engaged in the

¹ The amended information also included a count of possession of marijuana with intent to manufacture or deliver, but this count was dismissed prior to trial. CP 384, 418.

medical use of marijuana has an affirmative defense as long as he or she proves that they acted in compliance with the Act. RCW 69.51A.040. The phrase “qualifying patient” is defined in the statute and requires that the person have been diagnosed as “having a terminal or debilitating medical condition.” See former RCW 69.51A.010(4)(b) (2007).² “Terminal or debilitating medical condition” is also defined in the statute and includes a number of conditions including “Intractable pain, limited for the purpose of this chapter to mean pain unrelieved by standard medical treatments and medications.” See former RCW 69.51A.010(6)(b) (2007). Finally, the Act requires, among other things, that the qualifying patient must “meet all criteria for status as a qualifying patient” and possess no more than a “sixty-day supply” of marijuana. RCW 69.51A.040.

In the present case the State argued that Dalton did not qualify for the affirmative defense because he did not meet the requirements for being a “qualifying patient” and because he possessed more than a sixty-day supply of marijuana. RP 546. Dalton argued that he met all of the statutory requirements. RP 555-56.

² Portion of the Act were amended in 2010, although none of the amendments are relevant to the present case.

At trial, the majority of the statutory requirements were not at issue.³ Rather, the sole issues were whether Dalton had established that: (1) he had been diagnosed with a debilitating medical condition that caused intractable pain “unrelieved by standard medical treatments and medications;” and (2) that he had no more than a sixty day supply of marijuana.

In support of his defense, Dalton presented testimony from Dr. Thomas Orvald. RP 366. Although he previously worked as a surgeon, Dr. Orvald’s testified that he now works for the “THCF group, which is a hemp and cannabis group,” where he typically sees approximately 40 patients a day. RP 368-69, 371-72.

Dr. Orvald testified that he had seen Dalton as a patient and that he diagnosed Dalton with “chronic pain related to trauma.” RP 377. Specifically, Dr. Orvald explained that Dalton had a “significant fracture to his right forearm and associated multi-level degenerative disk disease.” RP 378. Dr. Orvald also noted that Dalton had previously been treated in a “traditional fashion” with the use of narcotics, but Dr. Orvald noted those medications have side effects. RP 379-80.

³ For instance, there was no dispute that Dalton possessed a medical marijuana authorization and presented this to the police at the appropriate times, and that a licensed doctor signed the authorization.

On direct examination, Dr. Orvald discussed his views on intractable pain unrelieved by standard medications as follows:

Q . . . Doctor, when they say – and again, we – we have a definition in the statute of intractable pain to be chronic pain unrelieved by standard medications.

When someone has side effects from a particular medication, is that part of what you would consider to be the standard treatment?

In other words, you – if your pain – if you had someone – this is a very difficult area to split here.

If you had someone that had pain and the got relief – some relief from that pain with the narcotics, but they were not able to tolerate those narcotics, they just – the side effects became too much for them; they can't sleep, they can't eat, things like that. Is that, medically speaking – in your opinion, is that pain unrelieved by standard medications?

A. I don't think I would be willing to say, "unrelieved." But I would say that the traditional use of medications by most physicians in this country have – in addition to pure pain relief, they have significant noxious side effects, which when used long term can result in addiction and serious complications from the medications themselves

RP 380.

On cross-examination, Dr. Orvald identified and discussed an "eligibility questionnaire" that Dalton filled out when he visited Dr. Orvald.

RP 400-02. Dr. Orvald acknowledged that the form asked Dalton to list the current and former medications that he used, and that Dalton listed no current medications that would help to relieve pain. RP 402. Dr. Orvald also acknowledged that the form did not indicate what medications Dalton had

taken to relieve pain in the past. RP 405. Another form also asked what medications and treatments Dalton had tried in the past, and Dr. Orvald acknowledged that “Percocet” was the “only narcotic that [was] mentioned specifically.” RP 408-09. The State then asked if Dr. Orvald was aware of any other pain medications or treatments that Dalton had tried in the past, and Dr. Orvald responded that he was aware that Dalton had tried physical therapy and exercises in the past. RP 409. The State then asked,

And as to the narcotic medication, has there been other narcotic medication prescribed to the defendant, that’s to your knowledge, besides the Percocet that the defendant listed?

