

FILED

APR 09 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 302954-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

JAMISON BRUCE ZELLER, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 10-1-00664-1

BRIEF OF RESPONDENT

ANDY MILLER
Prosecuting Attorney
for Benton County


ANITA I. PETRA, Deputy
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STATEMENT OF THE CASE

On January 23, 2010, Det. White was on the second floor of a building on the corner of Clearwater and Columbia Center Boulevard in Kennewick, WA. (RP 9-10). Det. White had been employed as a police officer with the Kennewick Police Department for sixteen years. (RP 8). He was assigned to the Metro Drug Task Force and had been since 2008. (RP 8). Part of his duties on the Task Force involved observing drug transactions and purchasing drugs. (RP 8). He estimated that he had observed between five hundred and a thousand drug transactions. (RP 8).

While in the building Det. White, was looking down at the parking lot. (RP 10). He saw two vehicles that were not parked in parking stalls. (RP 10). They were parked next to the road. (RP 10). He saw three individuals talking near the parked cars. (RP 10, 12). He recognized one of the individuals from prior gang contacts.

(RP. 11). He began looking at the individuals through binoculars. (RP 11). The individual he recognized was holding and clutching his waistline. (RP 11). Based on his training and experience that is an indication that someone is carrying a weapon. (RP 11). He then observed the defendant enter the vehicle he arrived in for a short time, get out and hand another individual something very small. (RP 11-12). The defendant was clutching whatever it was in his hand as he handed it to the other individual. (RP 12). Det. White observed the individuals for approximately twenty minutes. (RP 12). Based on his observations and his training and experience, Det. White suspected he just witnessed a drug transaction. (RP 12). Based on being in an undercover capacity, he contacted the Criminal Apprehension Team and requested they make contact with the three individuals. (RP 12).

At 7:08 Det. Trujillo, responded to the location after being told that the Metro Drug Task Force had observed a possible drug transaction. (RP 26). Det. Trujillo has thirteen years of experience with the Kennewick Police Department and extensive training and experience involving narcotics. (CP 49). He along with other officers arrived and immediately detained all three individuals. (PG 26). They secured all three individuals and secured the vehicles. (RP 48-49).

Immediately upon detaining the defendant, Det. Trujillo smelled marijuana coming from the defendant's vehicle. (RP 27). At that moment Det. Trujillo decided to apply for a search warrant. (RP 27). The defendant was placed in the back of Det. Dorame's patrol vehicle and Det. Trujillo commenced the process of obtaining a telephonic search warrant. (RP 27).

After the defendant had been placed in Det. Dorame's patrol car. Det. Dorame began to tell

the defendant why he was being detained. (RP 48). The defendant wanted to talk so he was advised of his Miranda warnings. (RP 42, 47). Det. Dorame spoke with the defendant while Det. Trujillo was applying for the search warrant. (PG 43). The defendant told Det. Dorame that he had marijuana in his possession and had a marijuana card. (RP 48). He denied any narcotics transaction. (RP 43). He told Det. Dorame that he could search his vehicle. (RP. 43). Det. Dorame declined to search the vehicle with the defendant's consent. (RP 43). A search warrant was already in the process of being done. (RP 43-44). Det. Dorame did not tell Det. Trujillo what the defendant had told him. (RP 44). Det. Dorame testified that he normally would have told Det. Trujillo what the defendant had told him but did not at that time because he was already in the process of obtaining the warrant. (RP 46).

At 7:54 Det. Trujillo was granted a search warrant. (CP 49-50). In his affidavit he provided information regarding the suspected drug transaction and the smelling of the marijuana. (CP 50). Det. Trujillo did not know what the defendant had told Det. Dorame. (RP 28). He obtained this information after he had applied for the search warrant. (RP 28).

Det. Trujillo was granted permission to search for:

Marijuana or drug paraphernalia ... and all implements used, or kept for the illegal manufacture, sale, barter, exchange, giving away, furnishing, possessing or otherwise disposing of such controlled substances and all other evidence ...

(CP 50). A search of the defendant's vehicle produced a lit burnt marijuana cigarette in the ashtray. (RP 29, 57-58). Officers also found two bags of marijuana on the driver's side of the vehicle. (RP 29). Inside the trunk officers found a loaded pistol grip shotgun. (RP 28).

