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Court of Appeals
Division III
State of Washington

No. 30076-5-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON

Plaintiff/Respondent,

vs.

GABRIEL SAGE BECKLIN

Defendant/Appellant.

APPEAL FROM THE FERRY COUNTY SUPERIOR COURT

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

A. STATEMENT OF THE CASE. 1

B. ARGUMENT. 2

1. *The Trial Court Properly Required the Defendant/Appellant to Make an Offer of Proof Regarding Medical Marijuana. 3*

2. *The 2011 Amendments to the MMA Are Not Retroactive and Are Inapplicable To This Case. 4*

3. *The Defendant/Appellant Failed to Offer Sufficient Admissible Evidence To Present the Affirmative Defense to the Jury. 4*

A. The Defendant/Appellant Was Not a “Qualifying Patient” for 116 Marijuana Plants. 6

B. The Defendant/Appellant Could Not Qualify as a Valid “Designated Provider” for Two Others. 7

C. The Defendant/Appellant was not a Valid “Designated Provider” for Tyson Wheeler. 8

D. The Defendant/Appellant was not a Valid “Designated Provider” for Marlin Martinez. 9

E.	<u>The Defendant Is Not Entitled to Claim “Designated Provider” Status Because He Failed to Segregate Crops..</u>	10
C.	CONCLUSION.	11

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>State v. Butler</i> , 126 Wn.App. 741, 750 (2005).	3
<i>State v. G.B. Brown</i> , ___ Wn.App. ___, 269 P.3d 359 (2012)..	4
<i>State v. Ginn</i> , 128 Wn.App. 872 (2005)	3, 5
<i>State v. Janes</i> , 121 Wn.2d 220, 236–37, 850 P.2d 495 (1993)..	3, 4
<i>State v. Mullins</i> , 128 Wn.App. 633 (2006).	3, 4
<u>State Statutes</u>	<u>Page</u>
Laws of 2010, ch. 284; Laws of 2011, ch. 181.	4
RCW 69.51A	9
RCW 69.51A.010(1).	8
RCW 69.51A.010(1)(b)..	8, 10
RCW 69.51A.010(1)(c)..	10
RCW 69.51A.010(4).	6
RCW 69.51A.010(5) and (7)(a)..	8
RCW 69.51A.010(6)(d)	7
RCW 69.51A.010(7)(b)..	8, 9

RCW 69.51A.040(3)	5
RCW 69.51A.090.	8

A. STATEMENT OF THE CASE

From the air, police spotted an apparent marijuana growing operation on the Becklins' property in Ferry County. Affidavit for Search Warrant, CP 111. A warrant was obtained and executed on August 20, 2010. Search Warrant, CP 95-104; Report of Deputy Venturo, CP 123.

Upon arrival at the subject residence, Deputy Venturo made contact with Andre Becklin and Defendant/Appellant Gabriel Becklin. CP 123-124. Gabriel Becklin produced copies (not originals) of three marijuana prescriptions. One was for Gabriel Becklin; the other two were for "Marlin Martinez" and "Tyson Wheeler". Becklin's prescription had been signed by "Dr. Mohammed Said" of CBR Medical in Spokane; the signature on Martinez's form was illegible, did not include an MD after the signature or a Washington License Number and did not identify the prescriber's medical office; Wheeler's prescription was signed by "Dr. Ralph Capone, ND [presumably a Naturopathic Doctor] of CBR Medical. CP 123-124; Marijuana Prescription cards, CP 144-146. Gabriel Becklin also produced a handwritten sheet of paper allegedly designating Gabriel Becklin as "caretaker" for Tyson Wheeler. CP 29, 123-24, 147. The designation contained a signature, but was undated and did not specify

what Becklin was supposed to be taking care of on Wheeler's behalf. It contained no identifying information on Wheeler, such as date of birth, social security number, address or telephone number. CP 147. Neither "Martinez" or "Wheeler" were present at the scene, neither lived at the residence, and Mr. Becklin made no attempt to contact them. CP 30, 124.

During the course of the search, several firearms were discovered and a total of 141 marijuana plants were found. CP 123-126. Mr. Becklin was allowed to keep 15 plants pursuant to his medical marijuana prescription; the rest were seized. *Id.* The Defendant/Appellant was charged with Manufacturing Marijuana and Unlawful Use of a Building for Drug Purposes. CP1-2. At the trial on stipulated facts, the State proceeded with the Manufacturing Marijuana charge only, based on 116 marijuana plants. CP 123-126, 146.