RP 409. Dr. Orvald responded,

At this point in time the only one I can define is Percocet, but the tradition is to try to use any one of a number of different narcotic entities or combinations when a physician tries to control pain.

RP 409. Dr. Orvald implied that Dalton had possibly tried other narcotic medications (although Dr. Orvald never mentioned any by name), and that,

He [Dalton], to my recollection, said that the – the analgesia, that is the effect that a narcotic has on a control pain, was apparent but that the attendant symptoms made his pain medication unacceptable and he was not willing in – in continuing with these medications.”

RP 410. Dr. Orvald then essentially summed up Dalton’s complain as, “I’m using medications that control my pain, but they have side effects.” RP 410.

Dalton also testified at trial. RP 499. Dalton mentioned that he had tried using Percocet or opiates in the past, but that they gave him a “long-lasting kind of a rummy effect” and could cloud his vision. RP 500. Dalton explained that he worked as a longshoreman on the waterfront in Tacoma and that the pain medications he took interfered with his ability to operate the machinery at his work. RP 500-01. Dalton, however, did not deny that the standard medications relieved his pain. RP 533.

At the conclusion of the evidence, the State argued that Dalton had failed to carry his burden regarding the affirmative defense because he had failed to show that he was a “qualifying patient” because he did not show that his pain was “unrelieved by standard treatments or medications.” RP 546. Rather, the State pointed out that Dr. Orvald and Dalton both explained that the standard medications were working to relieve Dalton’s pain, although the medications also had side effects that Dalton preferred not to have. RP 546.

Dalton argued that the court could not second guess a doctor’s opinion and the *State v. Ginn* stood for the proposition that once a doctor finds that a patient qualifies for medical marijuana the court cannot second guess that diagnosis,

Mr. Dalton has that qualifying condition. Dr. Orvald testified to it. He’s a doctor licensed to practice in the state of Washington. The evidence is in. He is a qualifying patient. That’s it.

RP 555-56.

The trial court then issued a lengthy oral ruling, prefacing her ruling with the following comments:

This Court was the finder of fact and bound by the same familiar restrictions that we place on jurors. You've heard this before. As officers of this court, you should permit neither sympathy nor prejudice to influence your decisions.

Further, in terms of defining the law, it is important that trial courts not base their decisions on personal preferences or policy decisions. If a statute is clear, a trial court is bound to honor the plain language. What this means is that I have not permitted compassion, nor sympathy, nor prejudice, nor personal preference to enter into this decision.

Secondly, in addition to the restrictions placed on a fact finder comes great responsibility and, concurrently, great authority. As trier of fact, analysis of the credibility of the witnesses and the weight to be given to the testimony of each is left to this Court's judgment.

This applies both to fact witnesses and expert witnesses. The defense has argued that some enhanced status should be given to Dr. Orvald, and that will be discussed later.

As a general proposition, however, the trier of fact properly considers bias, prejudice, manner on the stand, the reasonableness of the testimony of the witnesses together with any other factors bearing on believability when making those credibility assessments.

RP 589-90.

The trial court first found that State had proven that Dalton was growing marijuana at his property, and the Court then turned to the affirmative defense, noting that most of the issues were not disputed and that the

contested issues were whether Dalton was a “qualifying patient” and whether he possessed more than a sixty-day supply. RP 592-94. After noting that Dalton had the burden of proof on the affirmative defense, the trial court stated that:

Mr. Dalton must show must show that he has been diagnosed by Dr. Orvald as having a terminal or debilitating medical condition.

Dr. Orvald diagnosed Mr. Dalton as having chronic pain related to a fracture in his right arm, and chronic pain related to degenerative disk disease, which was triggered by the aging process and trauma.

The statute defines a “terminal or debilitating medical condition as one of intractable pain unrelieved by standard medical treatments or medications.”

Obviously the question to be answered is whether chronic pain from degenerative disk disease and fractured nondominant arm meets the statutory definition of intractable pain.

The defense argues that at this point in my analysis the statute and case law mandate that a trial court accept the doctor’s interpretation of the statutory language as binding and no further evaluation is necessary.

I believe Mr. Hiatt used the vernacular that judge should not second-guess the doctor. This statute – or this argument is contrary to longstanding jurisprudence regarding the authority of a trier of fact, and, consequently, requires some thought.

