

NO. 30979-7-III

**STATE OF WASHINGTON
COURT OF APPEALS - DIVISION III**

FILED
March 04, 2014
Court of Appeals
Division III
State of Washington

STATE OF WASHINGTON,

Respondent,

vs.

ANDRE STRATTON

Appellant.

**APPEAL FROM THE SUPERIOR COURT FOR
FRANKLIN COUNTY**

BRIEF OF RESPONDENT

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A. COUNTERSTATEMENT OF ISSUES

1. **ANDRE STRATTON WAS PRESENT WHEN POLICE FOUND MARIJUANA IN HIS POSSESSION ON FEBRUARY 3, 2012. HE WAS IMMEDIATELY QUESTIONED BY POLICE CONCERNING SUCH POSSESSION. UNDER THESE CIRCUMSTANCES, WAS HE REQUIRED BY RCW 69.51A.043(1)(A) TO PRESENT VALID DOCUMENTATION REGARDING HIS MEDICAL USE OF MARIJUANA? DID PRESENTATION OF A MARIJUANA CARD THAT EXPIRED ON DECEMBER 17, 2011, SATISFY THIS REQUIREMENT?**

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B. COUNTERSTATEMENT OF THE CASE

Andre Stratton (hereinafter defendant) is appealing his Franklin County conviction for Unlawful Possession of a Controlled Substance, to-wit: Marijuana Over 40 Grams. (CP 12-13, 14-28). While defendant's statement of the case is substantially correct, the State would make the following additions and amplifications.

The State filed a motion in limine seeking "an order limiting and restricting the defendant from raising in voir dire, opening statement, testifying to, or offering exhibits relating in any way to

the issue of medical marijuana.” (CP 43). This motion was granted by order dated July 10, 2012. (CP 35-37). In granting the motion, the trial court noted that “[f]or purposes of this hearing, the parties accepted the statement of facts in the State’s motion dated May 31, 2012. That statement is incorporated herein by reference.” (CP 35). That statement of facts, appearing to pages 43-45 of the Clerk’s Papers, now follows.

“On February 3, 2012, officers of the Pasco Police Department knocked on the door of defendant’s apartment based on a report that a wanted person, Lawrence Adams, may be located there. Defendant answered the door and stated he was the resident of the apartment. The officers, all of whom had been trained in detecting the odor of marijuana, smelled an obvious odor of marijuana coming from inside the apartment.

“Defendant told the officers that he had a ‘prescription’ for the marijuana. He showed the officers an expired marijuana authorization from a physician. It had expired in 2011.

“Defendant repeatedly told the officers that Adams was not in the apartment. As the officers were continuing their investigation, Adams emerged from inside the apartment. Adams was placed under arrest on outstanding warrants.

“A search warrant was obtained for the apartment. Approximately one-half pound of marijuana was located in the apartment. The marijuana was packaged in 12 individually-wrapped bags labeled with the type of marijuana in each bag. Officers also found empty vacuum sealed bags and many different Ziploc bags. Based on the training and experience of the officers, it appeared the marijuana was being separated from the larger bags into smaller bags for the purpose of distributing it. Two digital scales were found in the apartment of a type commonly used in drug trafficking. Defendant was found to be in possession of \$572.00 in cash on his person and Adams had \$402.00 in cash on his person. These large sums of cash were also consistent with drug trafficking.

“After being advised of his rights, defendant admitted possessing the marijuana but claimed it was for his personal use. He said it was packaged in individual baggies because each different type did different things for him. He said he had a sore back. He stated he did not know his marijuana card was expired. He said he had bought the marijuana at a dispensary in Spokane earlier that day for about \$1,400. He did not know the name or

address of the dispensary and said he was not required to show a medical card to purchase it.

“Defendant was arrested, booked into jail, and charged . . . Approximately six days after bailing out of jail, defendant obtained a new medical marijuana card.” (CP 43-45).

“In response to the court’s inquiries, the parties further stipulated that defendant was arrested on February 3, 2012, and that the medical marijuana (cannabis) documentation that defendant possessed and showed to the police on that date carried an expiration date of December 17, 2011.” (CP 35).

C. ARGUMENT

The trial court properly granted the State’s motion in limine. Under the Medical Marijuana Act, a “qualifying patient” is “a patient of a health care professional . . . [who has] been diagnosed by that health care professional as having a terminal or debilitating medical condition . . . [who 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). One of the requirements of the Medical Marijuana Act is that unless the qualifying patient is

registered with a state registry (the provision for which was vetoed by the governor and has never been established), he or she must present “his or her valid documentation to any peace officer who questions the patient . . . regarding his or her medical use of cannabis[.]” RCW 69.51A.043(1)(a) (emphasis added). Valid documentation is “[a] statement signed and dated by a qualifying patient’s health care professional written on tamper-resistant paper, which states that, in the health care professional’s professional opinion, the patient may benefit from the medical use of marijuana[.]” RCW 69.51A.010(7)(a).

