

No. 42119-4-II  
Cowlitz Co. Cause No. 08-1-001275-9

**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

**STATE OF WASHINGTON,**

Respondent,

v.

**BUDDY DUANE JENKINS,**

Appellant.

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**BRIEF OF RESPONDENT**

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## **I. ANSWERS TO ASSIGNMENT OF ERROR**

1. The search of the vehicle incident to arrest was lawful and appropriate under Article I, Section 7 of the Washington State Constitution
2. The trial court properly found the appellant had failed to satisfy his burden on the medical marijuana affirmative defense.

## **II. STATEMENT OF THE CASE**

The Respondent generally accepts the Appellant's recitation of the facts, which one important addition. The appellant never presented law enforcement with medical marijuana documentation, valid or otherwise. When he was contacted by Officer Sawyer, he did not have any medical marijuana documentation on him, nor did he present documentation. RP 17.

## **III. ARGUMENT**

### **A. THE SEARCH OF THE APPELLANT'S VEHICLE INCIDENT TO ARREST WAS LAWFUL UNDER BOTH THE 4<sup>th</sup> AMENDMENT AND ARTICLE I, SECTION 7**

The search in this case was a lawful search incident to arrest for evidence of the crime of arrest and the evidence should not be suppressed. The Fourth Amendment allows searches incident to a lawful arrest where evidence of the crime of arrest is likely to be found. *Arizona v. Gant*, 556 U.S. 332 (2009). Specifically, the *Gant* Court renewed the vitality of *Thornton v. United States*, where an officer discovered drugs in the pocket of the defendant after a pat-down search and subsequently searched the

vehicle incident to arrest. 541 U.S. 615 (2004). In cases involving drugs, the Court found that “the offense of arrest will supply a basis for searching the passenger compartment of an arrestee’s vehicle and any containers therein.” *Gant*, 1719.

The search incident to arrest in this case was also lawful under Article I, Section 7. The court of appeals recently clarified in *State v. Wright* that a search incident to arrest for a drug crime for evidence of the crime of arrest was lawful, even considering the Washington State Supreme Court’s recent decision in *State v. Valdez*. 155 Wn.App. 537, 556 (2010). The *Wright* court was explicit, finding that where a search was based on probable cause to arrest and search for evidence of the crime of arrest “the search of the passenger compartment of the car incident to arrest did not violate Article I, Section 7.” *Id.* at 556. The court also specifically distinguished *Patton*, the principle case upon which the appellant relies, as a case being akin to *Gant*, where the arrest was based on a warrant, unlike *Wright*, where the arrest was for a drug offense. *Id.* at 552, discussing *State v. Patton*, 167 Wn.2d 379 (2009). Following the decision in *Wright*, an arrest based on drugs justifies a search incident to arrest of the passenger compartment of the vehicle for evidence of that crime.

Aside from *Wright*, there appears to be a split within Division II regarding this issue. The court in *State v. Louthan* found that *Valdez* would have allowed a search incident to arrest for evidence relating to the

crime of arrest. 158 Wn.App. 732, 751 (2010). The court in *State v. Swetz* found that no search incident to exception applied even where there could be evidence of the crime of arrest found, specifically limiting a search incident to arrest to exigent circumstances involving either officer safety or destruction of evidence. 160 Wn.App. 122, 136 (2011). As recently as October, this court has acknowledged that the status of the search incident to arrest for evidence of a crime exception is unclear. *State v. Ferwick*, No., 40542-3-II, 7 (2011). The decisions in *Wright* and consolidated case *State v. Snapp*, 153 Wn.App. 485 (2009), are currently on review at the Washington State Supreme Court.

The respondent would urge the court to adopt the analysis of *State v. Louthan* and find that the search incident to arrest of a vehicle for evidence of the crime of arrest is lawful and appropriate under Article I, Section 7 of the Washington Constitution. Officer Sawyer arrested the defendant for driving with a suspended license and lawfully searched the defendant himself incident to arrest. CP 56. He smelled marijuana coming from the vehicle. CP 56. The appellant told him he had marijuana on him, that he had a medical marijuana authorization, and gave the marijuana to Officer Sawyer. CP 56. There was a reasonable likelihood of finding evidence related to the possession of a controlled substance within the vehicle and thus the search was valid under both the Fourth Amendment of the Constitution of the United States and Article I, Section 7 of the Washington State Constitution. This was not a fishing

expedition. Accordingly, the court should affirm the decision of the trial court.