As we all know, jurors are instructed that they are the sole judges of the credibility of the witnesses; they are also particularly instructed about experts. They are told that they are not bound by the opinions of experts, and in determining the credibility and weight to be given that opinion evidence, they may consider, among other things, the education, training, experience, knowledge, and ability of that witness;

the reasons given for the opinion, the sources of the witnesses' information; together with the other factors already given to them, including bias, prejudice, et cetera.

To accept Mr. Dalton's argument regarding the deference to be accorded Dr. Orvald, is to reject decades of this jurisprudence.

At this point I think it is important to talk about *State v. Ginn*. That case was described by counsel as holding that the doctor is the sole gatekeeper. That a trial court in a bench trial may not second-guess a doctor's authorization. I find that that is too broad of a reading of *State v. Ginn*. That case is found at 128 Wn. App. 875.

First, the factual situation and the procedural situation of the *Ginn* case are distinguishable from the instant case. The court in that case clearly held that they were not being asked to decide whether Ginn proved the medical use defense by a preponderance of the evidence; instead, they were asked to decide whether he had presented sufficient evidence to allow the jury to consider the defense. They went on to say that in that situation a trial court must interpret the evidence most strongly in favor of the defendant. Significantly, that court went on to say that the jury, not the judge, must weigh the proof and evaluate the witnesses's credibility.

We had a hearing on this very issue as a preliminary matter. And based on *State v. Ginn*, I allowed the defense to put on evidence on the medical use of marijuana defense. The evidence that was presented to me at that point was evaluated in a light most favorable to Mr. Dalton. But clearly, *State v. Ginn* holds to the contrary that at some point a jury, in this case a judge, must weigh the proof and evaluate those expert witnesses's credibility.

There was no holding that the jury should not evaluate the credibility of the witness, the doctor. To the contrary, there was a clear statement that that very process is anticipated.

There is nothing in this case compelling enough to shield the doctor's testimony from the typical evaluation by a trier of fact.

RP 594-97. The trial court later discussed another case, *State v. Fry*, 142 Wn. App. 456, 174 P.3d 1258 (2008), and noted that it provided some guidance on the issue of the deference to be given to the doctor in a medical marijuana case. RP 601. Specifically, the trial court below stated that,

The Court of Appeals in [*Fry*] again endorsed a plain reading of the statute. The defendant's diagnosis was severe anxiety and anger. And it was not among those listed in the statute, so the Court of Appeals held that he was not a qualifying patient. This was in the face of the fact that he had a medical use card, presumably signed by a physician who had believed that Mr. Fry was a qualifying patient. The Court of Appeals disagreed, and that is what governs my analysis.

Based on that case, the history of the statutory changes, and the plain directive in *State v. Ginn*, a trier of fact is free to evaluate the opinion of a medical provider and accept it or reject it.

RP 601-02. The trial court then explained its assessment of the evidence and its conclusion:

Dr. Orvald was an interesting and charming fellow. His work on heart surgeries was impressive and his charitable work in Third World countries was admirable. However, those attributes have nothing to do with the value of his opinion that Mr. Dalton was a qualifying patient.

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 indicated that he felt it was underutilized by traditional medicines. His bias is clearly in favor of the use of medical marijuana. More particularly to Mr. Dalton, he saw Mr. Dalton at the Bellevue branch of the THC

Foundation clinic. On a typical day at that clinic Dr. Orvald sees between 41 and 42 people per day. Thus, if he spent eight hours at the clinic without any breaks for water, coffee, or bathroom, he met with each patient sometime between 11 and 12 minutes per person. Presumably, this is the same amount of time he spent with Mr. Dalton at the initial meeting and at the renewal appointment.

Of the people he sees at the clinic, roughly 85 percent are granted a medical use marijuana card. Dr. Orvald does little of the medical records review or physical exam of patients leaving that to other staff at the clinic.

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 that I've expressed taint Dr. Orvald's conclusion that Mr. Dalton is a qualifying patient.