In the instant case, the health care professional opined that defendant may benefit from medical marijuana only until December 17, 2011. (CP 35). While defense counsel attempted to portray this as “a business decision to have them expire every year so the patient would be forced to go back in and [the physician] could continue making money in terms of reissuing it,” the trial judge noted, “[A]ll my prescriptions expire once a year. I think it’s to make sure I still need them.” (07/03/2012 RP, at 49). The physician’s opinion setting an outside date was especially understandable here, as defendant only claimed to have a “sore back” and not any type of terminal illness. (CP 44). For example,

in the case of sciatica resulting from spinal disc herniation (“slipped disc”), a common source of back pain, “after 12 weeks, 73% of patients showed reasonable to major improvement without surgery.” Wikipedia, “Spinal disc herniation” (quoting Vroomen, de Krom, & Knottnerus, “Predicting the outcome of sciatica at short term follow-up,” British Journal of General Practice (Feb. 2002)). See also WebMD, “Should I have surgery for a herniated disc?” (“Most herniated discs heal, and pain eases after a few months of nonsurgical treatment, such as rest, medicines, injections, and rehabilitation.”) Thus, the marijuana card that defendant displayed to the police had no relevance to his status as a qualifying patient authorized to possess marijuana on February 3, 2012.

In State v. Butler, 126 Wn. App. 741, 750-51, 109 P.3d 493 (2005), Division Two of the Court of Appeals stated: “In order to render his marijuana possession legal under the Act, [the defendant] needed to obtain and to possess this required documentation from his personal physician in advance of law enforcement’s questioning his medical use and possession.” Id. at 750-51 (emphasis original). The same statement is quoted by Division Three in State v. Hanson, 138 Wn. App. 322, 327, 157 P.3d 438 (2007). Finally, Division Three stated in State v. Adams,

148 Wn. App. 231, 198 P.3d 1057 (2009): “ A defendant is required to have obtained his authorizing documentation in advance of law enforcement questioning.” Id. at 236.

In the instant case, defendant did not provide the officers with a valid document covering the date of the questioning, but with a card that authorized marijuana possession during an earlier time period. (CP 35). Since defendant was required to obtain his authorizing document in advance of law enforcement questioning, it is no defense that he obtained a new marijuana card after was had been arrested and charged. An analogy could be drawn to a driver presenting an expired driver’s license to an officer and then getting a new license the next week; it would not excuse his driving without a license on the date in question.

In the trial court, defendant seemed to believe he had a defense under Hanson. However, he misread that case. In Hanson, the police executed a search warrant on Hanson’s motel room while he was not present. The next day, Hanson obtained a valid authorization from a physician to use marijuana for medical purposes. The trial court refused to admit the authorization card at trial and after a stipulated facts bench trial, the trial court found

Hanson guilty of manufacturing a controlled substance. Hanson, 138 Wn. App. at 325.

The Court of Appeals reversed, holding that Hanson satisfied the provisions of the statute. Hanson, 138 Wn. App. at 327. The court reasoned that the statute does not require that a qualifying patient obtain documentation in advance of police search and seizure, and that Hanson provided his documentation the first day he was “questioned” by police, in accordance with the statute. Hanson, 138 Wn. App. at 327. However, the Hanson court expressly stated: “Had Mr. Hanson been present on the day of this raid and had he been asked to present valid documentation, he would not have been able to do so and would not, then, have satisfied the requirements of the statute.” Hanson, 138 Wn. App. at 327.

Here, unlike in Hanson, defendant was present during the search of his property and did not present a valid authorization card to the police on the day of his arrest. Instead, defendant presented an expired card to the officer. (CP 35, 44). See State v. Ginn, 128 Wn. App. 872, 884, 117 P.3d 1155 (2005) (defendant precluded from raising a medical marijuana defense because a handwritten notarized letter does not strictly comply with the valid

documentation statute). Defendant obtained valid documentation only after police questioning. (CP 45). Thus, even if the court would have admitted defendant's new authorization card at trial, defendant could not have proven he was in compliance with statute on February 3, 2012. RCW 69.51A.043(1)(a). Obtaining a valid authorization card after questioning does not relieve defendant of the consequences of failing to comply with the statute. RCW 69.51A.043.

Defendant also cites RCW 69.51A.047. However, the plain language of that statute shows it has no relevance here. The statute merely provides a defense for someone who has misplaced his or her medical marijuana card or does not have it handy at the time of police questioning. In defendant's case, he was not a validly authorized medical marijuana user at the time of the police questioning.

RCW 69.51A.047 begins by referring to "a qualifying patient who is not registered with the registry established in *section 901 of this act[.]" Section 901 of the act was vetoed by the governor and was not enacted into law, so there has never been a registry established.

The operative language is that a “qualifying patient . . . [who] does not present his or her valid documentation to a peace officer who questions the patient or provider regarding his or her medical use of cannabis but is in compliance of all other terms and conditions of this chapter may establish an affirmative defense to charges of violation of state law through proof at trial, by a preponderance of the evidence, that he or she was a validly authorized qualifying patient . . . at the time of the officer’s questioning.” (Emphasis added).

In order to take advantage of this statute, a defendant must be a validly authorized qualifying patient at the time of the officer’s questioning. Defendant was not a validly authorized qualifying patient at the time he was questioned by the police. The physician he chose had placed an outside time limit on the authorization, which had already expired at the time of the questioning. (CP 35).

