

FILED

JUL 03 2012

CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

87078-1

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

2012 JUL 03 2:38

BY RONALD R. CARPENTER

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CLERK

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM ANDREW KURTZ,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Carol Murphy, Judge
Cause No. 10-1-00914-4

SUPPLEMENTAL BRIEF OF RESPONDENT

Jon Tunheim
Prosecuting Attorney

Olivia Zhou
Attorney for Respondent

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

TABLE OF CONTENTS

I. INTRODUCTION..... 1

II. ISSUES..... 1

III. STATEMENT OF THE CASE..... 2

IV. ARGUMENT 2

A. Division Two was correct in holding that medical necessity defense did not exist for marijuana related crimes..... 2

B. Even if the common law medical necessity defense does exist, the Medical Use of Marijuana Act supersedes the common law defense..... 6

C. The medical necessity defense was not applicable to Mr. Kurtz. 13

V. CONCLUSION..... 14

TABLE OF AUTHORITIES

U.S. Supreme Court Decisions

<u>City of Milwaukee v. Illinois and Michigan</u> , 451 U.S. 304, 101 S. Ct. 1784, 1791 (1981)	7
<u>Mobil Oil Corp. v. Higginbotham</u> , 436 U.S. 618, 98 S. Ct. 2010, 2015 (1978)	7

Washington Supreme Court Decisions

<u>Potter v. Washington State Patrol</u> , 165 Wn.2d 67, 196 P.3d 691 (2008)	7-8
<u>Seeley v. State</u> , 132 Wn.2d 776, 940 P.2d 604 (1997)	3-6
<u>State v. Estill</u> , 50 Wn.2d 331, 311 P.2d 667 (1957)	6
<u>State v. Fry</u> , 168 Wn.2d 1, 228 P.3d 1 (2010)	2
<u>State ex rel. Madden v. Pub. Util. Dist. No. 1</u> , 83 Wn.2d 219, 517 P.2d 585 (1973)	6
<u>State v. Mays</u> , 57 Wn. 540, 107 P. 363 (1910)	6
<u>State v. Palmer</u> , 96 Wn.2d 573, 637 P.2d 239 (1981)	4
<u>State v. Smith</u> , 93 Wn.2d 329, 610 P.2d 869 (1980)	3
<u>State v. Whitney</u> , 96 Wn.2d 578, 637 P.2d 956 (1981)	4

Washington Court of Appeals Court Decisions

State v. Butler,
126 Wn. App. 741, 109 P.3d 493 (2005)..... 1, 4, 6, 8

State v. Diana,
24 Wn. App. 908, 604 P.2d 1312 (1979)..... 2, 10, 12, 14

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

State v. Williams,
93 Wn. App. 340, 968 P.2d 26 (1998)..... 4

Wilmot v. Kaiser Aluminum & Chem. Corp.,
118 Wn.2d 46, 821 P.2d 18 (1991) 8

Statutes

RCW 4.04.010..... 6

RCW 69.50.203..... 3

RCW 69.50.204(c)(22) 3

RCW 69.51A 1

RCW 69.51A.005(3)..... 5

RCW 69.51A.040 9

Other Authorities

Medical Use of Marijuana Act..... 1, 5-6, 8, 10-11, 13-14

Initiative 692. Medical Use of Marijuana Act, Ch. 2, 1999 Wash.
Sess. Laws 1-16..... 8

Ch. 2, 1999 Wash. Sess. Laws at 2 9

Ch.2, 1999 Wash. Sess. Laws at 4	9
Section 3.02 of the Model Penal Code (Proposed Official Draft A, 1962).....	12

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 petition for review, Kurtz asks this Court to overrule Butler, in which Division Two held that medical necessity defense does not exist for possession of marijuana and if it did, it was abrogated by the Medical Use of Marijuana Act. State v. Butler, 126 Wn. App. 741, 750, 109 P.3d 493 (2005). Kurtz argues that Butler should be overruled because the common law and statutory defense co-exist. The order of the Supreme Court is simply that review is granted.

II. ISSUES

1. Whether Division Two was correct in deciding that medical necessity defense did not exist for marijuana related crimes in Butler.
2. Whether the affirmative defense pursuant to the Medical Use of Marijuana Act superseded or abrogated the common law medical necessity defense.
3. Whether the medical necessity defense is applicable to Mr. Kurtz's case.

III. STATEMENT OF THE CASE.

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

IV. ARGUMENT.

- A. Division Two was correct in holding that medical necessity defense did not exist for marijuana related crimes.

