

NO. 44549-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

JONATHAN BROOKS,

Appellant.

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

The Honorable Toni A. Sheldon, Judge
The Honorable Amber L. Finlay, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The affidavit for search warrant was inadequate to establish probable cause that a crime had been committed.

2. The trial court erred in failing to suppress the evidence discovered pursuant to the search warrant.

3. Defense counsel was ineffective for failing to argue that the convictions for possessing and manufacturing marijuana constituted the same criminal conduct.

4. The trial court erred in entering a community custody condition prohibiting possession of alcohol.

Issues Pertaining to Assignment of Error

1. Under statutory amendments that became effective in 2011, the Medical Use of Marijuana Act (MUMA)¹ no longer provides a mere affirmative defense for certain marijuana-related charges. Rather, under certain circumstances, certain activities, if performed in a manner consistent with MUMA, are no longer considered crimes. Police officers' observations suggesting that marijuana was being grown at a residence were, therefore, ambiguous as to whether a crime was being committed. Did the trial court

¹ Chapter 69.51A RCW.

err in concluding there was probable cause to issue a search warrant for the residence?

2. The appellant was convicted of possessing and manufacturing marijuana, crimes that involve the same victim, same time and place, and same objective intent. Was defense counsel ineffective for failing to argue the crimes were the "same criminal conduct"?

3. Where there was no evidence the crimes involved the use of alcohol, must the condition prohibiting possession of alcohol be stricken?

B. STATEMENT OF THE CASE²

1. Procedural facts

The State charged Jonathan Brooks with manufacturing marijuana, possession of more than 40 grams of marijuana, possession of marijuana with intent to deliver, and two counts of bail jumping. CP 47, 58-59.

Brooks moved under CrR 3.6 to suppress the evidence seized pursuant to a search warrant. CP 94-96. The trial court denied the motion and later denied Brooks's motion for reconsideration. CP 61-85; Supp. RP at 2.

² This brief refers to the verbatim reports as follows: 1RP – 5/24/12, 5/30/12, 6/7/12, 6/15/12, 1/10/13, 1/15/13, 1/18/13, and 1/23/13; 2RP – 1/23, 1/24, and 2/11/13; and Supp. RP – 10/4/13 (hearing on motion for reconsideration).

A jury acquitted Brooks of possession with intent but convicted him of the other four counts. CP 21-25. Based on an offender score of four, including three points for other current offenses, the court sentenced Brooks to standard range, concurrent terms of 13 months on each count. CP 7. The court imposed community custody conditions including a prohibition on possession or consumption of “any mind or mood-altering substances, to include the drug alcohol.” CP 14.

2. Motion to suppress

Brooks moved to suppress the evidence discovered in a search of the residence, arguing in part the affidavit for search warrant was insufficient because the smell of marijuana alone failed to establish a crime had been committed. CP 95. Brooks filed an amended motion to suppress, contending the officers had a duty to re-contact the magistrate after, upon execution of the warrant, Brooks presented documents indicating he was authorized to possess medical marijuana. CP 90-93; 1RP 32-35, 40-41; Pretrial Ex. 1 (complaint for search warrant for a shed on the property); Pretrial Ex. 2 (transcript of telephonic request for supplemental warrant). The court denied the motion, stating in part that

MUMA did not preclude the issuance of a search warrant but only permitted an accused to raise an affirmative defense. 1RP 44-45.³

Brooks filed a motion for reconsideration, attaching a recent federal court ruling suppressing evidence based on the 2011 amendments to the MUMA. CP 61-85. The court denied the motion, again without issuing written findings. Supp. RP at 2.

3. Trial testimony

On March 15, 2012, Trooper Ryan Los of the West Sound Narcotics Enforcement Team (WestNET) received a tip there was a marijuana grow operation at 262 Northeast Kissin Tree Lane in Tahuya. 1RP 131. Trooper Los and Detective Ses Maiava, also with WestNET, drove down a single-lane dirt road leading to a small driveway. 1RP 131, 135, 172-73. On one side of the drive was the house in question, as well as an outbuilding; another house was located on the other side of the drive. 1RP 135. The officers planned to do a “knock and talk” at the residence. 1RP 131.

