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NO. 69911-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM MICHAEL REIS,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE ANDREA DARVAS

BRIEF OF RESPONDENT

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A. ISSUES

1. Law enforcement is generally not required to disprove affirmative defenses before obtaining a search warrant. Should the same rule apply to searches for marijuana growing operations, where marijuana cultivation is illegal unless a defendant can establish an affirmative defense of medical use?

2. Proposed legislation would have required police to check a registry of medical marijuana users before seeking a search warrant, but the Governor vetoed the portion of the bill that created a registry, making the requirement a legal impossibility. Did the trial court properly deny a motion to suppress for failure to prove Reis was growing medical marijuana where no registry existed and where the statute includes an affirmative defense to the charges?

3. Police are not required to disprove affirmative defenses when seeking a search warrant. Where there was probable cause to believe Reis was growing a large quantity of marijuana, did the magistrate properly authorize a search warrant based on the available information?

B. STATEMENT OF THE CASE

On May 15, 2012, King County Sheriff's Detective Thomas Calabrese sought a search warrant for William Michael Reis's residence at 1225 Shorewood Drive SW in Burien, King County. CP 21, 27. The search warrant affidavit summarized the investigation as follows.

Detective Calabrese first received a confidential tip that someone named William was growing marijuana in the Shorewood area. CP 23. The informant said that the informant feared retaliation. Id. The detective drove through Shorewood and saw marijuana plants on the back deck of Reis's home. Id. On a second drive-by, Detective Calabrese saw a man matching Reis's description transferring the marijuana plants on the deck into larger pots. CP 11, 23. Detective Calabrese set up surveillance in a neighbor's yard and, from that vantage point, he could see black plastic covering Reis's basement windows and condensation on a window that was slightly open. Id. He could also hear a loud fan-like humming sound. Id. Based on his training and experience, he concluded that Reis was growing a significant amount of marijuana. CP 23-25.

Detective Calabrese traced the license number of the car in Reis's driveway to Reis; he discovered that Reis had previously been convicted of a Violation of the Uniform Controlled Substances Act for growing marijuana in his home, and he also discovered that Reis had been found in

possession of 1.3 grams of marijuana in 2011. CP 26. Detective Calabrese attempted to speak to Reis's neighbors, but they were afraid of Reis and did not want to cooperate with law enforcement for fear of retaliation. Id. Detective Calabrese then drove by Reis's house one more time and saw that the marijuana plants were still on the back deck. Id.

King County District Court Judge D. Mark Eide reviewed the affidavit and concluded that there was probable cause to believe Reis was violating the Uniform Controlled Substances Act, RCW 69.50; he approved the warrant. CP 32. The warrant was served on May 21, 2012. CP 32-33. Officers found a total of thirty-seven marijuana plants at Reis's residence and 13.17 pounds (approximately 210.72 ounces) of marijuana.[1] CP 33. Officers also found scales, ledgers, receipts for marijuana sales, and planting equipment—all indicative of a marijuana grow operation. Id. Reis was charged with a Violation of the Uniform Controlled Substances Act, Manufacturing Marijuana. CP 1.

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[1] Under RCW 69.51A.040, a qualifying medical marijuana patient may possess no more than fifteen marijuana plants and no more than twenty-four ounces of useable marijuana. Someone who is both a qualifying patient and a designated provider may possess no more than thirty plants and forty-eight ounces of useable marijuana. Under RCW 69.51A.085, a collective garden for qualifying patients may contain no more than fifteen plants per patient, up to forty-five plants. A collective garden may contain no more than twenty-four ounces of useable marijuana per patient, up to seventy-two ounces.

Initiative 502, passed in November 2012, legalized possession of small amounts of marijuana for individuals over twenty-one years of age. Growing marijuana for personal recreational use remains illegal. Initiative 502 has no bearing on the current case.

