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MAY 09 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 302954

BENTON COUNTY SUPERIOR COURT NO. 10-1-00664-1

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JAMISON BRUCE ZELLER,

Appellant.

REPLY BRIEF OF APPELLANT

NORMA RODRIGUEZ
WSBA # 22398
Attorney for Appellant

RODRIGUEZ & ASSOCIATES, P.S.
7502 West Deschutes Place
Kennewick, Washington 99336
(509) 783-5551

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A. IDENTITY OF PARTY

Jamison Zeller, Appellant, asks for the relief designated in Appellant's Brief.

B. RELEVANT FACTS

The Appellant accepts the statement of the case given in Appellant's Brief for purposes of this reply

C. ARGUMENT

1. *The initial seizure of the defendant was unconstitutional*

a. The initial seizure of the defendant was more than mere investigative detention, it was a warrantless arrest.

An articulable suspicion is not enough to justify in hindsight a seizure that was carried out as an arrest. The reason probable cause is not required for a *Terry* stop is because a stop for investigative purposes is significantly less intrusive than an arrest. *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986). The detention of Mr. Zeller cannot legitimately be characterized as a *Terry* stop under *State v. Williams*, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984). The Supreme Court concluded the police actions "so exceeded the proper purpose and scope of a *Terry* stop as to be justified only if supported by probable cause sufficient to arrest petitioner." *Williams*, 102 Wn.2d at 741.

In the case at hand, at 7:08 pm Mr. Zeller and his companions were surrounded by at least three unmarked patrol cars and six police officers. 04/01/11 RP 26. Mr. Zeller and his companions were told to keep their hands clear and were immediately handcuffed and placed in the back of the patrol cars. 04/01/11 RP 36. Mr. Zeller was then almost immediately read his Miranda warnings. 04/01/11 RP 42. Detective Trujillo testified that he did not begin the process of applying for a search warrant until at least 30 minutes later at 7:39 pm. 04/01/11 RP 27, and didn't actually initiate the telephonic affidavit until 7:54 pm. CP 49. While police officers smelled the odor of marijuana, it is unclear where, in this 30 minute interval, they first noticed it.

Mr. Zeller was placed under arrest when multiple officers surrounded him, told him to stop, handcuffed him, placed him in a patrol car and mirandized him. In order to justify this warrantless arrest police were required to have probable cause. *State v. Hudson*, 124 Wn.2d 107, 112, 874 P.2d 160 (1994). Subsequent events or discoveries cannot retroactively justify a seizure. *State v. Mendez*, 137 Wn.2d 208, 224, 970 P.2d 722 (1999) (overruled on other grounds by *Brendlin v. California*, 551 U.S. 249, 127 S.Ct. 2400 (2007)). In the case at hand, police did not have probable cause to arrest Mr. Zeller immediately upon arriving at the scene. There is no indication that the area was a known drug location or even a high crime area, rather, it was a public parking lot at a busy intersection in broad daylight. 04/01/11 RP 13. Mr. Zeller and his

companions were in the parking lot for approximately 30 minutes before Detective White decided to contact other law enforcement. 04/01/11 RP 12. According to Detective White's observations, the men were simply "hanging out." 04/01/11 RP 11. Detective White testified that he saw what he thought was a "hand-to-hand" transaction of an item that he couldn't see. 04/01/11 RP 18. Necessarily, for a "hand to hand" type occurrence to be illegal the object transferred must necessarily be illegal and must be identified as an illegal substance or object. None of the witnessing officers could verify whether the transfer was a pill, a pill bottle, a brochure or even just a handshake.

Detective White certainly does have "training an experience" in identifying drug transactions, however, the combination of this training and experience contradicted his assertion that this was a drug transaction as generally, such transactions are quick, in a less public location, not in broad daylight, and in an area known for narcotics activities. 04/01/11 RP 18. There is no indication that these men were looking around and watching over their shoulders or any other furtive movements. These facts simply do not amount to probable cause.

b. Even if the initial seizure of the defendant was an investigative detention, law enforcement lacked reasonable suspicion.

