

No. 87078-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM ANDREW KURTZ,

Petitioner.

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
12 OCT -2 AM 8:16
BY RONALD R. CARPENTER
CLERK

RESPONDENT'S ANSWER TO AMICUS CURIAE BRIEF

Jon Tunheim
Prosecuting Attorney

Olivia Zhou
Attorney for Respondent

2000 Lakeridge Drive S.W.
Olympia, Washington 98502
(360) 786-5540

ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION1

II. ISSUES.....1

III. STATEMENT OF THE CASE2

IV. ARGUMENT.....2

Whether MUMA superseded or abrogated the
common law medical necessity defense for
marijuana related crimes.....2

V. CONCLUSION8

TABLE OF AUTHORITIES

United States Court Decisions

City of Milwaukee v. Illinois and Michigan,
451 U.S. 304, 101 S. Ct. 1784 (1981).....2

Mobil Oil Corp. v. Higginbotham,
436 U.S. 618, 98 S. Ct. 2010, 2015 (1978),
overruled on other grounds.....3

Washington Supreme Court Decisions

Amalgamated Transit Union Local 587 v. State,
142 Wn.2d 183, 11 P.3d 762 (2001).....5

Potter v. Wash. State Patrol,
165 Wn.2d 67, 196 P.3d 691 (2008).....3

Roe v. Teletech Customer Care Management,
171 Wn.2d 736, 257 P.3d 586, (2011).....5

Seeley v. State,
132 Wn.2d 776, 940 P.2d 604 (1997).....1

State ex rel. Madden v. Pub. Util. Dist. No. 1,
83 Wn.2d 219, 517 P.2d 585 (1973).....2

State v. Coffey,
77 Wn.2d 630, 465 P.2d 665 (1970).....4

Wash. Water Power Company v. Graybar Electric Company,
112 Wn.2d 847, 774 P.2d 1199 (1989).....3, 6

Washington Court of Appeals Court Decisions

Linda D. v. Fritz C.,
38 Wn. App. 288, 687 P.2d 223 (1984).....4

State v. Fry,
168 Wn.2d 1, 228 P.3d 1, (2010).....5

State v. Kurtz,
No. 41568-2-II, 2012 WL 298153 (Wash. App. Div. 2. Jan. 31,
2012)..... 1-2

Statutes

Former RCW 69.51A.005 (1999)5
Former RCW 69.51A.080 (2007)7
RCW 4.04.0102
RCW 69.51A.040.....7

Other Authorities

Initiative 692.....5
Medical Use of Marijuana Act (MUMA) 1-2, 4, 6-8
Washington Product Liability Act (WPLA) 3-4

I. INTRODUCTION.

This court has granted review of a Division Two Court of Appeals decision affirming William Kurtz's conviction for unlawful manufacture of marijuana and unlawful possession of marijuana—greater than 40 grams. That decision is reported at State v. Kurtz, No. 41568-2-II, 2012 WL 298153 (Wash. App. Div. 2. Jan. 31, 2012). In his supplemental brief, the petitioner argued that the medical necessity defense was not abolished by Seeley v. State, 132 Wn.2d 776, 940 P.2d 604 (1997). Additionally, he argued that the Medical Use of Marijuana Act (MUMA) did not supersede the common law medical necessity defense. Subsequent to the petitioner's filing of his supplemental brief, the American Civil Liberties Union of Washington (ACLU) filed an amicus curiae brief in which it further argued that the common law medical necessity defense was not abrogated by MUMA.

II. ISSUES

Whether MUMA superseded or abrogated the common law medical necessity defense for marijuana related crimes.

III. STATEMENT OF THE CASE.

The substantive and procedural facts of the case are set forth in the opinion of the Court of Appeals. State v. Kurtz, 2012 WL 298153, at *1.

IV. ARGUMENT.

- A. MUMA superseded or abrogated the common law medical necessity defense for marijuana related crimes.

It has been the rule of this State that common law “shall be the rule of decision in all the courts” as long as “it is not inconsistent with the...Constitution and laws of the state of Washington nor incompatible with the institutions and conditions of society...” RCW 4.04.010.