On January 21, 2012, Reis filed a motion to suppress evidence. CP 20. He alleged that the search warrant was not supported by probable cause. CP 18. The trial court denied Reis's motion. CP 88. Reviewing the relevant statutes, the trial court concluded, "[I]t is clear that the legislature did not intend to decriminalize all marijuana grow operations, nor put the burden on law enforcement to demonstrate that a grower of marijuana is not a qualified medical marijuana patient or a designated provider." CP 92. Thus, according to the trial court, probable cause for a search warrant does not require law enforcement officers to investigate whether a person growing marijuana is authorized to possess or cultivate marijuana for medical purposes. CP 93.

Reis sought discretionary review on February 12, 2013. CP 95. The trial court certified that its order denying the motion to suppress involved a controlling question of law. CP 110. This Court granted review on March 11, 2013.

C. ARGUMENT

The relatively narrow question before this Court is whether officers seeking a search warrant for a residence where marijuana is being grown must first establish that the grow operation is not for medical marijuana. Reis argues that officers must disprove full compliance with

the Medical Use of Marijuana Act because a search warrant is authorized only to investigate crime, and it is not a crime to possess medical marijuana. This argument should be rejected. Usually, officers need not disprove an affirmative defense to establish probable cause that a crime is being committed. The recent changes to the Medical Use of Marijuana Act did not decriminalize marijuana. Rather, marijuana cultivation is illegal in Washington State but medical marijuana may, under very specific circumstances, be possessed, used and grown. A defendant has the burden of proving as an affirmative defense that he had fully complied with the Medical Use of Marijuana Act.

1. A SEARCH WARRANT AFFIDAVIT NEED NOT DEFEAT AFFIRMATIVE DEFENSES.

Probable cause requires "reasonable grounds for suspicion supported by circumstances sufficiently strong to warrant a man of ordinary caution to believe the accused is guilty of the indicated crime." State v. Seagull, 95 Wn.2d 898, 906, 632 P.2d 44 (1981). According to the Washington Supreme Court, "[r]easonableness is the key ingredient in the test for issuance of a search warrant." State v. Patterson, 83 Wn.2d 49, 52, 515 P.2d 496 (1973). Probable cause does not require law enforcement officers to disprove innocent explanations. Illinois v.

Wardlow, 528 U.S. 119, 126, 120 S. Ct. 673, 145 L. Ed. 2d 570 (2000) ("[T]he Fourth Amendment accepts . . . persons arrested and detained on probable cause to believe they have committed a crime may turn out to be innocent."). "In making a determination of probable cause the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of non-criminal acts." Illinois v. Gates, 462 U.S. 213, 245, n.13, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983).

Washington courts have similarly concluded that probable cause does not demand an absence of innocent explanations for a suspect's behavior. State v. Fore, 56 Wn. App. 339, 344, 783 P.2d 626 (1989); State v. Graham, 130 Wn.2d 711, 725, 927 P.2d 227 (1996) (holding that police officers had probable cause to detain the defendant where a person of reasonable caution would believe the defendant possessed an illegal drug). In State v. Fry, 168 Wn.2d 1, 13, 228 P.3d 1 (2010), the court held that "an affirmative defense does not negate probable cause for a search . . . conducted with a valid warrant." Fry attempted to thwart a police search by showing a medical marijuana card. The Washington Supreme Court held that purported evidence of an affirmative defense did not

prevent the officer from carrying out the search. The Court reasoned, "It is difficult to imagine how a law enforcement officer, having been presented with a medical marijuana authorization, would be able to determine that the marijuana is otherwise being lawfully possessed . . . without some kind of search." Id. at 6. An officer does not need to assess the relative strength of the suspect's affirmative defense because "[t]he officer is not judge or jury." Id. at 8 (quoting McBride v. Walla Walla Cnty., 95 Wn. App. 33, 40, 975 P.2d 1029 (1999)).[2]

The rule that probable cause does not require law enforcement to disprove affirmative defenses is particularly apt with regard to the Medical Use of Marijuana Act. The facts that make possession lawful are uniquely in the user or grower's possession and are subject to important privileges, such that gathering those facts would be nearly impossible for police. RCW 69.51A.010 defines "qualified patients" and "designated providers" in a way that relies on confidential communications with health care