First, there is no indication that the area was a known drug location or even a high crime area: it was a public parking lot at a busy intersection with a

bank, professional offices and a diamond store. It was daylight. 04/01/11 RP 10, 13. Mr. Zeller and his companions were in the parking lot for approximately 30 minutes before Detective White called in law enforcement. 04/01/11 RP 12. According to Detective White's observations, the men were simply "hanging out." 04/01/11 RP 11. So why would the detective start watching these men who were simply hanging out and having a conversation; because they were three Hispanic males that had "flashy vehicles" that "were sitting there like they were showing off." 04/01/11 RP 10. Detective White testified that he saw what he thought was a "hand-to-hand" transaction of an item that he couldn't see. 04/01/11 RP 18. There was not enough evidence to establish a "well-founded suspicion that the defendant engaged in criminal conduct." *State v. Doughty*, 170 Wn.2d 57, 62, 239 P.3d 573 (2010). Since the initial stop of the defendant was not justified at its inception, the fact that police smelled the odor of marijuana after unlawfully seizing Mr. Zeller cannot be used to justify their further detention. *State v. Glover*, 116 Wash.2d 509, 514, 806 P.2d 760 (1991).

The State's proffered justification based on safety concerns is unsubstantiated by the evidence. The responding officers were not made aware of Detective White's indication that one of the individuals, not Mr. Zeller, was wearing baggy pants and grabbing around his waist. 04/01/11 RP 26, 35. Furthermore, none of the arresting officers remember patting down any of the other two individuals, which would have been the first response of officers

legitimately concerned for their safety. 04/01/11 RP 37, 39. The seizure was not initiated for safety purposes, but was to investigate a possible narcotics transaction that simply was not substantiated by the by the officer's training and experience.

2. *The affiant recklessly or intentionally omitted facts from the affidavit which would have negated probable cause to issue a search warrant.*

Detective Trujillo incorrectly informed the Judge that he had responded to the location at 7:20 pm, when he had in fact responded at 7:08 pm. 04/01/11 RP 25, CP 49. Detective Trujillo declared to the Judge only two objective factual bases for probable cause: 1) that another officer had witnessed "what he called a hand-to-hand exchange between two Hispanic male subjects;" and 2) that an odor of marijuana emanated from the passenger cabin of the car. CP 50. Both bases were negated during the course of investigation, *before* Detective Trujillo sought a search warrant.

Mr. Zeller notified the officers that the vehicle in question is his, that he has a license to take marijuana medicinally because of his clinical illness, and that he had a small amount of medicinal marijuana in the passenger cabin of his vehicle. 04/01/11 RP 43 & 48. Given this information, there is no objective, factual basis for a reasonable person to conclude based on the odor, that more likely than not, evidence of a particular crime would be found in Mr. Zeller's vehicle. In light of Mr. Zeller's license, marijuana found would be equally

consistent with a lawful use and under *Neth*, it could not support probable cause of a crime. The officers intentionally or recklessly excluded this information in the affidavit for the search warrant. All of the officers involved in detaining Mr. Zeller admit that they had knowledge of the existence of a medical marijuana license. 04/01/11 RP 28, 43 and 55. However, when confronted during testimony, all these officers suspiciously forgot when this information was learned.¹ Detective Trujillo testified that he could see the other officers talking to Mr. Zeller and the Diaz brothers and admitted that it would have been easy to bring important information to his attention even *after* he began applying for the search warrant. 04/01/11 RP 36-37. Detective Dorame admitted that he very easily could have gone to tell Detective Trujillo about the medical marijuana while he was applying for the search warrant and that the six other officers could overhear the conversation and were waiting for him to explain what Mr. Zeller had reported. 04/01/11 RP 49-50. Detective Schwartz testified that he was “kind of in between just talking with the individuals...just kind of worked

2. Testimony of Detective Trujillo: “Q: Do you remember if and when you found out he had a marijuana prescription? A: I don’t recall specifically, but it would have been after I obtained the search warrant.” 04/01/11 RP 44

Testimony of Detective Dorame: “Q: Okay. And after you found out that he had a marijuana prescription, did you get out of the car and leave him in there and go tell anybody about that, or what was – after you found that out do you recall what you did with that information? A: I don’t recall exactly the time frame, but I know eventually he had to tell the rest of the detectives what Mr. Zeller had reported.” 04/01/11 RP 55.