A challenge to the trial court's determination of whether a defense exists as a question of law is reviewed de novo. State v. Fry, 168 Wn.2d 1, 228 P.3d 1 (2010). In determining whether the medical necessity defense exists for possession of marijuana, the court must find the following:

- (1) The defendant reasonably believed his use of marijuana was necessary to minimize the effects of [the disease];
- (2) The benefits derived from its use are greater than the harm sought to be prevented by the controlled substances law; and
- (3) No drug is as effective in minimizing the effects of the disease.

State v. Diana, 24 Wn. App. 908, 916, 604 P.2d 1312 (1979). To show that he reasonably believed his actions were necessary, the defendant must proffer corroborating medical testimony. Id. In reaching its decision, the court must balance the defendant's

interest against the State's interest in regulating the drug involved.

Id.

Washington statute lists marijuana in Schedule I of controlled substances. See RCW 69.50.204(c)(22). A substance is listed in Schedule I if it has (1) high potential for abuse; (2) no currently accepted medical use in treatment in the United States; and (3) no accepted safety for use in treatment under medical supervision. RCW 69.50.203. In Seeley v. State, 132 Wn.2d 776, 940 P.2d 604 (1997), this Court concluded that the placement of marijuana as a Schedule I drug does not violate the Washington Constitution. In reaching its decision, this Court makes it clear that the state constitution has vested in the Legislature the task of determining whether there is an accepted medical use for particular drugs. Id. at 789. Additionally, this Court left the classification of marijuana to the Legislature since there were disagreements amongst experts regarding the seriousness of marijuana's effects. Id. at 799 (citing State v. Smith, 93 Wn.2d 329, 337, 610 P.2d 869 (1980)).

Although not a challenge on whether the common law medical necessity defense exists, this Court's previous rulings have suggested that marijuana has not been generally accepted for

medical use. See State v. Palmer, 96 Wn.2d 573, 637 P.2d 239 (1981) (holding that the state board of pharmacy did not abuse its discretion in declining to remove marijuana from schedule I); State v. Whitney, 96 Wn.2d 578, 637 P.2d 956 (1981) (concluding that the retention of marijuana in schedule I was reasonably related to a legitimate state purpose because the legislation did not manifest a finding that marijuana has an accepted medical use).

In the present case, at the time Butler was decided, common law medical necessity defense did not exist for marijuana related charges. Implicit in the medical necessity defense is the showing that marijuana has general accepted medical use.¹ However, this Court, as seen through its previously rulings, has continuously held that the ultimate determination of marijuana's accepted medical use and its classification is vested in the legislature. This was resonated in State v. Williams, 93 Wn. App. 340, 347, 968 P.2d 26 (1998), in which Division Two, looking to the holding in Seeley, concluded that with "respect to Schedule I drugs, there is not a

¹ The first element that a defendant has to establish is that he "reasonably believed his use of marijuana was necessary to minimize the effects of [the disease]." Diana, 24 Wn. App. at 916.

defense of medical necessity.”² In reaching its decision,³ Division

Two reasoned:

“Because the debate over medical treatment belongs in the political arena, it makes no sense for the courts to fashion a defense whereby jurors weigh experts’ testimony on the medical uses of Schedule I drugs. Otherwise, each trial would become a battlefield of experts. But the Legislature has designated the battlefield as the Board of Pharmacy. The Washington Constitution has not enabled each individual to be the final arbiter of the medicine he is entitled to take—it is the legislature that has been authorized to make laws to regulate the sale of medicines and drugs.”

Id.

Mr. Kurtz argues that the passing of the Medical Use of Marijuana Act (hereinafter the “Act”) suggests that medical necessity defense is applicable to marijuana related crimes. However, the language in the Act states otherwise. According to its 2011 amendments, the Act specifically stated that it did not have the purpose or intent to “establish the medical necessity or medical appropriateness of cannabis for treating terminal or debilitating medical conditions.” RCW 69.51A.005(3). In Seeley, this Court recognized that the constitutional history and preexisting state law

² The appellant in Williams petitioned this Court for review of Division Two’s opinion. However, this court denied review. State v. Williams, 138 Wn.2d 1002, 984 P.2d 1034 (1999).

³ When reaching its decision, Division Two took into consideration the recent passing of Initiative, No. 692. Williams, 93 Wn. App. at 347 n. 1.

vests in the Legislature the authority to “protect the public health and safety through the regulation of drugs.” Seeley, 132 Wn.2d at 789. Because the Legislature has already explicitly stated that the purpose of the Act was not to establish the medical necessity of marijuana, Division Two was correct in Butler to conclude that medical necessity does not exist as a defense for marijuana related crimes.

- B. Even if the common law medical necessity defense does exist, the Medical Use of Marijuana Act supersedes the common law defense.

