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STATE OF WASHINGTON
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NO. 90204-6

SUPREME COURT OF THE STATE OF WASHINGTON

CANNABIS ACTION COALITION
STEVE SARICH, JOHN WORTHINGTON;
AND; DERYCK TSANG ,

Appellants

v.

CITY OF KENT ET AL,

Respondents

APPELLANT JOHN WORTHINGTON'S SUPPLEMENTAL BRIEF

John Worthington
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Renton WA.98059

 ORIGINAL

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I. INTRODUCTION

The City of Kent's ban on medical marijuana collectives, KCC 15.08.290, should not be allowed to stand because it relies on a flawed interpretation of the Washington State Uniform and Federal Controlled Substances Acts.

Kent, the trial court and then the Court of Appeals all relied on an incorrect interpretation in both the Federal and State controlled substances act that a registry must be required to lawfully possess controlled substances, and without one, controlled substances are illegal. However, the registration requirement criteria in both acts clearly state that registration is not required to "lawfully possess controlled substances."

Even if the legislature thought it could create registration requirements for ultimate users and persons using controlled substances pursuant to the valid order of a practitioner, they would of had to modify RCW 69.50.302 (c)(3) of the Washington State Controlled Substances Act, which they did not do.

In addition, the City of Kent took concurrent jurisdiction to set its own penalties for violating "illegal conduct" based on a non-existent registration requirement of the federal and state controlled substances.

Ultimately, any criminal conduct must be charged within the framework

of the charging statutes which in this case are RCW 69.50, or Title 21 USC, but the state and federal criminal codes have no criminal charges for marijuana crimes, so the only criminal violations are in the pharmaceutical codes identified above.

Essentially, the controlled substances act has misled the public into thinking the public could be regulated from possessing drugs themselves either naturally or when created from derivatives. The language clearly separates ultimate users from use pursuant to a valid order and a prescription, which is not available for schedule I drugs. The language also clearly meant to apply for the distribution of drugs by individuals within the closed distribution system. That system was to be managed by registering and regulating those responsible for drug distribution in a closed distribution system, which were the pharmacists, not the ultimate users.

Absent any registration requirements for private use or in pursuant to a lawful order of a practitioner, Kent's ban and the penalties for the violation of it are ultra vires, and should be preempted and repealed. In essence what the City of Kent is trying to do is co-regulate controlled substances with the state and federal government, and develop its own interpretations and punishments for violating its regulations.

The state of Washington has no penalty for participating in a collective garden and until it does the City of Kent cannot just take concurrent jurisdiction to develop and enforce their own. The law to zone not only did not pertain to private use collective gardens, it did not contain any penalties for violating any zoning laws, plus it contained language that did not allow them to preclude dispensaries.

The justices should ask themselves the simple question of why the legislature would intend to prevent the cities from stopping dispensaries, and then somehow somehow allow banning collectives and allow the setting of penalties for violating those bans, which the state law does not have.

The City of Kent and other cities, who all have signed federal grant contracts to uphold federal marijuana policies over state marijuana policies, where upset with their failed attempts to influence the legislature, and simply took matters into their own hands.

This court should not allow any local government to set its own penalties that are separate from that of the state and federal government, because it would create an authority for cities to co-regulate controlled substances with the DEA, and Washington State Board of Pharmacy, and be an impediment to “all one Washington.”

This court should also not allow Washington cities, counties and towns to use federal laws and federal grant leveraging strategies to disrupt the will of the people or the will of the legislature in Washington State.

In allowing the ban on collectives to stand, this court would allow the City of Kent to have authority over “all production” including private, unlicensed, non-commercial cannabis production, which could extend to individual patient grows which are clearly ultimate users, and who are not required to register.

This result was not the intent of the legislature or the governor and could not be accomplished without altering the registration requirements in the international treaty, the Federal Controlled Substances Act and the Washington State Controlled Substances Act.

II. ISSUES

- A. CAN THE CITY OF KENT RELY ON REGISTRATION REQUIREMENTS TO CLAIM MARIJUANA IS ILLEGAL?**
- B. CAN THE CITY OF KENT CREATE CONCURRENT AUTHORITY TO SET PENALTIES FOR PARTICIPATING IN COLLECTIVE GARDENS?**
- C. DID THE LEGISLATURE INTEND TO GIVE LOCAL CONTROL OVER RCW69.51A?**
- D. CAN THE CITY OF KENT REGULATE ALL PRODUCTION OF CANNABIS?**

III. STATEMENT OF THE CASE

This case arises out of a dispute regarding the creation and enforcement of a City of Kent ban on medical cannabis collectives. In 2011, the Legislature adopted Engrossed Second Substitute Senate Bill 15073, (Heretofore ESSSB 5073), amending Washington's laws pertaining to the medical use of cannabis.