[2] Establishing probable cause to search is distinct from actually arresting someone. "Probable cause to arrest concerns the guilt of the arrestee, whereas probable cause to search an item concerns the connection of the items sought with crime and the present location of the items." U.S. v. O'Connor, 658 F.2d 688, 693, n.7 (9th Cir. 1981). "This distinction is a critical one, and is particularly important in search warrant cases . . . . [A] search warrant is not rendered invalid because of a lack of grounds to arrest any particular person . . . ." 2 Search and Seizure §3.1(b), 12 (5th ed. 2012).

providers.[3] Police officers do not have access to private medical information of suspects to determine whether a marijuana grow operation is for medical as opposed to recreational purposes. RCW 5.60.060 ("a physician ... shall not, without the consent of his or her patient, be examined in a civil action as to any information acquired in attending such patient, which was necessary to enable him or her to prescribe or act for the patient); RCW 10.58.010 ("The rules of evidence in civil actions, so far as practicable, shall be applied to criminal prosecutions."); State v. Broussard, 12 Wn. App. 355, 529 P.2d 1128 (1974) (discussing privilege in the criminal law context). Thus, officers cannot know by normal investigative techniques whether a grow is medical or illicit. They would have to rummage through medical records or otherwise delve into the private physician/patient relationship to do so. It would be impossible for police to know where to begin their investigation, because they would have no idea who treated a patient for medical problems, if anyone.

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[3] "'Designated provider' means a person who: (a) Is eighteen years of age or older; (b) Has been designated in writing by a patient to serve as a designated provider under this chapter; (c) Is prohibited from consuming marijuana obtained for the personal, medical use of the patient for whom the individual is acting as designated provider; and (d) Is the designated provider to only one patient at any one time." RCW 69.51A.010(1). "'Qualifying patient' means a person who: (a) Is a patient of a health care professional; (b) Has been diagnosed by that health care professional as having a terminal or debilitating medical condition; (c) Is a resident of the state of Washington at the time of such diagnosis; (d) Has been advised by that health care professional about the risks and benefits of the medical use of marijuana; and (e) Has been advised by that health care professional that they may benefit from the medical use of marijuana." RCW 69.51A.010(4).

Moreover, it is difficult to imagine how officers would obtain access to such records without first searching the grow operation itself, and without some other evidence that the defendant was, under Reis's heightened standard, violating the Medical Use of Marijuana Act. For all these reasons, one would expect that the usual rule – that police need not disprove affirmative defenses – should apply in this context.

2. CULTIVATION OF MARIJUANA IS ILLEGAL UNDER WASHINGTON LAW; AN AFFIRMATIVE DEFENSE EXISTS FOR QUALIFYING PATIENTS AND DESIGNATED PROVIDERS WHO POSSESS MARIJUANA FOR MEDICAL PURPOSES.

Because it is well-established that police need not refute affirmative defenses in an application for a search warrant, Reis must argue that recent changes to the Medical Use of Marijuana Act eliminated the affirmative defense. He argues that those changes decriminalized the use and cultivation of medical marijuana, such that the onus is on law enforcement to show that he is acting illegally, rather than on him to establish an affirmative defense. This argument should be rejected. The recent changes to the statute do not decriminalize marijuana use; a defendant who is complying with the Medical Use of Marijuana Act may assert and prove an affirmative defense to a criminal charge.

Under RCW 69.50.204(c)(22), marijuana is a Schedule I unlawful controlled substance, and possession or cultivation is prohibited. RCW 69.50.401(1). Thus, the possession and use of marijuana is, and has been, generally prohibited under Washington law.

Starting in 1998, however, the legislature passed the Medical Use of Marijuana Act to allow people suffering from serious medical conditions to use marijuana medicinally. The Act provided that:

> Qualifying patients with terminal or debilitating illnesses who, in the judgment of their physicians, may benefit from the medical use of marijuana, shall not be found guilty of a crime . . . . Persons who act as designated providers to such patients shall also not be found guilty of a crime . . . .

RCW 69.51A.005. The law provided an affirmative defense for medical marijuana.

> 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 provider 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.

RCW 69.51A.040. Thus, Washington law provided that marijuana possession and cultivation remained presumptively illegal, but it gave qualified patients and their designated providers an affirmative defense to prosecution.