In general, our state is governed by the common law to the extent that it is “not inconsistent with the Constitution and laws of the United States, or of the state of Washington or incompatible with the institutions and condition of society.” RCW 4.04.010. The legislature has the power to supersede, abrogate, or modify the common law. See State v. Estill, 50 Wn.2d 331, 334-35, 311 P.2d 667 (1957); State v. Mays, 57 Wn. 540, 542, 107 P. 363 (1910). This Court examined the doctrine of abrogation of common law by statutes in State ex rel. Madden v. Pub. Util. Dist. No. 1, 83 Wn.2d 219, 222, 517 P.2d 585 (1973). This Court observed that as a general rule, the Legislature is assumed to be aware of established

common law that is applicable to a statute's subject matter. Id. at 222.

A statute abrogates common law when the "provisions are so inconsistent with and repugnant to the prior common law that both cannot simultaneously be in force. Id. For a statute to abrogate a common law, it is not necessary for a legislature to affirmatively proscribe in the statute the rule, but it must "speak directly" to the question addressed by that rule. City of Milwaukee v. Illinois and Michigan, 451 U.S. 304, 315, 101 S. Ct. 1784, 1791 (1981). A statute does not need to address every issue of the common law rule, 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.

In Potter v. Washington State Patrol, 165 Wn.2d 67, 196 P.3d 691 (2008), this Court laid out the factors in the analysis of determining whether there is a statutory abrogation of common law. In Potter, this Court held that to determine whether a statutory remedy is exclusive, the court must first examine the language and provisions of the statute to see if there is language suggesting

exclusivity. Id. at 80 (citing Wilmot v. Kaiser Aluminum & Chem. Corp., 118 Wn.2d 46, 62, 821 P.2d 18 (1991)). If the statute does not contain an exclusivity clause, then the court needs to examine the language and provisions of the statute to determine whether it was the legislature's intent for the statute to be exclusive. Potter, 165 Wn.2d at 81; Wilmot, 118 Wn.2d at 54. Some factors to consider, among others, are "comprehensiveness of the remedy provided by the statute, the purpose of the statute, and the origin of the statutory right. Potter, 165 Wn.2d at 84; Wilmot, 118 Wn.2d at 61-65.

Assuming, *arguendo*, that common law medical necessity defense exists, the enactment of the Act abrogated the common law defense. In November 1998, voters passed Initiative 692. Medical Use of Marijuana Act, ch. 2, 1999 Wash. Sess. Laws 1-16. When the Legislature enacted the Act, it acknowledged that some patients with terminal or debilitating illnesses may benefit from the medical use of marijuana. Butler, 126 Wn. App. at 749. In enacting the statute, the Legislature explicitly stated its intent was to ensure that certain people would not be punished by the Controlled Substance Act:

“Qualifying patients with terminal or debilitating illnesses who, in the judgment of their physicians, would benefit from the medical use of marijuana, shall not be found guilty of a crime under state law for their possession and limited use of marijuana...Persons who act as primary caregivers to such patients shall also not be found guilty of a crime under state law for assisting with the medical use of marijuana.”

Ch. 2, 1999 Wash. Sess. Laws at 2. This section was later amended to read the following:

“If charged with a violation of state law relating to marijuana, any qualifying patient who is engaged in the medical use of marijuana, or any designated primary caregiver who assists a qualifying patient in the medical use of marijuana, will be deemed to have established an affirmative defense to such charges by proof of his or her compliance with the requirements provided in this chapter. Any person meeting the requirements appropriate to his or her status under this chapter shall be considered to have engaged in activities permitted by this chapter and shall not be penalized in any manner, or denied any right or privilege, for such actions.”

RCW 69.51A.040 (2010).⁴

Beyond the clear statement of the statute’s purpose and intent, the Legislature proceeds to carefully define diseases and conditions that constitute terminal or debilitating condition. Ch.2, 1999 Wash. Sess. Laws at 4. The statute also provides a way for

⁴ This was the statutory language of RCW 69.51A.040 at the time Mr. Kurtz was arrested. RCW 69.51A.040 was later amended in 2011.

medical practitioners and patients to add terminal or debilitating conditions to those that are already included. Id. at 5.

In reading the Act, it is clear that when the Legislature enacted the statute, it intended to “speak directly” to the object and purpose of the defense that was provided under the common law of medical necessity. For example, the Act directly addresses the first element of the medical necessity defense. In Diana, Division Three Court of Appeals held that a defendant must provide medical testimony to show that he reasonably believed marijuana was necessary to treat the illness. Diana, 24 Wn. App. at 916. The Act adopts the first element by requiring a defendant to obtain an authorization for use of marijuana from a qualifying physician.