Testimony of Detective Schwartz: “Q: At some point did you learn from anybody at the scene the defendant had a medical marijuana license, do you remember – a medical marijuana prescription? A: Yes. Q: Do you remember around when that was? I’m not positive exactly at what point.”

in between the detectives on the scene” making it easy for him to report this important information as well. 04/01/11 RP 55.

Officers arrived on the scene at 7:08 pm, immediately handcuffed and detained Mr. Zeller and gave him Miranda warnings which Mr. Zeller promptly waived before telling officers that he had Crohn’s disease², medications (including marijuana) and prescriptions for all those medications. The State would have this court believe that officers simply were not aware of this information in time to tell Judge Runge when the telephonic affidavit was given at 7:54, CP 49, almost an hour after Mr. Zeller was initially detained. That assertion is without merit. Law enforcement was aware of this information and chose not to disclose it to the judge issuing the warrant. For the reasons outlined below, this information should be determined material for the purpose of finding probable cause.

It should be noted that in the State’s Memorandum in Opposition to *Frank’s* Motion, CP 36-50, the State did not deny that information regarding the defendant’s medical marijuana license was intentionally or recklessly withheld. Taken cumulatively, the officers’ behaviors clearly evince their intent to disregard the truth. The Kennewick Police Department responded by executing a raid with incapacitation and detention upon three pedestrians standing between two cars in a public parking lot in broad daylight, in full view

3. RCW 69.51A.010(6)(b) classifies Crohn’s disease as a “terminal or debilitating medical illness” qualifying an individual for use of medical marijuana.

of the public, 20 feet away from a major artery in Kennewick, because one officer, after observing the “Hispanic males” for over half an hour, thought he might have observed one innocuous hand gesture. After executing their raid, handcuffing the pedestrians upon arrival, and placing them in their patrol cars, the officers learned simple, objective facts, which would negate all probable cause that any crime had taken place. Instead, the officers intentionally disregarded those facts and chose to keep that information from the Judge.

3. *The existence of a facially valid medical marijuana license is a fact that must be disclosed to an issuing magistrate when applying for a search warrant.*

State v. Fry, 168 Wn.2d 1, 228 P.3d 1(2010), does not stand for the proposition that police now no longer need to inform the judge issuing the warrant of the relevant fact that the suspect of a search warrant based on the crime of marijuana possession has a medical marijuana license. In *Fry*, police disclosed this information to the Judge issuing the search warrant. *Id* at 6. There is no indication here that the police doubted the validity of the license, or that Mr. Zeller possessed more than allowed by the statute, only that they failed to disclose its existence. The existence of a medical marijuana license is an important factor for a judge to be able to consider in making an unbiased determination of probable cause sufficient to issue a warrant. It may be true that in the case of medical marijuana, “the officer is not the judge or jury,” but this only supports the defendant’s position that the existence of a medical marijuana

license as well as the other factors present here, should have been presented to a Judge. *State v. Fry*, 142 Wn.App. at 460. "Probable cause depends on all of the surrounding facts, including those that reveal a person's status as a qualified patient or primary caregiver under" [the CUA or MMPA], *People v. Mower*, 28 Cal.4th 457, 122 Cal.Rptr.2d 326, 335, 49 P.3d 1067 (2002) (citations omitted).

"The law has been clearly established since at least the Supreme Court's decision in *Carroll v. United States*, 267 U.S. 132, 162 (1925), that probable cause determinations involve an examination of all facts and circumstances within an officer's knowledge at the time of an arrest." *Estate of Dietrich v. Burrows*, 167 F.3d 1007 (6th Cir. 1999; *See also, Painter v. Robertson*, 185 F.3d 557, 571 (6th Cir. 1999) ("in assessing probable cause to effect an arrest, may not ignore information known to him which proves that the suspect is protected by an affirmative legal justification for his suspected criminal actions"); *Radich v. Goode*, 886 F.2d 1391, 1396-97 (3d Cir. 1989).

All of the officers involved in detaining Mr. Zeller admit that they had knowledge of the existence of a medical marijuana license. 04/01/11 RP 28, 43 and 55. However, when confronted during testimony, all these officers conveniently forgot when this information was learned. *See* FN 2. All of the officers involved testified that this information could easily have been relayed to the officer apply for the search warrant 04/01/11 RP 36-37, 49-50, 55. Mr.

