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WASHINGTON STATE COURT OF APPEALS, DIVISION II

State of Washington
Respondent

v.

MATTHEW COLT CHAPMAN
Appellant

40491-5-II

Cowlitz County Superior Court Cause Number 08-1-00662-7

REPLY BRIEF

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III. STATEMENT OF THE CASE

In June, 2008, Cowlitz County charged Appellant Matthew Chapman with manufacturing marijuana based on some plants the police had found growing on his property six months before. Information, Sub 1, Supp CP. Chapman moved to suppress the marijuana as fruit of the poisoned tree. CP 1. He also challenged allegations in the search warrant affidavit. CP 22. A full suppression hearing was held which developed the following facts.

At some time during the evening of December 29-30, 2007, the Cowlitz County sheriff's department received a report that shots had been fired in the vicinity of South Silver Lake Road in Castle Rock, Washington. CP 27; RP 9.¹ They traced the suspected shooter, Cody Chapman, to the home of his father, Matthew Chapman, at 128 Barba Road, Castle Rock. RP 9, 23; 26; 50. The home is in a rural area. It is heavily wooded and not visible from the road. RP 9, 101-02, 132. At all relevant times, the driveway was marked with NO TRESPASSING signs. RP 21-22, 133-34. None of the officers had ever heard of the Chapmans before and had no reason to suspect marijuana activity on the premises. RP 19, 45, 61.

¹ The record is in two continuously paginated volumes, designated RP.

At 2:30 in the morning of December 30, 2008, a posse of sheriff's deputies converged on Matthew Chapman's home without a warrant, looking for Cody. RP 9, 10. The officers parked on the road and crept up to the house on foot. RP 12. The house was dark, except for a couple of porch lights. RP 15.

Deputy Robert Brewer knocked, and a woman opened the door. Matthew Chapman appeared behind her. The couple were not sure if Cody was home. Matthew Chapman checked Cody's bedroom and told Brewer Cody was in bed. RP 15.

At that point, Brewer did not know whether probable cause existed to arrest Cody. RP 18. Nevertheless, Brewer and another officer walked into the home, mounted the stairs and entered the bedroom.² Brewer then radioed to confirm probable cause. RP 16. He was told there was probable cause to arrest Cody for the misdemeanor offense of reckless endangerment.³ He arrested Cody and placed him in the back seat of his patrol car. RP 15-16.

² Original appellate counsel states in the opening brief that the police had probable cause to believe Cody Chapman may have committed a felony, and implies that Chapman consented to the warrantless intrusion into his home. Appellant's Brief (AB) at 1. This misrepresents the record. Brewer testified that he did not even inquire about probable cause until he was in Cody's bedroom. RP16. After Chapman told him Cody was in bed, Brewer testified merely that, "We walked in." RP 15.

³ RCW 9A.36.050:

Meanwhile, other deputies were poking around outside. They observed an outbuilding and went to check it out. The building had standard barn doors, which were ajar. RP 44. They went inside. Ten to twelve feet inside the building, they saw a door secured with several padlocks. RP 32- 33, 42, 44, 123. They realized the padlocks meant no-one could be inside. RP 33, 38, 106. But from inside the entry-way they detected the odor of marijuana. RP 33, 46. They relayed this information to Brewer who joined them. He also smelled marijuana. RP 17, 19 55.⁴ The deputies obtained a warrant, searched the inner room, and discovered growing plants. RP 57, 58, 64.⁵

At the suppression hearing, the issue was framed as whether the warrant affidavit was sufficient to support issuance of the search warrant. RP 74-75. The court entered a bench ruling. The court characterized the sheriff's officers' evidence as "somewhat labile." RP 153. But the court found that some officers did go into the house while others investigated the outbuilding. RP 153. From the bench, the court announce

(1) A person is guilty of reckless endangerment when he or she recklessly engages in conduct not amounting to drive-by shooting but that creates a substantial risk of death or serious physical injury to another person.