Defendant refers to the rule of lenity. However, the rule of lenity only applies to the construction of a criminal statute “where two or more possible constructions are permissible.” State v. Mullins, 128 Wn. App. 633, 642, 116 P.3d 441 (2005). “This rule requires us to construe the statute strictly against the State and in favor of the accused. But we do not consider the rule of lenity

when the statute is clear on its face.” Id. (citation omitted). Here, the statute is clear on its face: To take advantage of the affirmative defense, the defendant must be a validly authorized qualifying patient at the time of the officer’s questioning. An analogy can be drawn to a motorist who is questioned by police about his possession of an automobile owned by a rental car company. A rental contract that expired two months earlier is not valid documentation of his authority to possess the car on the date of the questioning.

In the trial court, defendant attempted to analogize to possessing leftover prescription drugs that were obtained during the time a prescription was valid. First, the medical marijuana statutes require that the person be a validly authorized qualifying patient at the time of police questioning about possession of marijuana; the person may only continue to possess marijuana as long as he or she remains a validly authorized qualifying patient. RCW 69.51A.043(1)(a). Second, defendant admitted he had purchased the marijuana in Spokane the same day of the search for about \$1,400. (CP 44).

A criminal defendant has no right to present irrelevant or inadmissible evidence. State v. Hilton, 164 Wn. App. 81, 91, 261

P.3d 638 (2011). Any reference to medical marijuana would serve only to confuse a jury by raising matters that are not an issue in this case. All references to medical marijuana were correctly excluded.

Finally, defendant claims in passing that “he may also present on remand a common law medical necessity defense. State v. Kurtz, 178 Wn.2d 466, 309 P.3d 472 (2013).” Brief of Appellant, at 8. By referring to presenting the defense on remand, he effectively acknowledges it has no relevance to this appeal. “A necessity defense arises only when an individual acts contrary to law.” Kurtz, 178 Wn.2d at 476. “For the evidence to support submission of the defense of necessity to the jury Appellant must admit the offense. Like a plea of self-defense, Appellant must first admit the offense, but claim his commission of it is justified because of other facts.” Maldonado v. State, 902 S.W.2d 708, 712 (Tex. App. 1995) (citations omitted). Necessity is an affirmative defense that the defendant bears the burden of proving by a preponderance of the evidence. 13B SETH A. FINE & DOUGLAS J. ENDE, WASH. PRAC.: CRIMINAL LAW § 2904 at 212 (1998); State v. Jeffrey, 77 Wn. App. 222, 224-25, 889 P.2d 956 (1995). See also WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL (WPIC) 18.02. No affirmative defense, including necessity, need

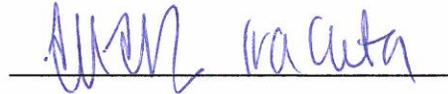
be submitted to the jury unless some evidence supports it. Jeffrey, 77 Wn. App. at 227; Maldonado, 902 S.W.2d at 702. The failure of a criminal defendant to raise an affirmative defense during trial precludes review of its validity on appeal. City of Seattle v. Lewis, 70 Wn. App. 715, 718-19, 855 P.2d 327 (1993).

In the instant case, defendant relied exclusively on the Medical Marijuana Act and never raised the common law defense of necessity; he never admitted having violated the law or claimed his commission of a crime was justified by other facts. (07/03/2012 RP at 48-52). His failure to raise the common law defense of necessity in the trial court precludes consideration of its applicability on appeal. Lewis, 70 Wn. App. at 718-19.

Moreover, while the existence of the Medical Marijuana Act does not completely preclude the common law defense of necessity in a prosecution for possessing marijuana, "it can be a factor in weighing whether there is a viable legal alternative to a violation of the controlled substance law." Kurtz, 178 Wn.2d at 476. Here, defendant obtained a new marijuana card just six days after being released on bail. (CP 45). He clearly had a viable alternative to violating the law. There is nothing that would have justified

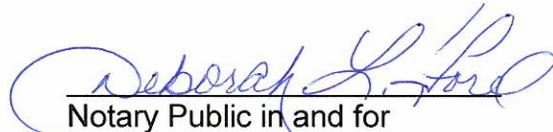
That she is employed as a Legal Secretary by the Prosecuting Attorney's Office in and for Franklin County and makes this affidavit in that capacity.

I hereby certify that on the 4th day of March, 2014, a copy of the foregoing was delivered to Andre Stratton, Appellant, 1911 West Jay Street Apt C, Pasco WA 99301 by depositing in the mail of the United States of America a properly stamped and addressed envelope and to Kenneth H. Kato, opposing counsel, khkato@comcast.net by email per agreement of the parties pursuant to GR30(b)(4).



A handwritten signature in blue ink, appearing to read "Andre Stratton", is written over a horizontal line.

Signed and sworn to before me this 4th day of March, 2014.



A handwritten signature in blue ink, appearing to read "Deborah L. Ford", is written over a horizontal line.

Notary Public in and for
the State of Washington,
residing at Kennewick
My appointment expires:
May 19, 2014

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