Zeller's disclosed illness made him an obvious qualified patient.³ In *Fry*, the medical marijuana patient did not have a qualifying illness under the Act: Fry argued his qualifying condition was "severe anxiety, rage, & depression related to childhood," conditions which "did not qualify under I-692 as enacted" *Fry*, 168 Wash.2d at 11-12. Additionally, if sale or distribution was the concern, officers should have applied for search warrants for all the individuals and vehicles present, they did not. The State asserts that "a doctor's authorization does not indicate that the presenter is totally compiling [sic] with the Act." While this may be true, absent some proof or evidence that the qualified patient is not in compliance with the act a facially valid prescription provides proof of compliance sufficient to negate the basis for probable cause. *See* RCW 69.51A.040(4).

4. *State v. Fry is inconsistent with the legislative intent and related statutory provisions*

The State argued below that seeing even one marijuana plant in the possession of a licensed user is sufficient for a warrant. This reading violates legislative intent that a qualifying patient may fully participate in the medical use of marijuana "*without fear of state criminal prosecution.*" Former RCW 69.51A.005. Shortly after *State v. Fry* was decided, the legislature began the

3. RCW 69.51A.010(6)(b) classifies Crohn's disease as a "terminal or debilitating medical illness" qualifying an individual for use of medical marijuana.

process of amending Chapter 69.51A.⁴ This is an indication that the legislature was displeased with the holding set forth in *Fry*. This Statute has since been amended and is now even clearer about the intent of the legislature:

The medical use of cannabis in accordance with the terms and conditions of this chapter *does not constitute a crime* and a qualifying patient or designated provider in compliance with the terms and conditions of this chapter *may not be arrested*, notwithstanding any other provision of law:

Current RCW 69.51A.005(2)(a). This is not the only amended portion of Chapter 69.51A. The 2011 amendments also dramatically altered RCW 69.51A.040 which now states in part:

The medical use of cannabis in accordance with the terms and conditions of this chapter *does not constitute a crime and a qualifying patient* or designated provider in compliance with the terms and conditions of this chapter *may not be arrested*, prosecuted, or subject to other criminal sanctions or civil consequences, for possession, manufacture, or delivery of, or for possession with intent to manufacture or deliver, cannabis under state law, or have real or personal property seized or forfeited for possession, manufacture, or delivery of, or for possession with intent to manufacture or deliver, cannabis under state law...

Current RCW 69.51A.040(1) (emphasis added).

Under the State's reading, all medical marijuana users will be subject to arrest and prosecution and forced to obtain legal counsel, often at their own expense, in order to prove to a jury that the license, which they expended so much time and effort to obtain, is actually valid. The State's reading is inefficient and counterproductive because it would appear to render the licensing procedures and

4. Senate Bill 5073 was first read and referred to Health and Long Term Care on January 12, 2011.

requirements ineffective. Mr. Zeller's position is further bolstered by the new amendments to the statute which show that medical marijuana users should not even be *arrested* for their use, because such use is *not a crime*. RCW 69.51A.040.

When an individual provides an investigating officer with his medical marijuana authorization, that officer does not have probable cause to arrest him or search his premises absent some other indicia of criminal activity (i.e., possession of more than amount granted by authorization). Evidence of some criminal act is the touchstone of probable cause. *See State v. Thein*, 138 Wn.2d at 140. Detective Trujillo testified that the reason he obtained a warrant was the odor of marijuana. 04/01/11 RP 40. The odor of marijuana was not enough to support probable cause because there was a valid prescription and therefore the odor was not evidence of unlawful activity. There is no indication that the officers in this case ever doubted the validity of Mr. Zeller's illness or license for medical marijuana or indicated that he appeared to be in possession of more than the statute allowed for. As there was only evidence of lawful activity, there was no probable cause. The search of Mr. Zeller's vehicle therefore violated Article 1, Section 7 of the Washington State Constitution as well as the Fourth Amendment of the United States Constitution.

