

NO. 38466-3-II

IN THE COURT OF APPEALS OF STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

Respondent,

v.

RICK FITCHITT,

Appellant.

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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

The trial court erred in admitting Detective Alloway's opinion on the amount of marijuana Mr. Fitchitt needed for a 60-day supply.

Issue Relating the Assignment of Error

Did the trial court err in permitting Detective Alloway to testify as to the proper 60-day supply of medical marijuana for Mr. Fitchitt when Detective Alloway had no medial training, no training in botany and stated that his opinion rested on one study and his own paper written for prosecutors?

B. STATEMENT OF THE CASE

a. Procedural History

Richard Fitchitt was charged with manufacturing marijuana, count 1, and possession with the intent to deliver marijuana, count 2. Supp. CP. _____ (Amended Information, Sub. No. 7, filed 2/5/07). The matter was tried to a jury. Mr. Fitchitt presented evidence that his possession was not unlawful because he had a medical marijuana authorization. The trial court instructed the jury on the medical marijuana defense. CP 26-53. The jury found Fitchitt guilty of manufacturing marijuana, CP 25, but not guilty of possession with the intent to deliver, CP 24.

Judgment and sentence were entered. Supp. C.P. ___ (Judgment and Sentence, Sub. No. 114, filed 9/22/08). This timely appeal followed. Supp. C.P. ___ (Notice of Appeal, Sub. No. 113, filed 9/22/08).

b. Substantive Facts

The trial controversy centered on the question of whether Mr. Fitchitt possessed more than a “60-day supply” medicinal marijuana.

On November 16, 2005, police officers searched the home of Richard B. Fitchitt. RP 467. Mr. Fitchitt was not home at the time. Members of the search team testified that the police found growing plants and both dried and frozen marijuana.

Mr. Fitchitt testified that he had been employed as a contract logger for much of his life. RP 524-526. He had been injured numerous times. RP 526-528. He used medical marijuana to ease the pain from these injuries. At the time of the search of his residence David Wilton was also living with him. RP 529.

He admitted that he had 10 mature plants, 30 cuttings and 29 “rooted plants.” RP 531. He said that the marijuana the police found growing at this residence was for his medical use. RP 530. Fitchitt testified that he could not get any medicine from the rooted plants or the juvenile plants. RP 531-32. He also said that he could get only 2 ounces

of usable marijuana from his adult plants. RP 532. Half of the growing plants belonged to a tenant, Polly Crateau, who also had a medical marijuana authorization. RP 543.

He stated the rest of the marijuana leaves found in his residence were unusable “shake.” RP 533. He also stated that his marijuana crop was unreliable so he had some “backup” medication. RP 535-37. Finally, marijuana found in the kitchen freezer belonged to his tenants. RP 537.

Dr. Carter, a medical professor from the University of Washington, testified for the defense. RP 473. He has published two peer reviewed journal articles on medical marijuana specifically addressing the “dosing” of cannabis. RP 474. Dr. Carter examined Fitchitt on January 10, 2008. RP 498. He recounted Mr. Fitchitt’s many physical injuries including injuries that occurred when he was hit by a 150-foot log. RP 498-99. As a result, he suffered from chronic pain. RP 500. Mr. Fitchitt also told the doctor that he could not take a number of traditional drugs because he had a stomach ulcer. RP 501. Dr. Carter testified that for a medical marijuana user, the primary usable substance was in the oil on the flower bud. RP 483. He also opined that only the mature plants contain useable marijuana. RP 489.

In Dr. Carter's opinion marijuana leaves, sometimes called "shake" have very little medicinal value. RP 492. After observing the "shake" produced as evidence in this case, he said that it had very little "usable" marijuana in it. RP 495. He also testified that some of the marijuana seized by police was of "very low quality." RP 493-94.

Dr. Carter testified that a the "upper end of a sixty day supply for a patient was 70 ounces of usable marijuana. RP 497.

Detective Roy Alloway testified has been a member of the West Sound Narcotics Enforcement Team for 10 years. RP 405. He also stated that he had 400 hours of training specific to narcotics investigations and indoor marijuana growing operations. He was present at the search. At the search the police found plants that had been stripped of their leaves and had only buds left. RP 423. Alloway testified that the entire marijuana plant is "usable" although the buds are preferred. RP 421-22.

When the State asked Alloway how much useable marijuana could be harvested from an adult plant, the defense objected. The trial judge agreed that the State had failed to demonstrate that Alloway had the proper qualifications to make this estimation. RP 424. The State then tried to qualify Alloway on this subject.

Alloway stated that he had been to "several classes specific to the cultivation of indoor marijuana." RP 425. He also stated that he had

“written a paper on medical marijuana and the 60 day supply for the prosecutor’s office.”¹ RP 425. He stated that in 2001, he told the prosecutor’s office that a patient should need only 9 adult plants for a 60-day supply. He said he came to this conclusion from a DEA class and from paper written by a Doctor Ross in Mississippi who grew marijuana for the federal government. RP 426. Alloway did not know if Dr. Ross’ study concerned the indoor or outdoor cultivation of marijuana. RP 428. Alloway did state, however, that he was making his estimates specifically for medical marijuana patients but he did not differentiate between patients who smoked marijuana and those who ingested it. RP 434. He said that he focused on a “smoker.” Alloway also admitted that the “potency” of various strains of marijuana differed. RP 450.