B. ARGUMENT

1. *The Trial Court Properly Required the Defendant/Appellant to Make an Offer of Proof Regarding Medical Marijuana.*

Prior to trial below, the State moved *in limine* to prohibit Gabriel Becklin from presenting a medical marijuana defense to the seized marijuana. CP 28-37. The trial court required the Defendant/Appellant to

provide an offer of proof of compliance with the Medical Marijuana Act (MMA), relying on *State v. Mullins*, 128 Wn.App. 633 (2006); *State v. Ginn*, 128 Wn.App. 872 (2005) and *State v. Butler*, 126 Wn.App. 741, 750 (2005). CP 56, 58. A defendant asserting a medical marijuana defense “must offer sufficient admissible evidence to justify giving the jury an instruction on the defense”. *State v. Ginn*, 128 Wn.App. at 879, citing *State v. Janes*, 121 Wn.2d 220, 236–37, 850 P.2d 495 (1993). *State v. Mullins* states the same rule. 121 Wn.2d at 639. The proffer must indicate the ability to meet the burden of proof at trial. *Butler*, 126 Wn.App. At 551-52. Thus, as part of his proffer, the defendant must make a showing that he can meet each element of the statutory affirmative defense. *Id.*

Here, the trial court properly required that the defendant “come forward with an offer of proof” of compliance with the MMA as a condition of presenting the affirmative defense to a jury. CP 56. This did not usurp the role of the jury. *See, Janes, supra; Mullins, supra.* The question is whether the information provided by the Defendant/Appellant met the minimal requirements needed to present the affirmative defense of medical marijuana to a jury.

2. *The 2011 Amendments to the MMA Are Not Retroactive and Are Inapplicable To This Case.*

The elements of the affirmative defense are set forth in the MMA, which has been amended on several occasions. *See*, Laws of 2010, ch. 284; Laws of 2011, ch. 181. The Defendant/Appellant asserts that the Court should apply the 2011 amendments, but those amendments are not retroactive. *State v. G.B. Brown*, ___ Wn.App. ___, 269 P.3d 359 (2012)(“We conclude that the 2011 amendments do not apply retroactively....”). The trial court applied the law in existence at the time of the search and at the time of the trial of this matter. The trial court applied the proper law. *See, State v. Brown, supra*.

3. *The Defendant/Appellant Failed to Offer Sufficient Admissible Evidence To Present the Affirmative Defense to the Jury.*

When a defendant makes a proffer in support of a MMA affirmative defense, the trial court is required to view the defendant’s proffer in the light most favorable to the defendant. *State v. Ginn, supra*, 128 Wn.App. at 879. The trial court recognized and applied this standard. CP 56-57, 59.

The version of RCW 69.51A.040(3) in effect from 2007 through 2010 sets forth the relevant elements of the affirmative defense under the

MMA:

A qualifying patient ... shall:

- (a) Meet all criteria as a qualifying patient...;
- (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.

As of 2010, the definition of "qualifying patient" was 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 risk 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).

A. *The Defendant/Appellant Was Not a "Qualifying Patient" for 116 Marijuana Plants.*

The defendant justified his possession of the 116 seized plants by producing three medical marijuana certificates and a caretaker designation.

Looking first to the documentation applying to the Defendant/Appellant himself, the Court noted that the documentation was dated 01/05/2010,

and was purportedly signed by a Dr. Mohammed H. Said, identified as a licensed physician in the State of Washington. CP 59. Dr. Said's authorization provides in pertinent part that:

As this patient's "60 Day Supply" as stipulated by RCW 69.51A.040(3)(b) [the law in effect at the time of issuance of the statement from Dr. Said] and WAC 246-75-010, the Qualifying Patient can reasonably expect to have in their Possession and [n]eed a total of no more than 24 Ounces of "useable Marijuana" and no more than 15 Plants.

CP 59 (Trial court quoting from Defendant/Appellant's Medical Marijuana Authorization form). Considering this documentation in the light most favorable to the Defendant/Appellant, the trial court inferred that Dr. Said was licensed pursuant to the appropriate Chapter RCW and that the Defendant/Appellant must suffer from a qualifying condition. As the trial court put it:

The problem, though, is that the uncontroverted 116 plants discovered would not qualify for the medical marijuana defense for Mr. Becklin as a "qualifying patient" alone since his authorization was only for up to fifteen (15) plants.