In determining whether common law is abrogated by a statute, the court must determine whether the provisions of the statute “speak directly” to the question addressed by the common law. City of Milwaukee v. Illinois and Michigan, 451 U.S. 304, 101 S. Ct. 1784 (1981). Common law is abrogated by a statute when the “provisions [of the statute] are so inconsistent with and repugnant to the common law that both cannot simultaneously be in force. State ex rel. Madden v. Pub. Util. Dist. No. 1, 83 Wn.2d 219,

222, 517 P.2d 585 (1973). A statute does not need to address every issue of the common law, but if it does speak directly to the question, courts may not supplement the legislature's statutory answer such that the statute is rendered meaningless. Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625-26, 98 S. Ct. 2010, 2015 (1978), *overruled* on other grounds.

Typically, the intent of the Legislature to abrogate common law is explicitly stated in the language of the statute. Potter v. Wash. State Patrol, 165 Wn.2d 67, 77, 196 P.3d 691 (2008). However, when the intent of the Legislature is silent in the statute, the court must look to the statutory language and the legislative history. Wash. Water Power Company v. Graybar Electric Company, 112 Wn.2d 847, 774 P.2d 1199 (1989).

In Wash. Water Power Company, one of the issues that the Washington Supreme Court was asked to determine was whether the Washington Product Liability Act (WPLA) preempted common law remedies for product-related harms. Id. at 851. In finding that there was statutory preemption of common law, the Court acknowledged that the plaintiff, WWP, would want to bring a claim under common law theories since the provisions of the WPLA proposed obstacles and limitations that were not present under the

common law theory. Id. Although the Court acknowledged that the Legislature did not explicitly state its intent to preempt common law product liability claims in the statute, it held that the statutory language and the legislative history left “no doubt about the WPLA’s preemptive purpose.” Id. The Court went on to state that even though there was no provision in the WPLA expressly stating the statute’s preemptory effect... “overriding all technical rules of statutory construction must be the rule of reason upholding the obvious purpose that the Legislature was attempting to achieve.” Id. at 855 (quoting State v. Coffey, 77 Wn.2d 630, 637, 465 P.2d 665 (1970), superseded on other grounds by statute as stated in Linda D. v. Fritz C., 38 Wn. App. 288, 687 P.2d 223 (1984)). Finally, the Court noted that if there was no preemption, then the WPLA would “accomplish little if it were a measure plaintiffs could choose or refuse to abide at their pleasure.” Id.

Although MUMA does not contain a provision explicitly stating its intent to preempt or abrogate the common law medical necessity defense, the language in the statute is clear that its purpose was to provide the *only* affirmative defense for individuals who may benefit from the use of marijuana. When the statute was first adopted, the purpose section stated, “The people of

Washington state find that some patients with terminal or debilitating illnesses under their physician's care, may benefit from the medical use of marijuana." Former RCW 69.51A.005 (1999). Additionally, the statute went on to say that the intent was for "qualifying patients with terminal or debilitating illnesses who...would benefit from the medical use of marijuana, shall not be found guilty of a crime under state law..." Id.

When reading a statute, the court's purpose in determining the meaning of the statute enacted by an initiative process is "to determine the intent of the voters who enacted the measure. This court focuses on the language of the statute 'as the average informed voter voting on the initiative would read it.'" Roe v. Teletech Customer Care Management, 171 Wn.2d 736, 746, 257 P.3d 586, (2011) quoting Amalgamated Transit Union Local 587 v. State, 142 Wn.2d 183, 205, 11 P.3d 762 (2001). In reading the statute, it is clear that Initiative 692 did not legalize marijuana, but rather "provided an authorized user with an affirmative defense if the user shows compliance with the requirements for medical marijuana possession." State v. Fry, 168 Wn.2d 1, 10, 228 P.3d 1, (2010).

The analysis as to whether MUMA supersedes or abrogates the common law medical necessity defense is similar to Wash. Water Power Company. Similar to Wash. Water Power Company, MUMA does not have a provision explicitly stating the Legislature's intent to supersede the common law medical necessity defense. However, in Wash. Water Power Company, the Court concluded that the statute preempted common law due to the "obvious purpose that the Legislature was attempting to achieve." Wash. Water Power Company, 112 Wn.2d at 855. In this case, it is obvious that the purpose of MUMA, as seen through the language of the statute and the initiative, was to provide an affirmative defense for certain individuals with terminal or debilitating illnesses in marijuana-related crimes.

