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AUG 19 2018
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
BY _____

28878-1-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DAVID HENDERSHOT, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF STEVENS COUNTY

APPELLANT'S BRIEF

Janet G. Gemberling
Attorney for Appellant

GEMBERLING & DOORIS, P.S.
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(509) 838-8585

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A. ASSIGNMENT OF ERROR

1. The court erred in ruling the defendant could not present evidence of an affirmative defense under the Medical Use of Marijuana Act.

B. ISSUE

1. When, one month after law enforcement executes a search warrant and obtains evidence that the accused is manufacturing marijuana and three months before the State files charges alleging unlawful manufacture of marijuana, the accused obtains the authorizing documentation required as an element of the affirmative defense created by the Medical Use of Marijuana Act, and in the absence of any evidence any law enforcement officer questioned the accused about his medical use of marijuana, does the court violate the right of the accused to present a defense by ruling that evidence necessary to establish the affirmative defense is inadmissible?

C. STATEMENT OF THE CASE

On August 13, 2008, Gig LeBrett was working as an aerial observer for the Montana National Guard and on that day he observed

marijuana from a helicopter. (RP 8) He determined the location of the marijuana and provided that information to Detectives Michael Gilmore and Brad Manke. (RP 12-13)

After observing the property from the ground, Detective Gilmore assisted Detective Manke in preparing a search warrant affidavit. (RP 27-28) While waiting for the warrant, Detective Gilmore went to David Hendershot's home and told him they had observed marijuana. (RP 30) Detective Manke arrived with the warrant, and the officers conducted a search and found numerous marijuana plants. (RP 32, 56-57)

On January 16, 2009, the State charged Mr. Hendershot with possessing marijuana with intent to manufacture or deliver it, with manufacturing marijuana, and with using drug paraphernalia. (CP 1-3) Mr. Hendershot moved to suppress the evidence. (CP 4) He argued the charges were based on evidence obtained in the course of executing a search warrant that lacked the requisite specificity. (CP 5-8)

He also moved for dismissal of the charges based on his medical authorization to possess marijuana. (CP 4-10) In support of that motion, he submitted a copy of a statement signed by his treating physician, Thomas Orvald, stating that Mr. Hendershot was under treatment for a debilitating condition and that in the physician's opinion the benefits of

medical marijuana use would likely outweigh the health risks for Mr. Hendershot. (CP 10)

The State moved to exclude all evidence relating to any medical marijuana authorization obtained after August 13, 2008. (CP 30)

The court found the evidence obtained in the execution of the search warrant was admissible. (CP 49-52) The court also granted the State's motion to exclude evidence that Mr. Hendershot was authorized to use marijuana because he did not possess authorization and it was not provided to law enforcement upon request. (CP 54) In light of these rulings, Mr. Hendershot agreed to a bench trial on stipulated facts and was duly convicted of manufacturing marijuana. (CP 48, 55-57)

D. ARGUMENT

1. EXCLUDING EVIDENCE OF THE DEFENDANT'S STATUS AS A QUALIFYING PATIENT VIOLATED HIS RIGHT TO PRESENT A DEFENSE.

A defendant has the right to present a defense. *State v. Ginn*, 128 Wn. App. 872, 879, 117 P.3d 1155 (2005).

Washington's Medical Use of Marijuana Act provides an affirmative defense for patients and caregivers charged with possessing marijuana. RCW 69.51A.005; *State v. Phelps*, 118 Wn. App. 740, 743, 77 P.3d 678 (2003) (*citing State v. Shepherd*, 110 Wn. App. 544, 549,

41 P.3d 1235, *review denied*, 147 Wn.2d 1017, 56 P.3d 992 (2002)). “In evaluating the sufficiency of the evidence to raise an affirmative defense under the Act, the trial court must view the evidence in favor of the defendant.” *State v. Adams*, 148 Wn. App. 231, 235, 198 P.3d 1057 (2009).