The defendant is a convicted felon. (CP 76).

On April 2, 2011, a Cr.R 3.6 hearing was held and a defense motion for a *Franks* hearing. RP 2-94. Both motions were denied and findings of facts and conclusions of law were filed on a later date. (CP 88).

On September 26, 2011, the defendant was found guilty in a bench trial of Unlawful Possession of a Firearm in the Second Degree. (CP 74-77). This appeal was timely filed thereafter.

ISSUES PRESENTED ON APPEAL

1. Was the seizure of the defendant unconstitutional?
2. Did the affiant recklessly or intentionally omit facts from the affidavit which would negate probable cause to issue a search warrant.
3. Is the existence of a facially valid medical marijuana license a fact that must be disclosed to an issuing magistrate when applying for a search warrant?
4. Is *State v. Fry* inconsistent with the legislative intent and related statutory provisions?

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

STANDARD OF REVIEW

The trial court's findings of fact are reviewed under a clearly erroneous standard, and will be reversed only if not supported by substantial evidences. *State v. Grewe*, 117 Wash.2d 211, 218, 813 P.2d 1238 (1991). Substantial evidence exists only if there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the findings. *State v. Hill*, 123 Wash.2d 641, 644, 870 P.2d 313 (1994) (citing *State v. Halstein*, 122 Wash.2d 109, 129, 857 P.2d 270 (1993)). Great deference is given to the trial court's factual findings. *State v. Cord*, 103 Wash.2d 361, 367, 693 P.2d 81 (1985). Conversely, this court reviews challenges to the trial court's conclusions of law de novo. *Robel v. Roundup Corp.*, 148 Wash.2d 35, 43, 59 P.3d 611 (2002).

A magistrate's determination of probable cause is reviewed for abuse of discretion, and the determination is accorded great deference by the reviewing court. *State v. Cole*, 128 Wash.2d 262, 286, 906 P.2d 925 (1995). Doubts are resolved in favor of the warrant's validity. *State v. Kalakosky*, 121 Wash.2d 525, 531, 852 p.2d 1064 (1993).

ARGUMENT

I. THE SEIZURE OF THE DEFENDANT WAS LAWFUL.

Officers properly detained the defendant to investigation a possible drug transaction. Upon contact they immediately smelled marijuana and this expanded the contact.

As a general rule, a warrantless search is per se unreasonable under both the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution unless the search falls within one or more specific exceptions to the warrant requirement. *State v. Ross*, 141 Wash.2d 304,

312, 4 P.3d 130 (2000). Once exception to the warrant requirement occurs in a situation where a police officer makes a brief investigatory *Terry* stop with reasonable suspicion, based on objective facts, that an individual is involved in criminal activity. *State v. Sieler*, 95 Wash.2d 43, 46, 621, P.2d 1272 (1980).

When evaluating a *Terry* stop, the court will inquire whether (1) the initial stop was justifiable at its inception and (2) whether the stop was reasonably related in scope to the circumstances that justified the interference. *State v. Williams*, 102, Wash.2d 733, 739, 689 p.2d 1065 (1984). As to this second inquiry, the court in *Williams* set out three factors to be considered when determining whether an intrusion on an individual is permissible under *Terry* or must instead be supported by probable cause: (1) the purpose of the stop, (2) the amount of physical intrusion upon the suspect's liberty,

and (3) the length of time the suspect is detained. *Id.* at 740.

a. *Initial seizure of the defendant was proper.*

The Appellant cites to *State v. Williams* in support of their argument that the initial seizure of the defendant was not proper. 102, Wash.2d 733, 689 P.2d 1065 (1984). First and foremost, the *Williams* court found that the initial investigative stop of the individual was proper. *Williams*, 102 Wash.2d at 737. What the *Williams* court was concerned with was the *scope* and *purpose* of the detention.