**B. THE TRIAL COURT PROPERLY FOUND THE APPELLANT HAD FAILED TO SATISFY HIS BURDEN FOR THE MEDICAL MARIJUANA AFFIRMATIVE DEFENSE**

The appellant did not meet the requirements for the affirmative defense under former RCW 69.51A.040 and the court properly denied this defense. The only real issue in this case is whether or not the appellant satisfied section RCW 69.51.040(c), which requires a qualified patient to “present his or her valid documentation to any law enforcement official who questions the patient or provider regarding his or her medical use of marijuana.” The appellant’s medical marijuana authorization had expired prior to the police contact in this case. The appellant could not comply with RCW 69.51.040(c) because he did not have valid authorization at the time of his contact with police. He did not meet the requirements of former RCW 69.51A.040 and the trial court properly found the same.

In order to qualify for the affirmative defense, the “qualified patient” must present valid documentation “when questioned by law enforcement.” Former RCW 69.51A.040(c). This case revolves around whether or not the appellant had valid documentation at the time of his law enforcement contact. It is undisputed that the appellant’s medical marijuana authorization, issued by Doctor Orvald, had expired at the time of his arrest. CP 56. The appellant asks this court to consider that at the time of his arrest, he met all the other requirements of the statute, except

for having an unexpired authorization. The court should deny this request.

The documentation that Jenkins could have presented was not valid. The documentation had expired almost a month before the arrest and was not renewed until almost a month after the arrest. There is simply no reasonable argument that the doctor's explicit limitation of the scope of his authorization, the one year limit, should be ignored by this court. That he was validly authorized before and after the contact is irrelevant to the question of whether the affirmative defense should be allowed. The legislature made clear in the recent amendment to the statute that the must establish "that he or she was validly authorized...at the time of the officer's questioning." RCW 69.51A.047. In no way was the appellant authorized to use medical marijuana at the time of the police contact.

This is somewhat similar to the case in *State v. Hanson*. In that case, police raided the defendant's hotel and seized plants, but were unable to contact the defendant. *Hanson*, 138 Wn.App. 322, 325 (2007). The defendant brought in documentation, obtained after the raid, and presented it to the police the following day. *Id.* The trial court denied the affirmative defense, but the court of appeals reversed the trial court, finding that the statute only required the defendant to present valid documentation when questioned. *Id.* The court of appeals specifically noted that "[h]ad Mr. Hanson been present on the day of this raid and had he been asked to present valid documentation, he would not have been

able to do so and would not, then, have satisfied the requirements of the statute.” *Id.* at 327. Similarly, even if the appellant had his paperwork in his possession, he could not have complied because it was expired at the time of contact.

This sentiment is echoed in *State v. Adams*, 148 Wn.App. 231 (2009). In that case, an individual with valid caregiver authorization was arrested, but did not have the documents on him at the time of arrest. *Id.* at 236. The trial court later denied his attempt to use the affirmative defense, but that decision was reversed. *Id.* The court of appeals found that he should have been allowed to raise the defense, noting that “he obtained the required documents well in advance of his arrest” and that should he have been unable to produce those documents, “he would not have satisfied the requirements of the statute.” *Id.* at 238. In contrast the *Adams*, the appellant in this case had documentation that had expired at the time of his questioning and arrest, so even if he had been able to provide documentation, it had expired and he could not make a *prima facie* showing to support the defense.

The appellant relies heavily on *Hanson* and *Adams*, but such reliance is misplaced. *Hanson* requires presentation of documentation at the time of police contact and the appellant did no such thing. The irony behind *Hanson*, that the defendant in that case received authorization **after** the police raided his residence, serves to bring into focus the importance of the timing of the authorization. As the *Hanson* court noted quite

specifically, if the suspect had been contacted during the raid, he would not have qualified because he would not have been able to present the documentation. 138 Wn.App. at 327. Similarly, here the appellant could not produce valid documentation because he did not have it at the time of contact.