(2) Reckless endangerment is a gross misdemeanor.

⁴ Brewer testified this was after the arrest. RP 15-16. Deputy Robinson said it was before anyone even approached the house. RP 56, 59. (The prosecutor suggested that Robinson was mistaken. RP 64.)

⁵ Another officer, Harris, testified that the deputies entered the outbuilding before anybody approached the house. RP 97-98. Harris claimed he never saw Brewer. RP 99.

contradictory findings. The court stated that the officers had no legal justification for being inside the barn and would not otherwise have been able to detect the presence of marijuana. But the court also found that exigent circumstances justified an intrusion to clear the area of possible armed suspects. RP 145-46. The court did not file any written findings and conclusions.

When confronted with the marijuana, Matthew Chapman produced a medical marijuana authorization, but it was recently expired. RP 255-56, 277. The expiration date had been altered from 2007 to 2008. RP 120.

Six months later, the State charged Chapman with manufacturing. Information, Sub 1, Supp CP. The trial court ruled in limine that he could not, as a matter of law, raise an authorized medical marijuana defense. RP 231-34.

A year later, in July, 2009, the State amended the information to add a charge of fraudulent production of or tampering with medical marijuana documentation in violation of RCW 69.51A.060(5).

Following two trials (the first jury hung on one issue) Chapman was convicted on both counts. CP 71. He had no prior criminal history, so his standard range was 0-6 months. CP 73. The court sentenced him to

15 days on each count to be served concurrently. CP 76. HE filed timely notice of appeal. CP 83.

After filing the opening brief, Appellate counsel withdrew to take a position with the prosecutor's office of a neighboring county. The Court substituted present counsel. The sole issue presented in the opening brief is whether the court prevented Chapman from presenting a complete defense and erroneously ruled as a matter of law that he could not assert a medical marijuana defense. Appellant's Brief (AB) at 1.

Chapman filed a Statement of Additional Grounds on February 1, 2011. He seeks review of the trial court's failure to suppress the marijuana on the grounds of the egregious search and seizure violations. In its Respondent's Brief filed April 11, 2011, the State has chosen not to respond to the additional grounds. Brief of Respondent (BR) at 1.

IV. ARGUMENTS IN REPLY

1. THE MARIJUANA WAS INADMISSIBLE FRUIT OF THE POISONED TREE.

Summary of the Argument: The State does not address the search and seizure challenge set forth in Chapman's Statement of Additional Grounds for review. Based on the evidence developed in the suppression hearing, the government had no conceivable grounds to conduct a warrantless invasion of Matthew Chapman's home in the dead of night.

The sole remedy is to suppress all evidence seized and to reverse his conviction.

Warrantless Home Intrusion: Any warrantless entry into a citizen's home is presumptively unreasonable. *State v. Bessette*, 105 Wn. App. 793, 798, 21 P.3d 318 (2001); *Payton v. New York*, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980). Such entries are unlawful under both the state and federal constitutions. "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Const. art. 1, § 7. "The right of the people to be secure in their persons [and] houses . . . against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation." U.S. Const. amend. IV. "Freedom from intrusion into the home or dwelling is the archetype of the privacy protection secured by the Fourth Amendment." *Dorman v. United States*, 140 U.S. App. D.C. 313, 317, 435 F.2d 385 (1970).

Warrantless In-Home Arrest: Art. 1, § 7 and the Fourth Amendment specifically prohibit a warrantless, non-consensual, entry into a home for the purpose of making an arrest. The sole exception is for exigent circumstances. *State v. Ramirez*, 49 Wn. App. 814, 818, 746 P.2d 344 (1987), citing *Payton*, 445 U.S. at 587-88; *State v. Terrovona*, 105 Wn.2d 632, 644, 716 P.2d 295 (1986). The State bears the heavy burden

of showing that “an immediate major crisis” required swift action to prevent imminent danger to life, forestall the imminent escape of a suspect, or to prevent the destruction of evidence. *Dorman* at 319; *State v. Johnson*, 128 Wn.2d 431, 447, 909 P.2d 293 (1996). The State must show why obtaining a warrant was not feasible. *State v. Wolters*, 133 Wn. App. 297, 303, 135 P.3d 562 (2006); *McDonald v. United States*, 335 U.S. 451, 460, 69 S. Ct. 191, 93 L. Ed. 153 (1948).