In *Williams*, an officer responded to burglar alarm. *Williams*, 102, Wash.2d at 735. The alarm was a silent alarm that is serviced by a security service. The security service called the police after it went off. *Id.* Officers arrived and saw a car parked in front of the residence and the car started to move away. *Id.* The officer pulled up, blocked the car from leaving, told the driver to shut off the car, throw the keys out

she window and place his hands on the roof. *Id.* The driver was then ordered out of the vehicle, patted down, handcuffed, advised of his rights and placed in the back of a patrol car. *Id.* Officer then called out a canine unit and searched the interior of the house. *Id.* Officers then searched the defendant's car and found evidence to support the crime of burglary. *Id.*

The Appellant then cites to *State v. Cain* in support of the argument that the officers lacked reasonable suspicion of criminal activity. 108 Wash.App. 546, 545, 31 P.3d 733. In *Cain* the officer saw people standing in a parking and he had a "hunch" they were selling drugs. *Id.* *Cain* holds, that officers cannot seize people based on a "hunch". *Id.*

The present matter is distinguishable from *Williams* and *Cain*. Det. White testified that he watched the individuals for approximately 20 minutes through binoculars. He recognized one of the individuals as a prior gang member who was

grabbing at his waistband. He then witnessed the defendant enter his vehicle for a short time, get out of his vehicle, and hand something to another individual with his fist in a clutching manner. Based on his all these observations he had reasonable suspicion of criminal activity. This was not a "hunch".

b. the initial stop was reasonably related in scope to the circumstances that justified the interference.

In the present matter, when officers responded to investigate a possible drug transaction, their scope and purpose of the detention was proper. First, they had information that one person was possible armed. Police officers may make limited searches for the purposes of protecting the officer's safety during an investigative detention. *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L.Ed.29 889 (1968). For their safety the officer patted down the individuals. (RP 63). Officers immediately smelled marijuana coming from the

defendant's vehicle. (RP 27) Now, the detention was expanded to probable cause. The stop was reasonably related in scope to the circumstances that justified the interference.

II. THE DETECTIVE DID NOT RECKLESSLY OR INTENTIONALLY OMIT FACTS FROM THE AFFIDAVIT WHICH WOULD HAVE NEGATED PROBABLE CAUSE TO ISSUE THE WARRANT.

A warrant may not be based upon materially false information or upon an affidavit which fails to include material information if the affiant's misstatement or omission is deliberately or recklessly made. *Franks v. Delaware*, 438 U.S. 154 (1978). Under *Franks*, in limited circumstances, a criminal defendant is entitled to challenge the truthfulness of factual statements made in an affidavit supporting a search warrant during a special evidential hearing. *Id.* at 155-56. As a threshold matter, the defendant must first make a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the

affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause. *Id.*

The defendant's allegations must be accompanied by an offer of proof, indicating the portion of the warrant affidavit at issue, and the offer of proof should include relevant statements of witnesses and reasons supporting the claims. *Franks*, 438 U.S. at 171. Assertions of mere negligence or innocent mistake or insufficient. *Id.* Rather, the defendant must allege deliberate falsehood or reckless disregard for the truth. *Id.*

The *Franks* test for material representation has been extended to material omission of fact. *State v. Cord*, 103 Wash.2d 361, 367, 693 P.2d 81 (1985). In examining whether an omission rises to the level of a misrepresentation, the proper inquiry is not whether the information tended to negate probable cause or was potentially relevant, but, rather, the court must find the

challenged information was necessary to the finding of probable cause. *State v. Atchley*, 142 Wash.App. 147,158, 173 P.3d 323 (2007) (citing, *State v. Garrison*, 118 Wash.2d 870, 874, 827 P.2d 1388 (1992)). If the defendant succeeds in showing a deliberate or reckless omission, then the omitted material is considered part of the affidavit. *Garrison*, 118 Wash.2d at 873. If the affidavit with the matter deleted or inserted, as appropriate, remains sufficient to support a finding of probable cause, the suppression motion fails and no hearing is required. *Id.*

In the present matter, the defendant had the burden of making a substantial preliminary showing that Detective Trujillo knowingly and intentionally, or with reckless disregard for the truth, omitted information from the affidavit. In support of the preliminary showing defense counsel, elicited testimony from the officers and the defendant. It appears from the briefing the defendant contends the search warrant omitted:

- a. The defendant denied he give another individual drugs.
- b. The defendant and the other individuals were frisked for weapons and no controlled substances were found.
- c. The defendant told police he had a medical marijuana license.
- d. The defendant told police he had marijuana in his vehicle.
- e. The defendant gave the officers consent to search his vehicle.