CP 60. The trial court properly determined that the Defendant/ Appellant was not entitled to the MMA defense as a "qualifying patient" because he failed to meet the requisite statutory definition. CP60. That left the Defendant/ Appellant's claim to be a "designated provider".

B. *The Defendant/Appellant Could Not Qualify as a Valid “Designated Provider” for Two Others.*

Under the version of RCW 69.51A.010(6)(d) in effect at the time the Defendant/Appellant was found in possession of 116 extra plants, the term “designated provider” was limited to those who were “the designated provider to only one patient at a time.” Thus, the trial court properly concluded that, if the Defendant/Appellant was a “designated provider”, it would have to be for Wheeler or Martinez, not both. CP 60-61

C. *The Defendant/Appellant was not a Valid “Designated Provider” for Tyson Wheeler*

The purported medical marijuana authorization for Tyson Wheeler is dated 08/05/2010. CP 144. Thus, the trial court applied Chapter 69.51A as amended by the June 2010 Amendments. Under that law, Wheeler fails to qualify as a “qualified patient” because the authorization is not on tamper resistant paper as required by RCW 69.51A.010(5) and (7)(a), and 69.51A.090. Also, there was no proof of Wheeler’s identity available at the time of the search and seizure as required by RCW 69.51A.010(7)(b). The trial court thus properly concluded that because Wheeler was not a “qualifying patient”, Becklin could not be his “designated provider”. CP 61. RCW 69.51A.010(1).

Additionally, the written designation allegedly signed by Wheeler fails to comply with statutory requirements. RCW 69.51A.010(1)(b) requires that the “qualifying patient” designate the provider as being “a designated provider under this chapter”. The document provided by Defendant/Appellant does not use the term “designated provider”; it uses the term “caretaker” instead. CP 147. Viewing the alleged designation in the light most favorable to the defendant, the documentation is still too vague to comply with statutory language because it makes no reference to marijuana or to Chapter 69.51A RCW as required. If the document used terminology – such as “designated provider” – that appears in Chapter 69.51A, a reasonable inference could be drawn that the documentation was intended as a MMA provider designation. However, “caretaker” has many meanings in many contexts, and the MMA is not one of those contexts, as the term does not appear in the MMA. Thus, the trial court rightly determined that even if Wheeler – whoever that may be – were a “qualified patient”, the designation of Defendant/Appellant as provider is insufficient. CP 61.

D. *The Defendant/Appellant was not a Valid
“Designated Provider” for Marlin Martinez*

The alleged medical marijuana authorization for Martinez is

undated, and the trial court noted that Defendant/Appellant failed to produce any evidence the 2010 Amendment requiring tamper-resistant paper did not apply. CP 61. However, even under the pre-2010 law, the documentation is insufficient. First, “Martinez” did not live at the property and there was no identification available at the time of the search as required by RCW 69.51A.010(7)(b). Nor is there a written document designating the Defendant/Appellant as Martinez’s “designated provider” as required by RCW 69.51A.010(1)(b). Thus, the trial court rightly determined that Defendant/Appellant failed to produce sufficient evidence that Martinez was a “qualified patient” or that Defendant/Appellant was his “designated provider”. CP 61-62.

E. The Defendant Is Not Entitled to Claim “Designated Provider” Status Because He Failed to Segregate Crops.

The State argued below that the Defendant/Appellant failed to qualify as a “designated provider” because he claimed to be both a user and a provider, but he failed to segregate the allegedly-different crops. A “designated provider” is not permitted to use the marijuana grown for the patient. RCW 69.51A.010(1)(c). The Defendant/Appellant provided no evidence to contradict that he had failed to segregate the marijuana grown

and kept for his own use from that allegedly being grown and kept for others. The trial court agreed that the State's argument had merit and properly relied upon it as an alternative reason to deny Defendant/Appellant status as a "designated provider". CP 62.

C. CONCLUSION

For the reasons stated above, and pursuant to the points and authorities cited herein, the State of Washington respectfully requests that the Court affirm challenged decision.

Respectfully submitted this 19th day of April , 2012.

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