In 2011, the legislature voted to approve amendments to chapter 69.51A RCW that were intended to broaden protections for patients and providers of medical marijuana. *See* Laws of 2011, ch. 181. The stated intent was to shield users from arrest, prosecution and criminal sanctions. Id. § 101(1)(a) (vetoed).[4] The bill attempted to establish licensing requirements and a registry for qualified medical marijuana patients and providers, and to require that police check the registry before obtaining a search warrant. Ch. 181, § 901(1), (4) (vetoed). The registry was necessary, of course, to allow police a means of quickly distinguishing between qualified patients and designated providers, on the one hand, and illicit users and illegal providers, on the other hand. Participation in the registry was not to be mandatory. Id. § 901(6) (vetoed). People who participated in the registry would, however, have the highest level of protection. Registrants were to be protected from arrest, prosecution, and other criminal sanctions as long as they followed the law.

> The medical use of cannabis **in accordance with the terms and conditions of this chapter** does not constitute a crime and a qualifying patient or designated provider **in compliance with the terms and conditions of this chapter** may not be arrested, prosecuted, or subject to other criminal sanctions or civil consequences ... if:

[4] "(a) Qualifying patients and designated providers complying with the terms of this act and registering with the department of health will no longer be subject to arrest or prosecution, other criminal sanctions, or civil consequences based solely on their medical use of cannabis."

> (1) The qualifying patient or designated provider possesses no more than [specified amounts of cannabis];
>
> (2) The qualifying patient or designated provider presents his or her proof of registration with the department of health, to any peace officer who questions the patient or provider regarding his or her medical use of cannabis;
>
> (3) **The qualifying patient or designated provider keeps a copy of his or her proof of registration with the registry established in section 901 of this act** and the qualifying patient or designated provider's contact information **posted prominently next to any cannabis plants, cannabis products, or useable cannabis located at his or her residence**;
>
> (4) The investigating peace officer does not possess evidence that [the patient or provider has violated various other statutory requirements relating to medical cannabis].

Id. 401, codified as RCW 69.51A.040 (emphasis added).

Patients and providers who were not listed on the registry, however, would have to rely on a more general affirmative defense to prosecution:

> A qualifying patient or designated provider who is not registered with the registry established in section 901 of this act, but who presents his or her valid documentation to any peace officer who questions the patient or provider regarding his or her medical use of cannabis, may assert an affirmative defense to charges of violations of state law relating to cannabis through proof at trial, by a preponderance of the evidence, that he or she otherwise meets the requirements of RCW 69.51A.040.

Id. § 402(2), codified as RCW 69.51A.043(2). Under this affirmative defense provision, there is no general protection against law enforcement,

there is only an affirmative defense that can be raised at trial. This is very similar to the protection that existed in 2010.

The Governor vetoed, however, large sections of the bill, including key provisions that would have established licensing of medical marijuana patients and providers.[5] The Governor feared that a registry with licensing and authorization requirements would compel state employees to violate federal law prohibiting marijuana use under any circumstances, and would "open public employees to federal prosecution," particularly because "the United States Attorneys have made it clear that state law would not provide these individuals with a safe harbor from federal prosecution." Governor's Partial Veto Message on E2SSB 5073 (April 29, 2011). Because a registry of patients and providers was "intertwined with requirements for registration of licensed commercial producers, processors and dispensers of cannabis," the registry provisions were vetoed, too. Id. at 3. The legislature did not override the veto.

When a Governor vetoes a bill voted on by both houses of the legislature, the Governor is acting in a legislative capacity, so the intent of

[5] The following sections were vetoed: §§ 101, 201, 407, 410, 411, 412, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 701, 702, 703, 704, 705, 801, 802, 803, 804, 805, 806, 807, 901, 902, 1104, 1201, 1202, 1203 and 1206.

the legislature cannot be considered apart from the Governor's intent.[6] Shelton Hotel Co. v. Bates, 4 Wn.2d 498, 506, 104 P.2d 478 (1940); Hallin v. Trent, 94 Wn.2d 671, 677, 619 P.2d 357 (1980). The Governor's veto of a portion of a measure, if the veto is not overridden, removes the vetoed material from the legislation as effectively as though it had never been considered by the legislature. State ex rel. Stiner v. Yelle, 174 Wash. 402, 408, 25 P.2d 91 (1933).