(Appellant's brief 23 - 26). The defendant was not able to meet their burden of showing that this information was omitted intentionally or with reckless disregard for the truth. (CP 88-89). Det. Trujillo did not know what the defendant had told Det. Dorame at the time he was applying for the search warrant. (RP 28).

Nonetheless, even assuming that the omissions were intentional or reckless, the affidavit would have established probable cause if the omitted information had been included. Because the trial court's finding of fact are

supported by substantial evidence, the court was not required to provide the defendant with an evidentiary hearing under *Franks*.

A search warrant may issue only upon a determination of probable cause. *State v. Cole*, 128 Wash.2d 262, 286, 906 P.2d 925 (1995). Probable cause exists where there are facts and circumstances sufficient to establish a reasonable inference that the defendant is involved in criminal activity and that evidence of the criminal activity can be found at the place searched. *State v. Thein*, 138 Wash.2d 133, 140, 977 P.2d 582 (1999). To establish probable cause the affidavit for a search warrant must set forth sufficient facts to lead a reasonable person to conclude there is probability that the defendant is involved in criminal activity. *Cord*, 103 Wash.2d at 365-66. Probable cause requires only a probability of criminal activity, not a prima facie showing. *State v. Maddox*, 152 Wash.2d 499, 505, 98 P.3d 1199 (2004). In

determining probable cause, the magistrate made a practical, commonsense decision, and is entitled to draw reasonable inferences from all the facts and circumstances set forth in the affidavit. *Id.* All the statements that the defendant would have wanted in the affidavit would not have been necessary to determine probable cause.

The Statement regarding the defendant's denial of the drug transaction was not necessary to a finding of probable cause.

Any statements regarding the weapons frisk would not have been necessary to a finding of probable cause. A weapons frisk is simply that, a frisk for weapons. A protective frisk of a person is strictly limited to a pat-down to discover weapons that might be used against the officer. *State v. Hudson*, 124 Wn.2d 107, 112, 874 P.2d 160 (1994). This is because the purpose of the limited pat down search is not to discover evidence of a crime, but to allow the

officer to pursue an investigation without fear of violence.

Any statements regarding the defendant alleging having a marijuana license would not have been necessary to the determination of probable cause. A defendant presenting officers with medical documentation purporting to authorize his use of marijuana under the statute creating a medical use defense does not vitiate an officer's probable cause to search for marijuana; authorization created only a potential affirmative defense that would excuse the criminal act, but did not make the act of possessing and using marijuana non criminal or negate any elements of the charged offense. *State v. Fry*, 168 Wash.2d 1, 228 P.3d 1 (2010). Furthermore, just because the defendant allegedly had a license to possess marijuana this did not allow him to deliver it to another. The Search warrant was not just for evidence of possession but included evidence of delivery. (CP 49-50).

This information was not necessary to the determination of probable cause.

Any statements regarding the defendant having marijuana in his vehicle or his consenting to the search of his vehicle would to have been necessary to determine probable cause. Information that the defendant admittedly had the drug in his car would have been helpful but not necessary.

III. THE EXISTENCE OF AN ALLEGED FACIALLY VALID MEDICAL MARIJUANA LICENSE IS A FACT THAT MUST BE DISCLOSED TO AN ISSUING MAGISTRATE WHEN APPLYING FOR A SEARCH WARRANT.

As was previously stated above, pursuant to *Fry*, a individual presenting officers with medical documentation purporting to authorize his use of marijuana under the statue creating a medical use defense does not vitiate an officer's probable cause to search for marijuana. Furthermore, a doctor's authorization does not indicate that the presenter is totally compiling with the Act.

In order to affirmatively defend a criminal prosecution for possessing marijuana, a defendant must show by a preponderance of evidence that he or she has met the requirements of the Statute. *State v. Mullins*, 128 Wash.App. 633, 116 P.3d 441.