The smell of fresh marijuana grew stronger as they approached the house. No one answered the door, but the officers could hear the humming of lights and the whirring of fans. 1RP 131-32. Several

³ The court asked the State to prepare written findings and conclusions, but none have been entered to date. 1RP 45.

windows were insulated with Styrofoam or covered with black plastic. 1RP 132. Believing marijuana was being grown inside, the officers decided to obtain a search warrant. 1RP 135-36. In the complaint for search warrant, the officers stated they contacted the closest neighbor, who owned the house in question, and asked whether Brooks had a medical marijuana authorization. The neighbor said he did not know. Pretrial Ex. 1.

The officers served the warrant the next day and found Brooks at the residence.⁴ 1RP 135. The officers discovered marijuana plants in various stages of growth in different rooms. They also found growing supplies such as plant food, cut plants in the process of drying, a collection of discarded stems and leaves, baggies containing marijuana, and a bong. 1RP 138, 141, 174; 2RP 210. A shed on the property contained large “adult” plants and a cooler with fertilizer and plant food. 1RP 142, 174.

⁴ Per the defense’s offer of proof, Brooks presented the officers his medical marijuana authorization paperwork at that time. But the court denied the motion to raise an affirmative defense under MUMA, in part based on possession of more than the permitted number of plants, and in part because the court found the written authorization was inadmissible hearsay. 1RP 125-26. The court’s second rationale is at odds with the holding of five justices – four concurring and one dissenting – in State v. Fry, 168 Wn.2d 1, 18-19, 228 P.3d 1 (2010) (Chambers, J., concurring) (such written authorization is prima facie evidence sufficient to present the defense to jury).

The officers found about 111 plants in various stages of growth. The total did not include mere “shoots” or discarded root balls. 1RP 144, 186. Maiava estimated each adult plant would produce half a pound to a pound of marijuana. 1RP 175-76.

Per an offer of proof, Brooks presented the officers his medical marijuana authorization paperwork at that time. But the court denied the motion to raise an affirmative defense under MUMA, in part based on possession of more than the permitted number of plants, and in part because the court found the written authorization was inadmissible hearsay. 1RP 125-26.

C. ARGUMENT

1. THE COMPLAINT FOR SEARCH WARRANT FAILED TO ESTABLISH PROBABLE CAUSE TO SEARCH THE RESIDENCE.

The circumstances presented to the officers when they visited the home the first time did not establish probable cause to believe a crime was being committed. At most, the circumstances suggested marijuana was being grown. The officers did not, however, know whether the grow operation was permitted under MUMA.

a. Introduction to applicable law

The Fourth Amendment provides, “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable

searches and seizures, shall not be violated.” Washington Constitution article I, section 7, provides: “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Generally, warrants provide the authority of law required by the constitution. State v. Morse, 156 Wn.2d 1, 7, 123 P.3d 832 (2005) (citing State v. Ladson, 138 Wn.2d 343, 350, 979 P.2d 833 (1999)).

To justify the issuance of a warrant, the supporting affidavit must show probable cause. State v. Cole, 128 Wash.2d 262, 286, 906 P.2d 925 (1995). Probable cause requires the State to set forth facts establishing a reasonable inference that the accused is “probably” involved in criminal activity and that evidence of the crime can be found at the location to be searched. State v. Shupe, 172 Wn. App. 341, 289 P.3d 741 (2012) (quoting State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999)), review denied, 177 Wn.2d 1010 (2013). Although this Court defers to the issuing magistrate's determination, the trial court's assessment of probable cause is a legal conclusion that this Court reviews de novo. State v. Neth, 165 Wn.2d 177, 182, 196 P.3d 658 (2008).

b. Probable cause following 2011 MUMA amendments

In State v. Fry, the Washington Supreme Court determined that a medical marijuana authorization card does not eliminate a finding of

probable cause to search for marijuana. 168 Wn.2d 1, 6, 228 P.3d 1 (2010). There, a judge granted permission to search a residence for marijuana even after being informed Fry possessed a medical marijuana authorization card.