It follows that it is currently impossible to register as a "qualified patient" or "designated provider," so it is also impossible for police to check a registry before obtaining a search warrant. The premise for what Reis describes as the presumptively legal use of medical marijuana – assuming, arguendo that any such a presumption existed – depended on the ability of patients and providers to readily demonstrate to police that they were acting within the law. Once that premise was defeated by the veto of the registry provisions, however, the concept of legal medicinal use became impossible. What remains is the Legislature's retention of the provision allowing qualified patients and designated providers to present

[6] The Governor's veto did not, as Reis argues, invalidate the affirmative defense provisions. As the Governor pointed out in her veto message, because RCW 69.51A.043, RCW 69.51A.045, and RCW 69.51A.047 always governed those who are not registered, the affirmative defense provisions are "meaningful even though section 901 has been vetoed." Governor's Partial Veto Message on E2SSB 5073, p.3 (April 29, 2011).

an affirmative defense in response to charges of unlawful marijuana possession. *See* RCW 69.51A.043, .045, .047.

3. REIS'S INTERPRETATION OF RCW 69.51A.040 IGNORES THE REST OF THE UNIFORM CONTROLLED SUBSTANCES ACT AND KEY LANGUAGE OF THE MEDICAL USE OF MARIJUANA ACT.

Reis argues that because the "plain language" of RCW 69.51A.040 says, "the medical use of cannabis . . . does not constitute a crime," it follows that possession of marijuana for medical use is presumptively legal rather than an affirmative defense. He maintains that because medical marijuana is presumptively legal, law enforcement bears the burden of proving that a suspect does not have a medical reason for possessing or cultivating marijuana. He also argues that the rule of lenity demands his interpretation be accepted. Reis is incorrect on both accounts.

Reis treats the plain language rule as if the meaning of a single phrase can be deemed "plain" without reference to the surrounding language and related statutory provisions. "Legislation never is written on a clean slate, never is read in isolation, and never applies in a vacuum. Every new act is a component of an extensive and elaborate system of

written laws." 2B Statutes and Statutory Construction §53:1, 373-74 (7th ed. 2012).

> The plain meaning of a statute may be discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question. Further, "[a]n act must be construed as a whole, considering all provisions in relation to one another and harmonizing all rather than rendering any superfluous. Finally, we employ traditional rules of grammar in discerning the plain language of the statute.

State v. Bunker, 169 Wn.2d 571, 577-78, 238 P.3d 487 (2010) (statutory language was not "plain" because application of the first antecedent rule of grammar – normally a good indicator of legislative intent – did not make sense in the overall legislative scheme) (internal citations and quotation marks omitted). Especially when interpreting exceptions to a general statutory prohibition, the entire legislative scheme must be considered so that the exceptions are analyzed in the context of the general prohibition. In re Pers. Restraint of Adams, No. 87501-4, Slip op. at 6-7 (Wash.S.Ct., filed Sept. 12, 2013) (analyzing exceptions to a statutory time bar on the filing of collateral attacks on a judgment).

In keeping with these fundamental rules of statutory construction, RCW 69.51A.040 must be read in connection with the general prohibition in RCW 69.50.401(1) against the possession and cultivation of marijuana. From the general prohibition, the legislature has carved out exceptions for

medical marijuana users. It is not possible, however, to distinguish a medical marijuana grow operation from an illicit grow simply by looking at outward appearances and/or objective evidence. Rather, whether a grow is medical or illicit depends on the medical history of the patient and/or the connection between the patient and the provider; information that is uniquely available to the user but not to police. Reis's rule would mean that officers cannot get a search warrant for illicit grows because officers are not in a position to obtain information about a suspect's medical condition, or whether he has obtained approval for medical care with marijuana, and all the other predicates for determining whether someone is a "qualified patient" or a "designated provider."