On June 5, 2012, the City of Kent passed ordinance KCC 15.08.290. CP 28, 34, 335-341. On June 5, 2012, Worthington joined other plaintiffs and filed suit in King County Superior Court challenging the City of Kent's moratorium and ordinance banning medical marijuana collectives. CP 1-18.

On June 20, 2012, Worthington and the other plaintiffs filed an amended complaint, (CP 19-34), arguing amongst other things, that section 403, RCW 69.51A.085, did not contain any language permitting city or county regulatory On July 12, 2012, Worthington and the other plaintiffs filed a Motion for Summary Judgment, (CP 652-657), arguing again that there was no local control over RCW 69.51A.085 or federal preemption.

On August 15, 2012, the City of Kent also filed a motion for Summary Judgment, (CP 135-168), and asked for a Permanent Injunction against the plaintiffs, to uphold their ban. The City of Kent argued, that RCW

69.51A.140 contained language that allowed them to ban medical marijuana collectives, and insisted that the Governor left section 1102 intact, specifically for the purpose of banning production of all cannabis.

On October 5, 2012, King County Superior Court Judge Jay White ruled the City of Kent could enforce the ordinance banning medical cannabis collectives and issued permanent injunctions against all the plaintiffs. CP 558-560.

On October 15, 2012, Worthington and the other plaintiffs, filed a motion to reconsider, (CP 563-580), arguing federal law did not preempt state law, and the ordinance violated state law. Worthington also argued RCW 69.51A.025 contained language that protected the rights of qualified patients and designated providers from local control or an outright ban, if they complied with RCW 69.51A.040.

On March 31, 2014, the Washington State Court of Appeals upheld the City of Kent's ban on medical marijuana collective gardens with a 26 page published Opinion.

On May 5, 2014 Worthington filed a timely Petition for Review to the Washington State Supreme Court. On October 10, 2014, the Washington State Supreme Court accepted review of this case, and on November 4, 2014

Worthington files this timely supplemental brief.

IV. ARGUMENT

A. CAN THE CITY OF KENT RELY ON REGISTRATION REQUIREMENTS TO CLAIM MARIJUANA IS ILLEGAL?

There are no registration requirements to lawfully possess controlled substances for ultimate users and person using controlled substances pursuant to an order of a valid practitioner as shown below:

RCW 69.50.302
Registration requirements.

(a) Every person who manufactures, distributes, or dispenses any controlled substance within this state or who proposes to engage in the manufacture, distribution, or dispensing of any controlled substance within this state, shall obtain annually a registration issued by the department in accordance with the commission's rules.

(b) A person registered by the department under this chapter to manufacture, distribute, dispense, or conduct research with controlled substances may possess, manufacture, distribute, dispense, or conduct research with those substances to the extent authorized by the registration and in conformity with this Article.

(c) The following persons need not register and may lawfully possess controlled substances under this chapter:

(1) An agent or employee of any registered manufacturer, distributor, or dispenser of any controlled substance if the agent or employee is acting in the usual course of business or employment. This exemption shall not include any agent or employee distributing sample controlled substances to practitioners without an order;

(2) A common or contract carrier or warehouse operator, or an employee thereof, whose possession of any controlled substance is in the usual course of business or employment;

(3) An ultimate user or a person in possession of any controlled substance pursuant to a lawful order of a practitioner or in lawful possession of a substance included in Schedule V.

(d) The commission may waive by rule the requirement for registration of certain manufacturers, distributors, or dispensers upon finding it consistent with the public health and safety. Personal practitioners licensed or registered in the state of Washington under the respective professional licensing acts shall not be required to be registered under this chapter unless the specific exemption is denied pursuant to RCW 69.50.305 for violation of any provisions of this chapter.

(e) A separate registration is required at each principal place of business or professional practice where the applicant manufactures, distributes, or dispenses controlled substances.

(f) The department may inspect the establishment of a registrant or applicant for registration in accordance with rules adopted by the commission.

[2013 c 19 § 98; 2011 c 336 § 839; 1993 c 187 § 16; 1989 1st ex.s. c 9 § 432; 1971 ex.s. c 308 §69.50.302 .]

21 U.S.C. §822. Persons required to register

(a) Period of registration

(1) Every person who manufactures or distributes any controlled substance or list I chemical, or who proposes to engage in the manufacture or distribution of any controlled substance or list I chemical, shall obtain annually a registration issued by the Attorney General in accordance with the rules and regulations promulgated by him.