Where probable cause to arrest exists, consent also may relieve the police from obtaining a warrant. *State v. Griffith*, 61 Wn. App. 35, 41, 808 P.2d 1171 (1991).

Here, the State neither asserted nor proved that Brewer asked for or received Chapman’s consent to enter his home. He said only that, when Chapman told him Cody was in bed, the officers entered the house and inquired into the existence of probable cause from the bedroom.

Thus the State did not meet its heavy burden to establish probable cause, exigent circumstances, or consent.

The Sole Remedy is Suppression: Suppression is required whenever there is a meaningful causal connection between the State’s unlawful activity and the acquisition of evidence. That is, if the evidence is “the fruit of the poisonous tree.” *Wong Sun v. United States*, 371 U.S. 471, 487-88, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). Evidence directly

produced by an unlawful seizure is never admissible. *State v. Kichinko*, 26 Wn. App. 304, 310-11, 613 P.2d 792 (1980). This includes not only evidence seized directly during an illegal incursion but also derivative evidence. *State v. Gaines*, 154 Wn.2d 711, 716-17, 116 P.3d 993 (2005).

Here, there was neither warrant nor probable cause. Brewer entered Chapman's home before he even checked for probable cause. It is inconceivable that Brewer did not know that reckless endangerment is a gross misdemeanor that was not committed in his presence so that, even if there was reason to believe the allegations regarding Cody, this was not grounds to arrest him, let alone to invade his parents' home in the dead of the night to seize him in his bed.

Article 1, section 7 and the Fourth Amendment require reversal. Any evidence obtained pursuant to this egregious police conduct is barred from any Washington court for any purpose. *State v. Chenoweth*, 160 Wn.2d 454, 473, 158 P.3d 595 (2007); *State v. White*, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982); *Wong Sun*, 371 U.S. at 488.

2. CHAPMAN WAS A QUALIFYING PATIENT
UNDER THE MEDICAL MARIJUANA ACT.

The trial court violated Chapman's Sixth Amendment right to present a complete defense by precluding his affirmative defense of medical authorization. The State contends the trial court correctly barred

Chapman from asserting a medical marijuana act defense because of irregularities in the written authorization. BR at 1. This is wrong.

The Washington State Legislature has decreed that qualifying patients with terminal or debilitating illness who, in the judgment of their health care professionals, may 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.

The Legislature has defined a “qualifying patient” in this context.

It is a person who:

- (a) Is a patient of a health care professional;
- (b) Has been diagnosed by that health care professional 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 health care professional about the risks and benefits of the medical use of marijuana; and
- (e) Has been advised by that health care professional that they may benefit from the medical use of marijuana.

RCW 69.51A.010(4). The Legislature in its wisdom omitted from this list of qualifications:

- (f) Has in his possession current documentation from the health care professional referenced in (d) and (e).

Instead of bothering terminal and seriously debilitated patients with an ongoing documentation requirement, the Legislature has decreed that it is sufficient for the patient to produce documentation after he is charged with an offense:

If charged with a violation of state law relating to marijuana, any qualifying patient who is engaged in the medical use of marijuana ...will be deemed to have established an affirmative defense to such charges by proof of his or her compliance with the requirements provided in this chapter. Any person meeting the requirements appropriate to his or her status under this chapter shall be considered to have engaged in activities permitted by this chapter and shall not be penalized in any manner, or denied any right or privilege, for such actions.

RCW 69.51A.040(2) (emphasis added.) Chapman did this.