The ACLU in their amicus curiae brief asks this Court to look to intent of the people in proposing Initiative 692. In doing so, the ACLU acknowledges that MUMA only provides protections for "qualified patients" while the common law medical necessity defense provides an affirmative defense to a broader class of people—such as non "qualified patients" who can use marijuana for potential medicinal purposes. Thus, MUMA and the common law medical necessity defense cannot co-exist due to the

inconsistencies in the provisions of the two affirmative defenses. MUMA provides protections to qualified individuals while the common law medical necessity defense can also provide protection to people that are not considered a “qualified individual.”

Furthermore, under the common law medical necessity defense, an individual is not limited to a statutorily set amount of marijuana. Under MUMA, however, a “qualified patient” is only allowed to possess a 60 day supply of marijuana. Former RCW 69.51A.080 (2007). Under the new law, a qualified individual is allowed no more than fifteen cannabis plants and:

- “(1) no more than twenty-four ounces of useable cannabis;
- (2) no more cannabis product than what could reasonably be produced with no more than twenty-four ounces of useable cannabis; or
- (3) a combination of useable cannabis and cannabis product that does not exceed a combined total representing possession and processing of no more than twenty-four ounces of useable cannabis.

RCW 69.51A.040.

Finally, the ACLU asks the Court to uphold the common law medical necessity defense on the basis that it can provide protection to individuals who are not considered “qualified patients” under the Act. However, in the present case, Mr. Kurtz was a “qualified patient” since he was eventually able to obtain a

marijuana authorization card. He was not allowed the affirmative defense pursuant to the Act since he only obtained the authorization card *after* being arrested. If the medical necessity defense were to apply to even “qualified individuals” like Mr. Kurtz, then they would be allowed to freely abide by or refuse to follow the provisions of the statute. Because MUMA provides for more strict requirements than the common law medical necessity defense, individuals like Mr. Kurtz would then rather assert the common law medical necessity defense, thus rendering the purpose of MUMA meaningless.

V. CONCLUSION.

For the foregoing reasons, it is clear that the intent of the people and the Legislature in enacting MUMA was to provide the only affirmative defense for individuals who may benefit from the use of marijuana. Therefore, the State respectfully asks this Court to hold that MUMA abrogated the common law medical necessity defense for marijuana related crimes.

Respectfully submitted this 1st day of October, 2012.

for Olivia Zhou 19229
Olivia Zhou, WSBA #41747
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the Respondent's Answer to Amicus Curiae Brief, on the date below as follows:

VIA US MAIL

TO: SUSAN L. CARLSON
SUPREME COURT DEPUTY CLERK
SUPREME COURT OF THE STATE OF WASHINGTON
TEMPLE OF JUSTICE
P.O. BOX 40929
OLYMPIA, WA 98504-0929

--AND--

US Mail Postage Prepaid

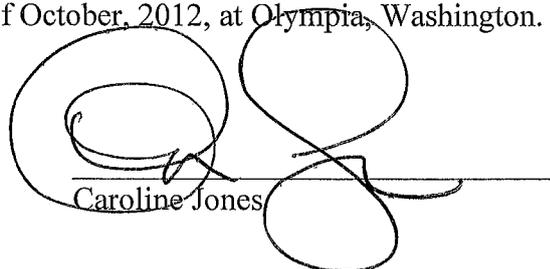
SUZANNE LEE ELLIOTT
ATTORNEY AT LAW
HOGE BUILDING
706 2ND AVE, STE 13
SEATTLE, WA 98104-1794

SHAWN J. LARSEN-BRIGHT
DORSEY & WHITNEY, LLP
701 FIFTH AVE STE 6100
SEATTLE, WA 98104

SARAH A. DUNNE
MARK M. COOKE
ACLU FOUNDATION
901 FIFTH AVE, STE 630
SEATTLE, WA 98164

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

Dated this 1 day of October, 2012, at Olympia, Washington.


Caroline Jones