Additionally, the second element of the medical necessity defense requires that “the harm sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged.” Diana, 24 Wn. App. at 916. The Act addresses this calculation by imposing a restriction on the maximum amount of marijuana a qualifying patient may possess. The restriction signifies that the Legislature has performed the balancing required by the second element of the medical necessity defense and determined that the harm derived from possession of

less than a 60-day supply of marijuana is not as great as the harm produced by the terminal or debilitating condition.

Finally, the last element of the medical necessity defense is adopted by the Act. Under the Act, an individual is not required to show that there are no other drugs that are as effective in treating the illness. The purpose and intent of the Act clarifies that for individuals who meet the requirements as listed within the Act, the medical justification for use of marijuana is absolute.

Although the Act addresses or adopts the elements listed under the medical necessity defense, there are still obvious inconsistencies between the common law defense and the affirmative defense as provided under the Act. While both defenses might be available to some patients, for many, only the medical necessity defense will justify their conduct. For example, an individual who obtains authorization by an “unqualified” physician would not satisfy the requirements under the Act even though he will qualify for the medical necessity defense. Additionally, an individual who possesses more than the 60-day supply will qualify for the medical necessity defense while protection under the Act is not available.

Additionally, when Division Three developed the rationale behind the medical necessity in Diana, it looked to the common law necessity defense for guidance, which had three parts:

- (1) The harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and
- (2) Neither the Code nor other law defining the offense provides exceptions or defense dealing with the specific situation involved; and
- (3) A legislative purpose to exclude the justification claimed does not otherwise plainly appear.

Diana, 24 Wn. App. at 914 (citing Section 3.02 of the Model Penal Code (Proposed Official Draft A, 1962)). In light of these elements, it is clear that a “necessity” defense no longer applies to marijuana related crimes after the enactment of the Act.

Ultimately and most importantly, the affirmative defense provided under the Act is in line with what the Washington Constitution and this Court has already stated—that the Legislature is vested with the authority in the regulation of drugs. By defining terminal or debilitating condition, the Legislature acknowledges that *not all* conditions are suitable for treatment by the use of marijuana. Furthermore, by requiring a qualifying patient to obtain authorization and advisement about the risks of medical use of marijuana prior to legally possessing marijuana, the Legislature

provided the balance between the possible benefits of medical use of marijuana and the potential for abuse.

Therefore, in reading the Act, it is clear that it was the Legislature's intent to make the Act the *only* affirmative defense available for the medical use of marijuana. Because the Legislature is assumed to be aware of established common law applicable to a statute's subject matter,⁵ it would have expressly saved the medical necessity defense from abrogation if it was the intent. However, it did not do so. Instead, the language of the statute contains detailed provisions that define the scope of the statutory affirmative defense. Allowing defendants the option to assert a medical necessity defense that is potentially applicable to a much broader range of individuals, illnesses, and amounts of marijuana would render the Act meaningless and defeat the purpose of the Initiative.

C. Medical necessity defense does not apply to Mr. Kurtz

Assuming, *arguendo*, this Court concludes that the medical necessity defense and the statutory defense under the Act are both available to defendants charged with marijuana related crimes, the medical necessity defense still does not apply to Mr. Kurtz as a

⁵ Pub. Util. Dist. No. 1, 83 Wn.2d at 222

defense. In the present case, Mr. Kurtz was ultimately able to obtain authorization to use marijuana pursuant to the Act. He was not allowed to assert the affirmative defense to the Act because he obtained the authorization *after* his arrest. In order to show that his possession and manufacture of marijuana was out of necessity, Mr. Kurtz has to establish that "no other law provides exceptions or defenses" dealing with his specific situation. When Division Three applied the necessity defense in Diana, Initiative 692 was not adopted yet. But today, the Act is available as a defense for an individual, like Mr. Kurtz. Therefore, Mr. Kurtz cannot make a showing of the medical necessity defense.

V. CONCLUSION.

Division Two was correct in holding that the common law medical necessity defense does not exist for marijuana related crimes. Even if it did, the enactment of the Medical Marijuana Act abrogated the defense. Therefore, for the foregoing reasons, this Court should affirm Division Two's holding in Butler.

Respectfully submitted this 3rd day of July, 2012.



Olivia Zhou, WSBA #41747
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the SUPPLEMENTAL BRIEF OF RESPONDENT, on the date below as follows:

VIA ABC MESSENGER

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

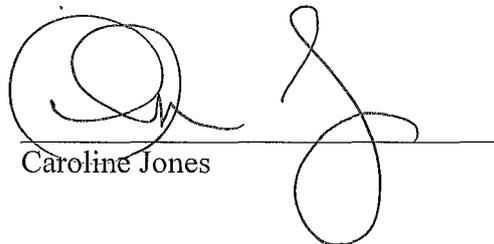
--AND--

US Mail Postage Prepaid

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

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

Dated this 3 day of July, 2012, at Olympia, Washington.


Caroline Jones