Further, and frankly, more significant, was Dr. Orvald's actual testimony. The plain language of the statute requires medical marijuana to be a drug of last resort for patients with intractable pain, not a drug of first resort. The pain must be unrelieved by standard medical treatments or medications. The plain language strongly suggesting that you have to try other medical treatments and medications before turning to medical marijuana. Dr. Orvald, when asked the question, quite honestly answered, "I don't think I would be willing to say unrelieved."

Certainly there was a lot of attempts to rehabilitate Dr. Orvald's testimony, but he was clear that the concern he had with medical marijuana and standard treatments was the side effects from the standard treatments, not the efficacy.

In sum, Dr. Orvald's testimony did not supply Mr. Dalton with the proof necessary to show he was a qualifying patient. There was, of course, other evidence. Chief among that was Mr. Dalton's testimony. Again, the focus of the complaints was the side effects, and he admitted that he was provided relief by some narcotics medication.

Mr. Dalton also indicates he continues to use muscle relaxants to reduce the spasms. A review of his medical records shows that he was prescribed only one narcotic, Percocet. He didn't like the side effects of that medication, but he admitted and Dr. Orvald testified that it did reduce his pain.

Other standard medical treatments were recommended to Mr. Dalton, including physical therapy, a very precise regimen of aerobic and weight-training exercise. There was no testimony that Mr. Dalton fully complied with any of these directions, and there was no testimony that such attempts were unsuccessful.

As the Court did in *State v. Fry*, this Court is going to use the plain language of the statute to resolve these questions. Mr. Dalton is only a qualifying patient if his intractable pain is unrelieved by standard treatments and medications. He has not sustained his burden on this point.

RP 602-05. The trial court then concluded that,

Mr. Dalton is not a qualifying patient as defined in RCW 69.51A. Since he is not a qualifying patient, he is not permitted to have in his possession any marijuana, and the determination of what a 60-day supply is for him is moot. Mr. Dalton stands convicted of the crime of manufacturing marijuana.

RP 606.

The trial court later entered written findings of fact consistent with its oral ruling and imposed a standard range sentence. CP 432, 436. This appeal followed.

III. ARGUMENT

A. THE TRIAL COURT DID NOT ERR IN CONCLUDING THAT DALTON HAD NOT CARRIED HIS BURDEN OF PROVING THE AFFIRMATIVE DEFENSE OF THE MEDICAL USE OF MARIJUANA BECAUSE SUBSTANTIAL EVIDENCE SUPPORTED THE TRIAL COURT'S FINDING THAT DALTON HAD FAILED TO SHOW THAT HE WAS A QUALIFYING PATIENT UNDER THE ACT.

Dalton contends that the trial court erred by finding that he had not proven his affirmative defense under the Medical Use of Marijuana Act—chapter 69.51A RCW. Specifically, Dalton argues that the court erred by finding that “Dalton’s pain was relieved by standard medical treatments” and by finding that Dr. Orvald was not credible. These claims are without merit for several reasons. First, the trial court’s conclusion that Dalton had failed to prove that his pain was “unrelieved by standard medical treatments” was supported by the record. Secondly, the trial court did not specifically find Dr. Orvald to not be credible, rather the trial court found that his testimony failed to show that Dalton’s pain was “unrelieved by standard medical treatments.” As the record supported this finding, the trial court did not err.

Following a bench trial, an appellate court is to determine whether substantial evidence supports the trial court's findings of fact and whether the findings support the conclusions of law. *State v. Stevenson*, 128 Wn. App. 179, 193, 114 P.3d 699 (2005). Substantial evidence is “evidence sufficient

to persuade a fair-minded, rational person of the finding's truth.” *Stevenson*, 128 Wn. App. at 193. Where the findings of fact and conclusions of law are supported by substantial but disputed evidence, an appellate court cannot disturb the ruling. *State v. Aase*, 121 Wn. App. 558, 564, 89 P.3d 721 (2004).