The Court concluded that probable cause existed despite the authorization card because MUMA did not decriminalize the use and possession of marijuana and the defense did not negate any element of the crime. *Id.* at 8. Instead, MUMA established an affirmative defense to excuse the criminal act. *Id.* at 7.

The statute the Fry Court considered provided that

[i]f 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 primary caregiver 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.

Former RCW 69.51A.040(2) (2007) (emphasis added). Thus, the officers had probable cause to search based on a reasonable inference that criminal activity was taking place. Fry, 168 Wn.2d at 8.

In 2011, a year after the Supreme Court's decision in Fry, the legislature made substantial changes to MUMA. The 2011 amendments alter the protections afforded to patients, providers, and physicians. While the former statute categorized the protections as an affirmative defense,

the new statute provides that “medical use of cannabis in accordance with the terms and conditions of this chapter does not constitute a crime.” RCW 69.51A.040; Laws of 2011, ch. 181, § 401 (eff. July 22, 2011). Moreover, under RCW 69.51A.025,

Nothing in this chapter or in the rules adopted to implement it precludes a qualifying patient or designated provider from engaging in the private, unlicensed, noncommercial production, possession, transportation, delivery, or administration of cannabis for medical use as authorized under RCW 69.51A.040.

Laws of 2011, ch. 181, § 413.

The amended statute now provides an explicit exception to the general prohibition on possession of controlled substances. Thus, to obtain a warrant, officers must show the exception does not apply. Without such a showing, the officer’s observations do not establish probable cause a crime has been committed.

Although there is no published decision on point, the Supreme Court’s decision in Neth provides the rationale for reversal in this case. There, the Court determined plastic baggies often associated with drug distribution, a large sum of money, and Neth’s criminal history were insufficient to support a warrant to search his vehicle. 165 Wn.2d at 183-84. As the Court explained, evidence that is equally consistent with lawful

and unlawful drug-related conduct does not provide probable cause to search. Id. at 185.

Here, officers ultimately discovered the residence contained more than the permitted number of plants.⁵ They did not, however, know that when they applied for the search warrant. Nor did they know whether Brooks was permitted to possess or grow marijuana. Pretrial Ex. 1 at 3.

The officer's observations are therefore analogous to the evidence deemed too ambiguous to support probable cause in Neth. The smell of growing marijuana may have indicated a crime was being committed. On the other hand, following the 2011 amendments, it may be consistent with permitted activity.

The complaint for search warrant also indicates Brooks had an Idaho conviction for manufacturing a controlled substance. Before criminal history can significantly contribute to probable cause, some factual similarity between the past crime and the currently charged offense must be shown Neth, 165 Wn.2d at 185-86. Here, the complaint does not reveal the controlled substance at issue. More significantly, the issue identified above remains: While growing marijuana is a crime in Idaho, it

⁵ RCW 69.51A.040 (a qualifying patient or provider may possess no more than fifteen plants or, if the person is both a qualifying patient and a provider for another patient, no more than twice that amount); see also RCW 69.51A.085 (“collective garden” may contain up to 45 plants).

may, or may not be, a crime in Washington. Under the circumstances, therefore, the previous conviction does not contribute to the probable cause determination. The court erred in affirming the probable cause finding. Id. at 186.

Without the evidence obtained under the search warrant, the State could not have proved every element of the marijuana-related charges. This Court should therefore reverse Brooks's manufacturing and possession convictions and remand for dismissal with prejudice. State v. Armenta, 134 Wn.2d 1, 17-18, 948 P.2d 1280 (1997) (dismissal appropriate where unlawfully obtained evidence forms the sole basis for the charge).