(2) Every person who dispenses, or who proposes to dispense, any controlled substance, shall obtain from the Attorney General a registration issued in accordance with the rules and regulations promulgated by him. The Attorney General shall, by regulation, determine the period of such registrations. In no event, however, shall

such registrations be issued for less than one year nor for more than three years.

(b) Authorized activities

Persons registered by the Attorney General under this subchapter to manufacture, distribute, or dispense controlled substances or list I chemicals are authorized to possess, manufacture, distribute, or dispense such substances or chemicals (including any such activity in the conduct of research) to the extent authorized by their registration and in conformity with the other provisions of this subchapter.

(c) Exceptions

The following persons shall not be required to register and may lawfully possess any controlled substance or list I chemical under this subchapter:

(1) An agent or employee of any registered manufacturer, distributor, or dispenser of any controlled substance or list I chemical if such agent or employee is acting in the usual course of his business or employment.

(2) A common or contract carrier or warehouseman, or an employee thereof, whose possession of the controlled substance or list I chemical is in the usual course of his business or employment.

(3) An ultimate user who possesses such substance for a purpose specified in section 802(25) \1\ of this title.

As shown above there are no requirements in either act to register in order to lawfully possess controlled substances. The registration requirement statute above was not superseded and was not contained in ESSB 5073, so RCW 69.50.302 (c) (3) must be searched out and given effect. “ if there are matters not superseded and not contained therein, they must be searched out and given effect.” Parosa v. City of Tacoma 57 Wn.2d 413 (1960).

Since the legislature adopted a mirror act of the United States

government, which was meant to abide by international treaty, they themselves could not alter the above language and stay within the meaning of a “uniform” controlled substances act. The act has to be altered at the federal level and then adopted by reference again at the state level. These steps have been proven with the acceptance of marinol into the closed distribution system.

The Washington State legislature could not create a registration requirement for an ultimate user and a person using controlled substances pursuant to a valid order of a practitioner, because the Uniform Controlled Substances Act was not a law promulgated by the State of Washington. Washington State adopted the Uniform Controlled Substances Act by reference as evidenced in WAC 246-887-020.¹

Under the current language of RCW 69.50.302 (C) (3), there is no

¹ (1) Consistent with the concept of uniformity where possible with the federal regulations for controlled substances (21 C.F.R.), the federal regulations are specifically made applicable to registrants in this state by virtue of RCW 69.50.306. Although those regulations are automatically applicable to registrants in this state, the board is nevertheless adopting as its own regulations the existing regulations of the federal government published in the Code of Federal Regulations revised as of April 1, 1991, and all references made therein to the director or the secretary shall have reference*****

The State of Washington never published for public inspection, the Uniform Controlled Substances Act, and held public meetings because the information was copyrighted and publishing it for Washington State citizens to view would have been copyright infringement. Therefore, Washington State was only able to adopt by reference a law it did not promulgate.

registration requirement for ultimate users or for persons using controlled substances pursuant to a lawful order of a practitioner.

There could only be registration requirements for the distributor of controlled substances because they are then part of a closed distribution system the controlled substances act was intended to regulate. In other words, any registration requirements could only be placed on the dispensaries if they were made legal under Washington State law, because registration requirements are for those who intend to distribute controlled substances not for those who use them.² Otherwise people that show up to get prescriptions could be arrested for picking them up and possessing them because possessing controlled substances would be illegal.

**B. CAN THE CITY OF KENT CREATE CONCURRENT
AUTHORITY TO SET PENALTIES FOR PARTICIPATING IN
COLLECTIVE GARDENS?**

Pursuant to RCW 69.50.608, the State of Washington preempts the entire field of regulating controlled substances as shown below:

RCW 69.50.608
State preemption.

The state of Washington fully occupies and preempts the entire field of setting penalties for violations of the controlled substances act. Cities, towns, and counties or other municipalities may enact only those laws and ordinances relating to controlled substances that are

²RCW 69.50.302 a.

consistent with this chapter. Such local ordinances shall have the same penalties as provided for by state law. Local laws and ordinances that are inconsistent with the requirements of state law shall not be enacted and are preempted and repealed, regardless of the nature of the code, charter, or home rule status of the city, town, county, or municipality.

There are no Washington State penalties for operating collective gardens, so the Kent misdemeanor penalty for operating one in the City of Kent is preempted and repealed because it is inconsistent with the requirements of state law. Accordingly, this court should not uphold the Kent ban on collective gardens and it should repeal it because the ban is inconsistent with the state law to zone.