Alloway did not have any training in botany or medicine and, no postgraduate degree RP 452. He had apparently graduated community college. RP 453.

The defense objected to the introduction of this testimony on the ground that Alloway was not qualified to opine on the issue. *Id.*; see also objections at RP 424 and 437. The Court ultimately said: “Once again

¹ At one point defense counsel handed this “paper” up to the judge who reviewed it but it does not appear that any copy was entered into evidence. RP 435.

counsel, you objection goes to weight, not admissibility, I'll allow the witness to testify." RP 435.

Alloway was then permitted to testify that, in his opinion, a medical marijuana patient needed only 9 adult plants and that marijuana plants generally produce 4 to 8 ounces of usable marijuana per plant. RP 437. He was also allowed to testify that it generally takes three months for a juvenile marijuana plant to reach maturity. RP 436. He was allowed to testify that the average marijuana cigarette weighted .5 grams. RP 438.

C. ARGUMENT

The trial court erred in permitting Detective Alloway to testify as to the proper 60-day supply of medical marijuana for Mr. Fitchitt when Detective Alloway had no medial training, no training in botany and stated that his opinion rested on one study and his own paper written for prosecutors.

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).

A qualifying patient may “possess no more marijuana than is necessary for the patient's personal, medical use, not exceeding the amount necessary for a sixty-day supply.” RCW 69.51A.040(3)(b).

In this case, Mr. Fitchitt made a prima facie showing of all of the criteria for the defense and the jury was so instructed. The only real issue before the jury was whether Fitchitt possessed more than a 60-day supply. The defense presented a medical expert on this issue. In order to rebut Dr. Carter, the State was permitted to qualify Detective Alloway as an expert on this issue. This was error.

ER 702 states:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

An opinion is admissible only if it has a rational basis, which is the same as to say that the opinion must be based on knowledge. ER 701; ER 702; *Riccobono v. Pierce Cy.*, 92 Wash.App. 254, 267-68, 966 P.2d 327 (1998).

The knowledge may be personal, or it may be scientific, technical or specialized. Compare ER 701 with ER 702. "Expert" opinion is simply opinion based in whole or in part on scientific, technical or specialized knowledge. *State v. Kunze*, 97 Wash.App. 832, 850, 988 P.2d 977 (1999), review denied, 140 Wash.2d 1022, 10 P.3d 404 (2000).

In this case, Detective Alloway was allowed to testify to expert medical and botanical information without the proper scientific knowledge or training. The State failed to produce any evidence that Alloway was remotely qualified to opine on how much medication Fitchitt needed, how much medication a marijuana plant produced and which part of the plant was medically useable. This failure did not go to the "weight" of his testimony; it made his testimony on these subjects inadmissible.

In addition, a witness may not give, directly or by inference, an opinion on a defendant's guilt. *State v. Madison*, 53 Wash.App. 754, 760, 770 P.2d 662, review denied, 113 Wash.2d 1002, 777 P.2d 1050 (1989).

To do so is to violate the defendant's constitutional right to a jury trial and invade the fact-finding province of the jury. *State v. Demery*, 144 Wash.2d 753, 759, 30 P.3d 1278 (2001). "Particularly where such an opinion is expressed by a government official, such as a sheriff or a police officer, the opinion may influence the fact finder and thereby deny the defendant of a fair and impartial trial." *State v. Carlin*, 40 Wash.App. 698, 703, 700 P.2d 323 (1985).

Here the trial court improperly permitted Detective Alloway to testify as an expert when he was not qualified to do so. Moreover, his testimony was tantamount to an opinion that Fitchitt was guilty. In this case, that was extremely prejudicial to Fitchitt. Indeed the only real question in this case was whether Fitchitt possessed more than a 60-day supply. Absent Detective Alloway's testimony, the only evidence before jury would have been Dr. Carter's testimony that supported Alloway's defense.

D. CONCLUSION

This Court should find that it was prejudicial error to admit Detective Alloway's testimony. This Court should reverse the conviction and remand for a new trial.

Respectfully submitted this 17th day of May, 2010.

Suzanne Lee Elliott
Suzanne Lee Elliott
WSBA 12634

Certificate of Service by Mail

I declare under penalty of perjury that on May 17, 2010, I placed a copy of this document in the U.S. Mail, postage prepaid, to:

Mr. Rick Fitchitt
P.O. Box 639
Shelton, WA 98584

And to:

Mr. Gary P. Burlson
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RICK FITCHITT,

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AMENDED CERTIFICATE OF SERVICE

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Certificate of Service by Mail

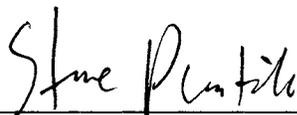
I declare under penalty of perjury that on May 20, 2010, I placed a copy of this amended certificate of service in the U.S. Mail postage prepaid to:

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Furthermore, I declare that on May 20, 2010, I also placed a copy of the appellant's opening brief in the U.S. Mail, postage prepaid, to:

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Steven Plastrik, Legal Assistant