An appellate court also is to accord a trial court's factual findings great deference because it alone has had the opportunity to view the witness's demeanor and to judge veracity. *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985). It is the fact finder whose role is to resolve conflicting testimony, evaluate the credibility of witnesses, and weigh the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). Furthermore, the determination of the credibility of witnesses and the weight to be given to their testimony is peculiarly within the discretion of the trial court and will not be disturbed on appeal. *In re Watson*, 25 Wn. App. 508, 511, 610 P.2d 367 (1979); *Rognrust v. Seto*, 2 Wn. App. 215, 222, 467 P.2d 204, *review denied*, 78 Wn.2d 993 (1970). The trial court may refuse to accept uncontradicted expert testimony as long as it does not act in an arbitrary or capricious manner. *State v. Hendrickson*, 46 Wn. App. 184, 190, 730 P.2d 88 (1986), *review denied*, 107 Wn.2d 1032 (1987); *Brewer v. Copeland*, 86 Wn.2d 58, 74, 542 P.2d 445 (1975); *Swenson v. Lowe*, 5 Wn. App. 186, 191, 486 P.2d 1120 (1971).

The State bears the burden of proving all the elements of the crime charged beyond a reasonable doubt. *State v. Teal*, 152 Wn.2d 333, 337, 96 P.3d 974 (2004). The medical marijuana defense, however, is an affirmative defense and the defendant bears the burden of proving the affirmative defense by a preponderance of the evidence. *State v. Fry*, 168 Wn.2d 1, 4-5, 228 P.3d 1 (2010).

In the present case, Dalton first argues that the trial court erred in finding that “Dalton’s pain was relieved by standard medical treatments.” App.’s Br. at 7. The trial court’s actual ruling was the Dalton had failed to carry his burden of showing that he was a qualifying patient under the Act. RP 605. As the trial court noted, the plain language of the statute requires that a defendant suffer from “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).

As explained by the trial court, Dalton failed to carry his burden in this regard. For example, as the trial explained, Dr. Orvald’s own testimony didn’t say that Dalton’s pain was “unrelieved by standard medical treatments and medications.” Rather, Dr. Orvald testified that “I don’t think I would be willing to say unrelieved.” RP 380. Dalton himself also did not deny that standard medications relived his pain. RP 533. Rather, the testimony of Dr. Orvald and Dalton was that standard medications caused side effects that

Dalton preferred to avoid. The plain language of the statute, however, requires pain “unrelieved by standard medical treatments and medications,” not pain “unrelieved by standard medications without unwarranted side effects.”

In addition, Dalton’s evidence regarding just what standard medical treatments and medications he had used prior to turning to marijuana was woefully lacking. As the trial court noted, the only narcotic medication mentioned by name or listed in Dalton’s medical file was Percocet. RP 604.⁴ Dalton failed to offer any specific evidence that he had ever tried any alternative pain relievers. Although Dalton offered some vague references that could be interpreted to imply that he had tried other drugs, his evidence in this regard was woefully insufficient, and the trial court found that Dalton’s medical files (which were admitted as an exhibit) showed that Percocet was the only narcotic ever prescribed. See, RP 414-15, 604.

As the trial court succinctly stated,

The plain language of the statute requires medical marijuana to be a drug of last resort for patients with intractable pain, not a drug of first resort. The pain must be unrelieved by standard medical treatments or medications. The plain language strongly suggesting that you have to try

⁴ The trial court mentioned in its ruling that “A review of his medical records shows that he was prescribed only one narcotic, Percocet.” RP 604. The trial court’s reference to the medical files clearly refers to the entire medical file, which Dalton had admitted as an exhibit. See RP 414-15

other medical treatments and medications before turning to medical marijuana.

RP 603. Given Dalton's limited evidence regarding his attempts to use standard medical treatments and medications, the record supported the trial court's conclusion that Dalton did not prove by a preponderance of evidence that he suffered from pain "unrelieved by standard medical treatments and medications."

Dalton's claim that the trial court abused her discretion in finding that Dr. Orvald was not credible is similarly without merit. Although the trial court stated that Dr. Orvald showed some bias in favor of the medical use of marijuana and that his opinion that Dalton was a qualifying patient was "tainted" by a number of factors, the trial court clearly stated that the most important reasons that she disagreed with Dr. Orvald's opinion was due to: (1) the doctor's own unwillingness to state that Dalton's pain was "unrelieved by standard medical treatments and medications" as required by the statute; (2) the lack of evidence regarding Dalton's use or attempted use of other standard medications other than Percocet; and (3) the general nature of Dr. Orvald's and Dalton's complaints centering around the side effects of narcotics – an issue that was inconsistent with the plain language of the statute. See, RP 603-05.