Unlike I-502 which created a law that allowed cities to file written objections to a location for which a license is sought³, the collective garden statute RCW 69.51A.085 does not give cities the same rights. Absent these rights, the City of Kent has unilaterally determined it has a right to regulate collective gardens thru the statute intended to regulate dispensaries under the tortured interpretation that the legislature never intended it couldn't.

The worst part about Kent's argument and one which has been made publically by the Washington State Department of Health, is that the legislature never intended the collective gardens to operate in store fronts.

³ RCW 69.50.331(7)(b)

Rather than address just the issue of storefronts, Kent threw in private residential collective gardens into their banning language, which are not subject to zoning because that is private use, and was intended by the legislature to be how the collective gardens were to be used.

Kent also over reached for authority to regulate “all production” including private, unlicensed, and non-commercial production which has always been intended for ultimate users and patients who grow for themselves. Rather than disqualify collective gardens from utilizing RCW 69.51A.085, Kent and other cities are using the storefronts as an excuse to throw out the baby with the bathwater, and to get a ruling that made criminals out of everyone who possessed controlled substances if they did not register.

What Kent should have done is argue that storefronts are distributing marijuana and should be required to register under RCW 69.50.302 a, because they possess business licenses and are not able to be ultimate users or persons using a controlled substances pursuant to the lawful order of a practitioner.

Instead, the City of Kent is riding the sentiment to abolish collective gardens because storefronts were not intended by the law, and because they

compete with the I-502 model, which they are trying to drown in the local bathtub. So far they have succeeded and it has led to an absurd result where everyone who possesses controlled substances is illegal, and where, the cities can create concurrent jurisdiction to set their own penalties under the controlled substances act, and where; they can alter an international law which was adopted by reference to regulate a closed distribution system, without properly promulgating a law.

C. DID THE LEGISLATURE INTEND TO GIVE LOCAL CONTROL OVER RCW69.51A?

If the legislature intended to give local control to regulate dispensaries and grow operations in ESSB 5073 it was news to Senator Jeanne Kohl Welles who stated the following:

" I also regret our failure to provide cities and counties with the tools they need to regulate dispensaries and grow operations."
(CP 530-533)

Senator Kohl Welles tried to give local control in two separate bills after ESSB 5073 in SB 5955, and SB 6265, but that local control was for project permitting. (CP 532-545) In both of those attempts it was also clear that Senator Kohl Welles attempted to pass language allowing the distribution of

medical cannabis by non-profit cooperatives. It was during those attempts that Worthington requested clarification from Senator Kohl Welles herself, who responded it was not the legislative intent to allow local control over home grows as shown below:

John, it is NOT the intent of the new bill to allow local jurisdictions to ban an individual patient from home grows. I would never support that. If we need to make a clarification, we can do that by amendment. (CP 639-642)

As shown above the drafter of ESSB 5073 “would never support” local control over home patient grows, which would be an absurd result of upholding Kent’s ban centered on a theory that gave local control over “all production.”

D. CAN THE CITY OF KENT REGULATE ALL PRODUCTION OF CANNABIS?

The authority to regulate controlled substances in Washington State was given to the Washington State Pharmacy Quality Assurance Commission in RCW 69.50.201a and is affirmed by RCW69.50.101.

The City of Kent has no authority to regulate controlled substances or enforce its own laws in Washington State. Kent only has what authority the state has intended to be enforced and they cannot determine on its own that a federal law allows them any authority to regulate controlled substances in a manner that is not consistent with the State of Washington.

The legislature only intended the cities to decide where a dispensary was placed and they did not make a public policy decision to allow Kent or other cities and counties to regulate all production of cannabis or marijuana in Washington State. The legislature also didn't want the non-profit cooperatives to be banned either when they tried to pass that language thru.

V. CONCLUSION

Worthington respectfully argues the Kent ban on collectives should be overturned and the injunction to prevent Kent from enforcing its ban should be granted.

For the reasons set forth herein, Worthington respectfully requests that this Court remand this case back to the Superior Court with orders to reverse all rulings and orders.

Executed on this 8TH day of December, 2014.

BY S:/JOHN WORTHINGTON

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DECLARATION OF SERVICE

I declare that on the date and time indicated below, I caused to be served via email and U.S. Mail, a copy of the documents and pleadings listed below upon the attorneys of record for the Respondent, and the Appellant, as well as the other parties herein listed and indicated below.

1. APPELLANT WORTHINGTON'S SUPPLEMENTAL BRIEF

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Please file this with the court.
Thank you

John Worthington