Accordingly, in *State v. Hanson*, 138 Wn. App. 322, 324, 157 P.3d 438 (2007), a the patient could not be prosecuted for not having a valid marijuana authorization in his possession at the time of a police raid. There, as here, the judge erroneously ruled that the authorization came too late. Division III of this Court applied the plain language of the Act and reversed Hanson's conviction. *Hanson*, 138 Wn. App. at 326. The *Hanson* court disagreed with Division II's holding in *State v. Butler*, 126 Wn. App. 741, 750-51, 109 P.3d 493 (2005), that the statute requires the patient to obtain written authorization before it is needed. *Hanson*, 138 Wn. App. at 327. Division III noted that the clear language of the statute

did not require Hanson to have a written authorization in order to be a “qualifying patient.”

Hanson present an authorization when asked by the police to do so. That was sufficient under RCW 69.51A.040(2)(c). *Hanson*, 138 Wn. App. at 327.

Likewise, here, Chapman obtained a valid authorization within two weeks of the raid, on January 10, 2008. RP 232. This was six months before he was charged with a crime. As in *Hanson*, that was sufficient under the plain language of the statute. Specifically, RCW 69.51A.040(2), which requires seriously debilitated patients to produce a valid authorization only when and if they are charged with violating a state marijuana law.

Moreover, *Burton* erroneously conflates a terminal or debilitatingly ill person’s status as a qualifying patient with the documentation of that status. The Legislature does not make this mistake. Rather, RCW 69.51A.030 clearly distinguishes qualification from documentation. Specifically, RCW 69.51A.030(1) immunizes health care professionals from liability for advising a qualifying patient of his status. A separate provision does the same thing for providing the patient with valid

documentation. RCW 69.51A.030(2).⁶ Thus, even if the statute can be deemed ambiguous — which it is not — by placing these two elements in separate provisions, the Legislature makes clear its intent that the factors that define a qualifying patient as set forth in RCW 69.51A.010(4)(c) and (d) do not include immediate documentation.

3. THE EVIDENCE IS INSUFFICIENT TO CONVICT
CHAPMAN FOR FRAUDULENTLY
PRODUCING A MARIJUANA ACT RECORD.

The State defends Chapman’ conviction for violating RCW 69.51A.060(5), which makes it a class C felony “to fraudulently produce any record purporting to be, or tamper with the content of any record for the purpose of having it accepted as, valid documentation under RCW 69.51A.010(7)(a)(5).” BR 4. This also fails to take into account the plain language of the Act and cannot be reconciled with the Legislative purpose in enacting the medical marijuana statute. See RCW 69.51A.005, calling

⁶ RCW 69.51A.030: A health care professional 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 health care professional’s medical judgment; or

(2) Providing a qualifying patient with valid documentation, based upon the health care professional’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.

for the State to exhibit “humanitarian compassion” toward desperately ill people in this regard.

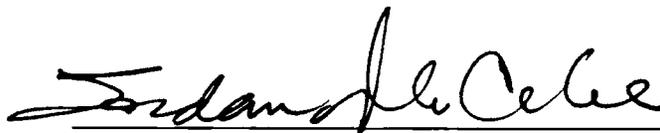
The charge that prove that Chapman fraudulently produced a medical marijuana record for the purpose of having it accepted as valid documentation fails as a matter of law. Since he had not been charged with anything, Chapman had no need to produce any record of any kind for any purpose. Rather, as an accommodation to the invasion force occupying his home, he produced a record for the purpose of an offer of proof that he would be able to produce valid documentation in the future should the need arise. The sole purpose for doing so would be to give the police the opportunity to display the humanitarian compassion required by law.

The remedy is to reverse and dismiss with prejudice.

V. **CONCLUSION**

For the foregoing reasons, the Court should reverse Chapman’s convictions and dismiss the prosecution with prejudice.

Respectfully submitted this 9th day of May, 2011.



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CERTIFICATE OF SERVICE

Jordan McCabe certifies that she mailed this day, first class postage prepaid, a copy of this Appellant's Brief to:

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