2. BROOKS WAS DENIED EFFECTIVE REPRESENTATION WHEN HIS ATTORNEY FAILED TO ARGUE MANUFACTURING AND POSSESSION OF MARIJUANA CONSTITUTED THE "SAME CRIMINAL CONDUCT."

In the alternative, the marijuana-related offenses should be counted as the same criminal conduct in determining Brooks's offender score. Brooks's attorney rendered ineffective assistance in failing to make this argument in light of this Court's holding in State v. Bickle, 153 Wn. App. 222, 230-32, 222 P.3d 113 (2009), which holds similar charges are same criminal conduct. Remand for resentencing is required.

- a. The manufacturing and possession charges constituted the same criminal conduct.

The sentencing court calculates an offender score by adding current offenses and prior convictions. RCW 9.94A.589(1)(a). The offender score for each current offense includes all other current offenses unless the trial court finds “that some or all of the current offenses encompass the same criminal conduct.” Id. Where the court makes such a finding, those current offenses are counted as one crime for sentencing purposes. Id.

Offenses constitute the same criminal conduct if they are (1) committed with the same criminal intent, (2) committed at the same time and place, and (3) involve the same victim. Id.; State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994). “Intent, in this context, is not the particular mens rea element of the particular crime, but rather is the offender's objective criminal purpose in committing the crime.” State v. Adame, 56 Wn. App. 803, 811, 785 P.2d 1144 (1990).

The crimes charged in this case – possession and manufacturing marijuana – involved the same place (the residence), the same time (March 15, 2012) and the same victim (the general public). CP 57-59; State v. Garza-Villarreal, 123 Wn.2d 42, 47, 864 P.2d 1378 (1993) (victim of a drug offense is the public).

The next question is whether the crimes involved the same criminal intent. Multiple factors inform the objective intent determination, including: (1) how intimately related the crimes are; (2) whether the criminal objective substantially changed between the crimes; (3) whether one crime furthered another; and (4) whether both crimes were part of the same scheme or plan. State v. Burns, 114 Wn.2d 314, 318, 788 P.2d 531 (1990); State v. Calvert, 79 Wn. App. 569, 577-78, 903 P.2d 1003 (1995), review denied, 129 Wn.2d 1005 (1996). Crimes may involve the same intent if they were part of a continuous transaction or involved a single, uninterrupted criminal episode. State v. Deharo, 136 Wn.2d 856, 858, 966 P.2d 1269 (1998). "[I]f one crime furthered another, and if the time and place of the crimes remained the same, then the defendant's criminal purpose or intent did not change and the offenses encompass the same criminal conduct." State v. Lessley, 118 Wn.2d 773, 777, 827 P.2d 996 (1992).

Here, manufacturing furthered possession, and vice versa. The manufacture of marijuana furthers the crime of possession of marijuana, and it is impossible to manufacture marijuana without possessing marijuana. Bickle, 153 Wn. App. at 230-32 (distinguishing cases discussing manufacture of methamphetamine and holding that

manufacturing and possession of marijuana constitute same criminal conduct).

- b. Defense counsel was ineffective in failing to raise a same criminal conduct argument.

Whether two crimes constitute the same criminal conduct involves both determinations of fact and the exercise of trial court discretion. State v. Nitsch, 100 Wn. App. 512, 519-20, 997 P.2d 1000, review denied, 141 Wn.2d 1030 (2000). Defense counsel waived a direct challenge to the same criminal conduct determination by not raising the argument below. Id. at 519-20.

A claim of ineffective assistance of counsel, however, is an issue of constitutional magnitude that may be considered for the first time on appeal. State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment and Article I, Section 22. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987).

Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26. A failure to argue same criminal conduct when such an argument is warranted

constitutes ineffective assistance. State v. Saunders, 120 Wn. App. 800, 824-25, 86 P.3d 232 (2004).

Only legitimate trial strategy or tactics constitute reasonable performance. Kyllo, 166 Wn.2d at 869. Defense counsel's performance fell below an objective standard of reasonableness because, under the circumstances, there was no legitimate reason not to have requested the trial court to find the offenses were the same criminal conduct. Brooks would only have benefited from such a request, and could not have suffered adverse consequences.