“[A]ny 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 [Chapter 69.51A RCW].” RCW 69.51A.040(2). The requirements that must be proved to establish the defense are contained in RCW 69.51A.040(3): 1) a qualifying patient must meet all criteria for that status; 2) possess no more marijuana than is necessary for his personal, medical use for sixty days; and 3) present his valid documentation to any law enforcement official who questions him regarding his medical use of marijuana. *See State v. Hanson*, 138 Wn. App. 322, 326, 157 P.3d 438 (2007).

The criteria for the first requirement, the status of “qualifying patient,” are stated in RCW 69.51A.010(4). A “qualifying patient” is a person who is a patient of a health care professional, has been diagnosed by that health care professional as having a terminal or debilitating medical condition, is a resident of the State of Washington at the time of

such diagnosis, and has been advised by that health care professional about the risks and benefits of the medical use of marijuana and that they may benefit from the medical use of marijuana. RCW 69.51A.010(4). *State v. Hanson*, 138 Wn. App. at 326.

Viewed in favor of Mr. Hendershot, the evidence presented to the court supported his claim to be a “qualifying patient.” He provided the court with a statement signed by Dr. Orvald stating that he was a physician who was treating Mr. Hendershot for a debilitating condition and had advised him in accordance with the statutory requirements. (CP 10) Although dated September 16, 2008, that statement does not establish the date on which Dr. Orvald began treating Mr. Hendershot or on what date he advised him about the risks and benefits of medical marijuana use. This evidence is sufficient to create a question of fact as to whether Mr. Hendershot was a patient who qualified for medical marijuana use on August 13, 2008.

As to the second requirement, evidence of the amount of marijuana necessary for sixty days’ personal medical use could include the nature of the individual’s medical condition, the treating physician’s opinion as to the quantity necessary to alleviate the individual’s symptoms, and the manner in which the marijuana is ingested. *State v. Shepherd*,

110 Wn. App. at 552. The trial court properly found this would present a question of fact for the jury.

The trial court determined that Mr. Hendershot was not entitled to present his defense because, in the court's view, he could not satisfy the third requirement: presentation of his valid documentation to law enforcement. Because Mr. Hendershot did not possess Dr. Orvald's written authorization at the time of the search, he could not have presented it to the officers if they had questioned him regarding his medical use of marijuana.

But the statute requires presentment only when such questioning actually occurs. *See State v. Butler*, 126 Wn. App. 741, 750-51, 109 P.3d 493 (2005). ("A defendant is required to obtain his authorizing documentation in advance of law enforcement questioning.") Indeed the Supreme Court has ruled that such authorization need only be presented when such questioning is preceded by formal charges: "The presentment requirement must be read in context. It is only triggered when someone is 'charged with a violation.'" *State v. Fry*, 168 Wn.2d 1, 9, 228 P.3d 1 (2010).

The State charged Mr. Hendershot with violating RCW 69.50.401 on January 16, 2009, more than three months after the date on the authorizing documentation signed by Dr. Orvald in September 2009. The

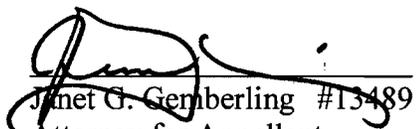
State failed to provide the court with any evidence that any law enforcement officer questioned Mr. Hendershot regarding his medical use of marijuana either before or after the charges were filed. Viewed in Mr. Hendershot's favor, the evidence before the court showed that Mr. Hendershot would have presented the documentation required by the statute upon questioning by any law enforcement officer about his medical use of marijuana.

E. CONCLUSION

The court erred in determining as a matter of law that Mr. Hendershot was not entitled to assert the affirmative defense provided by the Medical Use of Marijuana Act. The conviction should be reversed.

Dated this 9th day of August, 2010.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 28878-1-III
)	
vs.)	CERTIFICATE
)	OF MAILING
DAVID HENDERSHOT,)	
)	
Appellant.)	

I certify under penalty of perjury under the laws of the State of Washington that on August 9, 2010, I mailed copies of Appellant's Brief in this matter to:

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Signed at Spokane, Washington on August 9, 2010.



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