Moreover, Reis's interpretation of RCW 69.50.040 ignores RCW 69.50.042 and the other affirmative defenses in the statute. If possession of medical marijuana is legal, and if police and prosecutors have the burden to prove otherwise, then there would be no need for an affirmative defense.

Additionally, Reis's "plain language" argument that medical marijuana was decriminalized ignores the language saying that "medical use of cannabis <u>in accordance with the terms and conditions of this chapter</u> does not constitute a crime." (emphasis added). As noted above, whether use is "in accordance with the terms and conditions" of the chapter

depends on a myriad of factors that police will never know through ordinary investigation, like whether a person's doctor has recommended marijuana use to alleviate a medical condition. *See* RCW 69.51A.010(4) (definition of "qualifying patient"). In fact, nobody but the patient and his physician may know this. As argued above, it is absurd to claim that the legislature created an affirmative defense while simultaneously presuming use of medical marijuana is legal, and while requiring the State to disprove facts that are uniquely within the patient's knowledge. Thus, to ignore "in accordance with the terms and conditions of this chapter" is simply not a reasonable interpretation of the statute.

The only reasonable interpretation of the legislation is the one that recognizes the legislative intent to balance law enforcement's need to investigate illicit cultivation, while still protecting the rights of medical providers by allowing an affirmative defense to prosecution.[7] Although the legislature originally intended more protections for medical users, the final bill must be interpreted in light of the veto, and in light of the whole legislative scheme. Once the unique registration requirement was removed, the statute operates like other statutes in Title 69. The statute

[7] Even without a governor's veto, qualified patients and designated providers would have been forced to rely on the affirmative defense provisions while a registry was being compiled. *See* Ch. 181, 901(1) (vetoed) (allowing the Department of Health until January 1, 2013 to adopt rules governing the registry).

does not eliminate the affirmative defense or create a new obstacle to legitimate criminal investigations.

The State's interpretation of the Medical Use of Marijuana Act is consistent with other provisions in closely related statutes. RCW 69.51A's treatment of medical marijuana parallels RCW 69.50's treatment of prescription drugs. Like RCW 69.51A.040, RCW 69.50.4013 establishes an exception to the laws criminalizing controlled substances. And, the burden of proving medical exceptions under the Uniform Controlled Substances Act clearly falls on defendants. "The burden of proof of any exemption or exception is upon the person claiming it." RCW 69.50.506(a); State v. Bradshaw, 152 Wn.2d 528, 538, 98 P.3d 1190 (2004) (defendants must prove unwitting possession); State v. Staley, 123 Wn. 2d 794, 799, 872 P.2d 502 (1994) ("the defendant may … affirmatively assert that his possession of the drug was 'unwitting, or authorized by law, or acquired by lawful means in a lawful manner, or was otherwise excusable under the statute.'"). Unless there is a clear reason to do otherwise, RCW 69.51A should be construed in the same manner as similar provisions within Title 69.

Likewise, Reis's reliance on the rule of lenity is inapt.

> A statute is ambiguous if it is susceptible to two or more reasonable interpretations, it is not ambiguous merely because different interpretations are conceivable." State v.

> Tili, 139 Wn.2d 107, 115, 985 P.2d 365 (1999). "A court should not be hasty in finding an ambiguity because the result may be a construction of the statute that does not accurately reflect legislative intent." Snoqualmie Valley Sch. Dist. No. 410 v. Van Eyk, 130 Wn. App. 806, 811, 125 P.3d 208 (2005).

State v. K.R., 169 Wn. App. 742, 748, 282 P.3d 1112 (2012). For the reasons explained above, it is not reasonable to conclude from the statutory language that the legislature intended to decriminalize marijuana. Thus, the statute is not subject to the rule of lenity.