The fact that the defendant might be complying with RCW 69.51A is not necessary for the determination of probable cause

IV. STATE V. FRY IS CONSISTENT WITH THE LEGISLATIVE INTENT.

The intent of former RCW 69.51A was not to legalize marijuana. The intent of former RCW 69.51A.005 stated:

The legislature intends to clarify the law on medical marijuana so that the lawful use of this substance is not impaired and medical practitioners are able to exercise their best professional judgment in the delivery of medical treatment, qualifying patients may fully participate in the medical use of marijuana, and designated providers may assist patients in the manner provided by this act without fear of state criminal prosecution. This act is also intended to provide clarification to law

enforcement and to all participants in the judicial system...

Marijuana was still a schedule I controlled substance. The purpose of the Act was to allow patients with terminal or debilitating illness to legally use marijuana when authorized by their physician. The Act only provided an affirmative defense to a drug crime.

This intent is consistent with *Fry*. *Fry* simply holds that presenting an officer with medical documentation purporting to authorize one's use of marijuana does not vitiate an officer's probable cause. The defendant argues that since the legislature amended RCW 69.51A after *Fry* it is clear that they were not happy with that decision. This argument has no merit. Had the legislature wanted to address probable cause with regards to medical marijuana they would have.

V. EQUAL PROTECTION IS NOT VIOLATED BY ANY ALLEGED SELECTIVE SEARCHED, SEIZURES AND ARRESTS OF MEDICAL MARIJUANA PATIENTS.

The defendant asserts in this case that "the right to be prescribed and to use medical marijuana in compliance with RCW 69.51A" is a fundamental right.

Equal protection under the law is guaranteed by both the Fourteenth Amendment to the United States Constitution and article I, section 12 of the Washington Constitution. The aim of equal protection is securing equality of treatment by prohibiting undue favor or hostile discrimination. *Andersen v. King County*, 158 Wash 1, 15, 138 P.3d 963 (2006). The appropriate level of scrutiny in equal protection claims depends upon the nature of the classification or rights involved. *Am. legion Post No.149 v. Wash. State Dep't of Health*, 164 Wash.2d 570, 608, 192 P.3d 306 (2008). Suspect classifications, such as race, alienage, and national origin, are subject to strict scrutiny. *Id.* at 608-09.

Strict scrutiny also applies to laws burdening fundamental rights or liberties. *Id.* at 609. Absent a fundamental right, or suspect class, or an important right or a suspect class, a law will receive rational basis review. *Id.* at 609.

Clearly, "the right to be prescribed and to use medical marijuana in compliance with RCW 69.51A" is not a fundamental right. How can it be a fundamental right when the Federal Government does not recognize the use of medical marijuana and in fact prosecutes those that possess it? The proper review is rational basis.

A classification passes rational basis review so long as it bears a relational relation to some legitimate end. *Am. Legion*, 164 Wash.2d at 609. Social and economic legislation that does not implicate a suspect class or fundamental right is presumed to be rational; this presumption may be overcome by a clear showing that the law is arbitrary and irrational. *Id.* A legislative distinction will withstand a minimum

scrutiny analysis if, first, all member of the class are treated alike; second there is a rational basis for treating differently those within and without the class; and third, the classification is rationally related to the purpose of the legislation. *Id.*

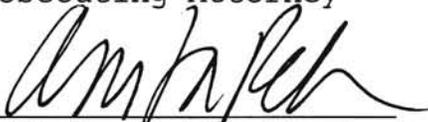
When analyzed under a rational basis review it is clear that former RCW 69.51A passes an equal protection claim.

CONCLUSION

The trial court properly denied the defendant's Cr.R 3.6 motion and their motion for a *Franks* hearing. The *Fry* holding is consistent with the legislative intent of former, RCW 69.51A. Furthermore, former RCW 69.51A survives an equal protection claim.

Respectfully submitted this 6th day of April, 2012.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

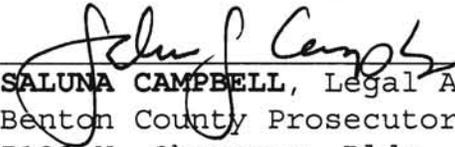
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