In short, the trial court clearly explained the numerous reasons it had for disagreeing with Dr. Orvald's conclusion and these reasons were supported by the record. Dalton's claim that the trial court merely concluded that Dr. Orvald was biased and not credible because the doctor favored the use of marijuana is simply not supported by the record. Furthermore, even if the trial court had concluded that Dr. Orvald testimony was not credible, such a finding would have been entirely in the province of the trial court that sat as the finder of fact in the trial below.

Finally, the trial court did not err in finding that a finder of fact is ultimately allowed to weigh the testimony of witnesses and render a verdict on whether a defendant met his burden of showing that he or she met the statutory requirements of the affirmative defense, including the requirement that the defendant be a qualifying patient. This conclusion was consistent with the Supreme Court's recent opinion in *State v. Fry* (which makes it clear that the finder of fact is tasked with deciding whether a defendant is a qualifying patient under the Act), and Dalton's claim that *Fry* is distinguishable is misplaced.

In *Fry*, the lead opinion held that Fry was properly precluded from raising a medical marijuana defense despite the fact that he had a medical marijuana authorization from a licensed doctor. *Fry*, 168 Wn.2d at 13. Fry's authorization was insufficient because the doctor had listed "severe anxiety,

rage, & depression” as the debilitating medical conditions qualifying Fry to use marijuana, yet those conditions did not qualify under the statutory definition of terminal or debilitating condition. *Fry*, 168 Wn.2d at 11-12. The lead opinion therefore concluded that it would not extend the statutory defense to permit an individual *without* a qualifying illness to claim its benefits. *Fry*, 168 Wn.2d at 13. In short, the court held that the a doctor’s authorization stating that the defendant had a terminal or debilitating condition was insufficient because there was no basis under the plain language of the statute for the conclusion that the defendant’s actual condition met the definition of terminal or debilitating condition. Thus the lead opinion found that the defendant could be precluded from raising the defense at trial.

The concurring opinion in *Fry* stated that the trial court should not have concluded from the face of the authorization alone that *Fry* did not qualify. Rather, *Fry* should have been allowed to present the defense to the jury and potentially show that he was a qualifying patient suffering from, for instance, intractable pain or nausea (as these are conditions listed in the statute). *Fry*, 168 Wn.2d at 17-19. In addition, the concurrence noted that,

Whether Fry was suffering from any of these symptoms can only be determined after a factual inquiry. Without allowing Fry to present a defense, we cannot know whether a fact finder would conclude that Fry had symptoms that would qualify him under the terms defined in the statute.

Fry, 168 Wn.2d at 17. The concurrence also noted that the question of whether Fry had a qualifying condition was a “question of fact, not law,” and that “whether a defendant can meet the burden of proving by a preponderance of the evidence that he in fact has a qualifying condition will of course depend on what is presented to the trier of fact.” *Fry*, 168 Wn.2d at 19. The concurrence noted, however, that Fry’s counsel conceded that Fry did not have a qualifying condition and failed to offer any supporting evidence that he had a qualifying condition, thus although the issue should have gone to the jury, the concurrence would have affirmed on the alternative ground that in response to a motion in limine Fry conceded he was not a qualifying patient and failed to provide any additional evidence to support the affirmative defense. *Fry*, 168 Wn.2d at 19.

In the present case the trial court did not preclude Dalton from presenting the defense at trial, rather the court allowed Dalton to present his defense at trial, thus satisfying even the more stringent requirements outlined in the concurrence in *Fry*. At trial, however, the court concluded that Dalton did not present facts sufficient to meet the statutory definition of intractable pain because he failed to prove that he suffered from pain unrelieved by standard medications. This conclusion was on par with the holding in *Fry* that a doctor’s mere assertion that the defendant has a terminal or debilitating

condition is insufficient if the facts supporting that conclusion do not comply with the statute. In the present case Dr. Orvald's assertion that Dalton suffered from a terminal or debilitating condition was similarly flawed because the record failed to show that Dalton's pain was unrelieved by standard medications.