Brooks's offender score would have been one point lower for each offense, which would have lowered his standard sentencing range for each offense. See RCW 9.94A.510 (sentencing grid); former RCW 9.94A.515 (2010) (seriousness level of current offenses); former RCW 9.94A.517 (2002) (drug offense sentencing grid); RCW 9.94A.518 (seriousness level of drug offenses); RCW 9.94A.589(1)(a) (sentence range for each current offense determined by using other current convictions as if they were prior convictions for offender score). No legitimate strategic or tactical decision justified counsel's acquiescence to a score that increased his client's minimum term of confinement.

In addition, "[r]easonable conduct for an attorney includes carrying out the duty to research the relevant law." In re Personal Restraint of

Wilson, 169 Wn. App. 379, 390, 279 P.3d 990 (2012). With proper research, Brooks's trial counsel would have found this Court's decision in Bickle. For these reasons, counsel performed deficiently.

Prejudice exists where there is a reasonable probability that the result would have been different but for counsel's performance. Thomas, 109 Wn.2d at 226. In light of this Court's holding in Bickle, there was at least a reasonable probability that the sentencing court would have found the two offenses constituted the same criminal conduct. This Court cannot be confident the trial court would not have concluded the crimes constituted the same criminal conduct had it been asked to do so. Remand for resentencing is required. Saunders, 120 Wn. App. at 824-25.

3. THE COURT ERRED IN IMPOSING AN UNLAWFUL ALCOHOL-RELATED COMMUNITY CUSTODY CONDITION.

Under RCW 9.94A.703, some community custody conditions are mandatory, while the trial court has discretion in imposing others. Under RCW 9.94A.703(3)(d), the sentencing court may order the defendant to “perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community.” Under RCW 9.94A.703(3)(f), the trial court may also order the defendant to “comply with any crime-related prohibitions.”

The court ordered Brooks to refrain from consuming and possessing alcohol. CP 14. While RCW 9.94A.703(3)(e) specifically permits the court to order a defendant not to consume alcohol, the court went further and required that Brooks not *possess* alcohol.

There was no evidence, and the court did not find, that Brooks consumed alcohol or that alcohol contributed to the offense. The court therefore wrongly imposed the alcohol-related conditions. See State v. Jones, 118 Wn. App. 199, 208, 76 P.3d 258 (2003) (alcohol-related conditions impermissible even where defendant admitted substance abuse contributed to the crime).

Sentencing errors may be raised for the first time on appeal. Id. at 204; State v. Anderson, 58 Wn. App. 107, 110, 791 P.2d 547 (1990). This Court should order the sentencing court to strike the condition pertaining to substance abuse treatment and counseling on remand. See State v. Lopez, 142 Wn. App. 341, 353-54, 174 P.3d 1216 (2007) (striking community custody condition where court did not make statutorily required finding that mental illness contributed to crime), review denied, 164 Wn.2d 1012 (2008).

D. CONCLUSION

Suppression of the evidence is required. Thus, the manufacturing and possession charges should be reversed and dismissed. In the alternative, counsel rendered ineffective assistance by failing to argue the marijuana-related charges were the same criminal conduct. Remand is required so the court can make that determination consistent with this Court's holding in Bickle. Finally, the condition related to possession of alcohol should be stricken on resentencing.

DATED this 20TH day of August, 2013.

Respectfully submitted,

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 44549-2-II
)	
JONATHAN BROOKS,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 20TH DAY OF AUGUST 2013, I CAUSED A TRUE AND CORRECT COPY OF THE BRIEF OF APPELLANT TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JONATHAN BROOKS
NO. 364020
PENINSULA WORK RELEASE
1340 LLOYD PARK WAY
PORT ORCHARD, WA 98367

SIGNED IN SEATTLE WASHINGTON, THIS 20TH DAY OF AUGUST 2013.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

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