5. *Equal protection is violated by the selective searches, seizures and arrests of medical marijuana patients*

Those individuals who meet the statutory definition of "qualifying

patients” are individuals who have been diagnosed with “a terminal or debilitating medical condition.” RCW 69.51A.010(4). Such conditions include:

- (a) Cancer, human immunodeficiency virus (HIV), multiple sclerosis, epilepsy or other seizure disorder, or spasticity disorders; or
- (b) Intractable pain, limited for the purpose of this chapter to mean pain unrelieved by standard medical treatments and medications; or
- (c) Glaucoma, either acute or chronic, limited for the purpose of this chapter to mean increased intraocular pressure unrelieved by standard treatments and medications; or
- (d) Crohn's disease with debilitating symptoms unrelieved by standard treatments or medications; or
- (e) Hepatitis C with debilitating nausea or intractable pain unrelieved by standard treatments or medications; or
- (f) Diseases, including anorexia, which result in nausea, vomiting, wasting, appetite loss, cramping, seizures, muscle spasms, or spasticity, when these symptoms are unrelieved by standard treatments or medications.

Individuals who meet the specifications to qualify under the Act are among our society's most vulnerable populous. These individuals have been subject to incredible invasion of privacy including arrest, searches of their person, searches of their homes and personal effects based solely on the odor of marijuana which they possess in complete compliance with the Act. Even so, such arrests and searches appear to have been the result of an inordinate amount of police discretion.

Equal protection of the laws is denied when state officials enforce the law with an “unequal hand or evil eye.” *City of Spokane v. Hjort*, 18 Wn.App. 606, 569 P.2d 1230 (Div.3 1977) quoting *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). Mr. Zeller is a qualifying patient suffering from a debilitating medical condition when he was stopped, questioned and investigated by law

enforcement. Mr. Zeller indicated the lawful nature of his possession and attempted to provide the necessary documentation. 04/01/11 RP 28, 43 and 55. Had Mr. Zeller been an elderly white male who was not driving a “flashy” vehicle it is probable that he would not have been subject to arrest and search based solely on the odor of marijuana. The holding urged by the State below would give law enforcement uncontrolled discretion to disregard the provisions of the Washington State Medical Marijuana Act and force the prosecutor to sort it out later.

Although “the fact that an ordinance may require a subjective evaluation by a police officer to determine whether the enactment has been violated does not mean the ordinance is unconstitutional. *American Dog Owners Ass'n*, 113 Wn.2d at 216, 777 P.2d 1046 (1989); *State v. Maciolek*, 101 Wn.2d at 267, 676 P.2d 996 (1984). The enactment will violate the Due Process Clause if it invites an inordinate amount of police discretion. *See American Dog Owners Ass'n*, 113 Wn.2d at 216, 777 P.2d 1046. The interpretation set forth by *Fry* and the State allow for an unequal application of the law. Officers may decide that some individuals, apparently complying with medical marijuana laws, are going to be arrested and charged, while others will not.

H. CONCLUSION

The trial court erroneously admitted evidence obtained in violation of the Washington Constitution as well as the United State Constitution. Based on

the forgoing, Mr. Zeller respectfully requests that this Court reverse his conviction for unlawful possession of a firearm.

May 8, 2012

Respectfully submitted,
RODRIGUEZ & ASSOCIATES, P.S.


Norma Rodriguez
Attorney for Appellant, WSBA# 22398

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MAY 09 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

PROOF OF SERVICE

I, Michelle Trombley, being over the age of 18, hereby declare that on the 8 day of

May, 2012, I caused a true and correct copy of Appellant's Reply Brief to be served on the following in the manner indicated below:

Court
Court of Appeals
Division III
500 N Cedar St
Spokane, WA 99201-1905

U.S. Mail
 Hand Delivery
 Fax
 e-mail

Counsel for Respondent
Andy Miller
Benton County Prosecutor
7122 West Okanogan Place Bldg A
Kennewick, Wa 99336-2359

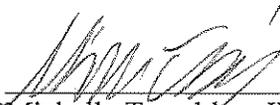
U.S. Mail
 Hand Delivery
 Fax
 e-mail

Defendant
Jamison Bruce Zeller
617 Hartford Street,
Richland, WA 99352

U.S. Mail
 Hand Delivery
 Fax
 e-mail

I declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 8 day of May, 2012

By: 
Michelle Trombley, WSBA 42912