Finally, Reis will likely cite the recent case of State v. Kurtz, No. 87078-1, Slip op. (Wash.S.Ct., filed Sept. 19, 2013), in support of his argument. The issue in Kurtz was whether the common law necessity defense for marijuana was inconsistent with the Medical Use of Marijuana Act. In finding that the Act did not abrogate the common law, the court observed:

> Moreover, in 2011 the legislature amended the Act, making qualifying marijuana use a legal use, not simply an affirmative defense. RCW 69.51A.040. A necessity defense arises only when an individual acts contrary to law. Under RCW 69.51A.005(2)(a), a qualifying patient "shall not be arrested, prosecuted, or subject to other criminal actions or civil consequences under state law based solely on their medical use of cannabis, notwithstanding any other provision of law." One who meets the specific requirements expressed by the legislature may not be charged with committing a crime and has no need for the necessity defense. Only where one's conduct falls outside of the legal conduct of the Act, would a medical necessity defense be necessary. The 2011 amendment legalizing

> qualifying marijuana use strongly suggests that the Act was not intended to abrogate or supplant the common law necessity defense.

State v. Kurtz, slip op. at 11. This passing reference to legislative intent is dicta and does not resolve the issue before this Court. The parties in Kurtz cited RCW 69.51A.040 but without any discussion of the legislative history or the Governor's veto of the registry provisions. Thus, the court in Kurtz assumed that a medical marijuana user will not be prosecuted under the Act, without recognizing that arrest and prosecution will be avoided only if a person could demonstrate that he or she had *registered.* It was sufficient for the court's purposes in Kurtz – showing that the Act was not inconsistent with a common law defense – for the court to note a general legislative intent to allow greater use of marijuana for medical purposes. The court had no occasion to decide the precise meaning of the statute, i.e., whether it decriminalized medical marijuana possession. Thus, Kurtz does not control the analysis in this case.

4. THE SEARCH WARRANT AFFIDAVIT IN THIS CASE ESTABLISHED PROBABLE CAUSE.

In a review of a denial of a motion to suppress, findings of fact will be upheld if they are supported by substantial evidence. Conclusions of

law are reviewed de novo. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999), overruled on other grounds by Brendlin v. California, 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007). The reviewing court should give the magistrate's decision "great deference." State v. Cole, 128 Wn.2d 262, 286, 906 P.2d 925 (1995). The reviewing court should resolve any doubts in favor of the warrant. State v. Jackson, 150 Wn.2d 251, 265, 76 P.3d 217 (2003).

There is no real dispute in this case about whether there was probable cause to believe that Reis was growing a significant amount of marijuana at his home. The search warrant for William Reis's residence was based on clear evidence described in Detective Calabrese's affidavit. The detective received a tip that a person named William was growing marijuana in Burien's Shorewood neighborhood. On three separate occasions, Detective Calabrese saw what he identified as marijuana plants on Reis's back deck as the detective drove by the house. From a neighboring yard, the detective saw black plastic covering the basement windows of Reis's home. The detective also heard the loud humming of a fan coming from the basement and noticed condensation on the interior of one of the windows.

Based on his training and experience, Detective Calabrese knew that covered windows, fans, and condensation from humidity were consistent with a marijuana grow operation. Detective Calabrese also found that Reis had been previously charged with VUCSA for growing marijuana in his home and that Reis's neighbors feared him. Only after this prolonged investigation did Detective Calabrese seek a search warrant for Reis's home. The facts all pointed to a large-scale marijuana grow operation.

Detective Calabrese's affidavit was based on sufficient evidence to establish probable cause for a search without an inquiry into whether Reis had a medical marijuana authorization. Without conducting a search of Reis's house, the detective had no way of discovering the intent behind Reis's possession and cultivation of marijuana. The detective was not required to rule out innocent explanations for Reis's conduct. Detective Calabrese was not required to disprove the affirmative defense that Reis was a qualifying patient or designated provider complying with all the terms and conditions of RCW 69.51A. The search of Reis's home was lawful.

D. CONCLUSION

For all the foregoing reasons, the State respectfully asks this Court to affirm the trial court's decision to deny Reis's motion to suppress the evidence found at his home.

DATED this 26th day of September, 2013.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorneys for the petitioner,

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and to the attorneys for respondent

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, containing a copy of the Brief of Respondent, in STATE V. WILLIAM MICHAEL REIS, Cause No. 69911-3-I, in the Court of Appeals, Division I, for the State of Washington.

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

LBrame
Name
Done in Seattle, Washington

9/26/13
Date 9/26/13