Further, contrary to *Adams*, the trial court did not hold the appellant responsible for failing to carry his medical marijuana authorization, rather the trial court found that his authorization had expired. Even if he had the paperwork on him, it would not have qualified him for the affirmative defense because it had expired. The court in *Adams* recognized the importance of the obtaining the documents in advance of arrest. 148 Wn.App. at 238. Neither *Adams* or *Hanson* justify, support, or advance the possibility of a court ignoring the specific limitation of the doctor's authorization for use of medical marijuana to a one-year time span.

This court should not ignore the medical provider's limitation on the medical marijuana authorization. In this case, the appellant had a medical marijuana authorization from Dr. Orvald that expired prior to the date of his arrest. Approximately a month after his arrest, he received a new authorization. At the time of his arrest, he had no authorization from a physician. He may have had a medical condition that complied with the statute, but he did not have a doctor's authorization to use marijuana. The treating physician specifically noted an expiration date on the appellant's

authorization. The appellant asks this court to ignore the Doctor's placement of an expiration date on the authorization for use of medical marijuana.

#### **IV. CONCLUSION**

The trial court denied the appellant's motion to suppress under Article I, Section 7 of the Washington State Constitution. The search incident to arrest in this case was **not** a fishing expedition designed to ensnare a hapless passer-by, but rather a search for evidence related to the crime of arrest. The respondent respectfully requests that this court follow its previous decision in *State v. Louthan* and affirm the trial court, or in the alternative stay decision in the case pending the outcome of the consolidated appeals in *Wright* and *Snapp*.

The trial court properly denied the appellant's attempt to establish the affirmative defense of medical marijuana authorization under former RCW 69.51A.040(c). The appellant's medical marijuana authorization was expired at the time he was arrested and this court should give effect to the doctor's decision to limit the authorization to a one-year time span. It is irrelevant that the appellant was a qualified patient before and after the arrest, the relevant time according to all the caselaw is the time of arrest. This court should affirm the trial court's finding of guilt and find the appellant failed to make the *prima facie* showing necessary to avail himself of the medical marijuana defense.

Respectfully submitted this 21<sup>st</sup> day of November, 2011.

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By:



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## APPENDIX

**RCW 69.51A.047**

**Failure to register or present valid documentation — Affirmative defense.**

A qualifying patient or designated provider who is not registered with the registry established in \*section 901 of this act or does not present his or her valid documentation to a peace officer who questions the patient or provider regarding his or her medical use of cannabis but is in compliance with all other terms and conditions of this chapter may establish an affirmative defense to charges of violations of state law relating to cannabis through proof at trial, by a preponderance of the evidence, that he or she was a validly authorized qualifying patient or designated provider at the time of the officer's questioning. A qualifying patient or designated provider who establishes an affirmative defense under the terms of this section may also establish an affirmative defense under RCW 69.51A.045.

**FORMER RCW 69.51A.040**

Laws 2011, ch. 181, § 401, rewrote the section, which formerly read:

“(1) If a law enforcement officer determines that marijuana is being possessed lawfully under the medical marijuana law, the officer may document the amount of marijuana, take a representative sample that is large enough to test, but not seize the marijuana. A law enforcement officer or agency shall not be held civilly liable for failure to seize marijuana in this circumstance.

“(2) If charged with a violation of state law relating to marijuana, any qualifying patient who is engaged in the medical use of marijuana, or any designated provider who assists a qualifying patient 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.

“(3) A qualifying patient, if eighteen years of age or older, or a designated provider shall:

“(a) Meet all criteria for status as a qualifying patient or designated provider;

“(b) Possess no more marijuana than is necessary for the patient's personal, medical use, not exceeding the amount necessary for a sixty-day supply; and

“(c) Present his or her valid documentation to any law enforcement official who questions the patient or provider regarding his or her medical use of marijuana.

“(4) A qualifying patient, if under eighteen years of age at the time he or she is alleged to have committed the offense, shall demonstrate compliance with subsection (3)(a) and (c) of this section. However, any possession under subsection (3)(b) of this section, as well as any production, acquisition, and decision as to dosage and frequency of use, shall be the responsibility of the parent or legal guardian of the qualifying patient.”

## UNITED STATES CONSTITUTION, 4<sup>th</sup> AMENDMENT

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

**WASHINGTON STATE CONSTITUTION ARTICLE I, SECTION 7**

**INVASION OF PRIVATE AFFAIRS OR HOME PROHIBITED.** No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

# COWLITZ COUNTY PROSECUTOR

## November 21, 2011 - 2:35 PM

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