Dalton attempts to distinguish *Fry* by claiming that the conditions in *Fry* (severe anxiety, rage, and depression) were not listed in the statute while Dalton's conditions were listed in the statute. This argument, however, misses the point of the trial court's findings below. The trial court found that Dalton failed to show that he suffered from pain that was "unrelieved by standard medications;" rather, the record showed that Dalton suffered from pain that was in fact relieved by standard medications. Given this finding, the trial court properly concluded that Dalton's conditions (like the conditions in *Fry*) were not listed in the statute. If the statute listed conditions such as "pain unrelieved without side effects by at least one standard medication," then the question would be different. The statute, however, clearly requires pain unrelieved by standard medications, and Dalton failed to show that he suffered from this condition. The present case, therefore is indistinguishable from *Fry*, as both involve an authorization based on a condition not covered by the plain language of the medical marijuana statute.

In the present case it was the trial court's duty to examine the evidence, resolve conflicts, and decide if, in fact, Dalton had proven the affirmative defense by a preponderance of the evidence. In order to prove the defense, Dalton was required to show that he was a qualifying patient with a terminal or debilitating condition. Although Dalton argued that he suffered from intractable pain unrelieved by standard medical treatments or medications, the trial court carefully examined the evidence before it and disagreed. As the trial court noted, the plain language of the statute makes marijuana a drug of last resort and Dalton failed to show that his pain was unrelieved by standard treatments or medication. Furthermore, the evidence showed that even in Dalton's limited experience with standard medications he had found that they relieved his pain, although he experienced unwanted side effects. The trial court, however, noted that the plain language of the statute made no exceptions for side effects, and required Dalton to show that his pain was "unrelieved" by standard medications. Dalton, however, failed to make this showing. This was a rational, non-arbitrary view of the evidence, and one the trial court was permitted to take. The trial court acted within its discretion, and it did not err.

Finally, Dalton argues that he should be entitled to rely on his doctor's authorization and should not be punished when his doctor has erroneously authorized him to use medical marijuana. App.'s Br. at 11. This argument,

however, is foreclosed by *State v. Fry* where the Washington Supreme Court recently held that a defendant could not demonstrate that he was entitled to a medical marijuana defense despite the fact that the defendant in that case had an authorization from his doctor. *Fry*, 168 Wn.2d at 13. As the *Fry* court noted,

The intent of the medical marijuana statute was 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.”

Fry, 168 Wn.2d at 11 (emphasis in original). The *Fry* court went on to note that although the defendant’s doctor had given him an authorization, the doctor’s basis for the authorization (severe anxiety, rage, and depression) did not qualify under the statute, and thus

Fry did not actually have a terminal or debilitating medical condition as provided in the Act. The stated intent of the statute was to allow a qualifying patient *with* a terminal or debilitating illness to be found not guilty of marijuana possession under certain circumstances. Former RCW 69.51A.005. (“The people of Washington state find that . . . [q]ualifying patients with terminal or debilitating illnesses . . . shall not be found guilty . . .”). Conversely, the intent was not to excuse a marijuana user without a terminal or debilitating illness from criminal liability.

Fry, 168 Wn.2d at 12 (emphasis in original). The *Fry* court then noted that in *State v. Tracy* it had declined to extend the medical marijuana defense to a

defendant who was not in compliance with the statute because the defendant's doctor was not authorized to issue a medical marijuana authorization. The *Fry* court found this reasoning instructive and thus held that, "Similarly, we will not extend the statute to permit an individual *without* a qualifying illness to claim its benefits." *Fry*, 168 Wn.2d at 13 (emphasis in original), *citing State v. Tracy*, 158 Wn.2d 683, 690, 147 P.3d 559 (2006). In short, the Fry court held that the fact that a defendant possessed a medical marijuana authorization is not sufficient, standing alone, to sustain the affirmative defense if the defendant does not also meet the standards for a "qualifying patient" under the Act. The holding in *Fry*, therefore, forecloses Dalton's argument that he should be allowed to rely on his doctor's authorization even if the evidence shows that Dalton was not a qualifying patient under the act.

For all of the above stated reasons, the trial court did not err in finding that Dalton had failed to carry his burden of proving the affirmative defense by a preponderance of the evidence.

IV. CONCLUSION

For the foregoing reasons, Dalton's conviction and sentence should be affirmed.

DATED September 3, 2010.

Respectfully submitted,

RUSSELL D. HAUGE
Prosecuting Attorney

JEREMY A. MORRIS
WSBA No. 28722
Deputy Prosecuting Attorney

DOCUMENT1