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FILED
July 11, 2013
Court of Appeals
Division III
State of Washington

No. 31158-9-III
Whitman County Superior Court No. 11-1-00074-0

IN THE COURT OF APPEALS
OF WASHINGTON STATE
DIVISION III

STATE OF WASHINGTON, Respondent

v.

TYLER MARKWART, Appellant

BRIEF OF RESPONDENT

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RESTATEMENT OF THE ISSUES

1. Did the trial court correctly rule to preclude Mr. Markwart from presenting a designated provider defense under Washington's Medical Marijuana Act?
2. Did the trial court properly deny Mr. Markwart's pre-trial motion to dismiss on the grounds of entrapment?
3. Did law enforcement properly investigate Mr. Markwart's case?
4. Was Mr. Markwart given a fair trial?
5. Was the sentence within the standard range available for the convictions?
6. Was the fine within the discretion of the trial court?

BRIEF ANSWER

1. Yes. The trial court ruled properly in precluding the designated provider defense based on the facts and law before the trial court at the time of the decision.
2. Yes. The trial court followed the law in denying Mr. Markwart's motion to dismiss based on entrapment.
3. Yes. There was nothing improper about the investigation into the criminal activity of Mr. Markwart.
4. Yes. Mr. Markwart was given a fair trial.
5. Yes. It was within the discretion of the trial court to sentence Mr. Markwart to the low-end of the standard range.
6. Yes. There was no error in the imposition of the fine as it was clearly within the standard range available to the sentencing judge.

STATEMENT OF THE CASE

Tyler Markwart was convicted by a jury of three counts of Delivery of a Controlled Substance – Marijuana, one count of Possession with intent to deliver a controlled substance – Marijuana, and one count of Manufacturing Marijuana on December 13, 2011. CP 256-260. He was sentenced to six months in jail on each count, to be served concurrently, on August 24, 2013. CP 361-370. He was also ordered to pay a fine of

\$10,000. *Id.* at 366. Mr Markwart's trial and subsequent conviction followed an investigation by the Quad Cities Drug Task Force that began in early 2011. CP 3-7.

The investigation revealed that Mr. Markwart had begun a business called "Allele Seeds Research" and that he was offering various marijuana products to qualifying patients under Washington's Medical Marijuana Act. CP 3-7. *See also* 12/12/2011 RP 116-187 & 12/13/2011 RP 197-199. As part of the investigation a confidential informant was used and controlled buys from Mr. Markwart were conducted. CP 3-7. On March 10, 24, and April 15, Mr. Markwart arranged to meet with the Confidential Informant, Christopher Turner, at three separate locations and each time Mr. Markwart sold a quantity of marijuana to Mr. Turner in exchange for cash. CP 3-7. *See also* 12/12/2011 RP 45-61. Mr. Turner presented a medical authorization that had been fabricated by law enforcement on non-tamper resistant paper. 12/12/2011 RP 51-52. At the third buy Mr. Markwart had only \$140 worth of marijuana instead of the usual \$200. *Id.* at 60. He told Mr. Turner that he could meet him at a party that night and get some more. *Id.* Mr. Markwart told Mr. Turner that he would "smell him at the party". *Id.*

On April 19, 2011 Detective Bryson Aase of the Quad Cities Drug Task Force arranged to buy marijuana from Mr. Markwart as part the

investigation. 12/12/2011 RP 99-103. Detective Aase also had a document that purported to be a medical marijuana authorization but was on non-tamper resistant paper. *Id.* at 101-103. *See also* CP 320. Mr. Markwart refused to sell to Detective Aase when he failed to produce his identification and Mr. Markwart was arrested. *Id.* Within Mr. Markwart's backpack were three jars containing marijuana, a digital scale for weighing, and packaging materials. *Id.* at 148-151 & 193.

Following Mr. Markwart's arrest a search was conducted at his home. CP 3-7. *See also* 12/12/2011 RP 151-162. A total of 32 plants were found in the home as part of a grow operation. *Id.* at 160-162. Mr. Turner's designated provider paperwork was also recovered from Mr. Markwart's home. *Id.* at 169. CP 184. It should be noted that Mr. Turner's purported Designated Provider Authorization does not identify in writing who the designated provider is to be. CP 184. Also recovered from Mr. Markwart's home were the medical marijuana authorizations and designated provider authorizations for no less than fourteen individuals. CP 155-183.

At sentencing, the trial court imposed the low end-end of the standard range and imposed a \$10,000 fine. 8/24/2012 RP 370. The trial court went on to find that Mr. Markwart is a "political activist". *Id.* The trial court also found that "Mr. Markwart took the law and, I think, took

advantage of that law and stretched that law beyond its terms, beyond its boundaries, and beyond its intent. And while he may profess these deep political beliefs and personal beliefs towards medical marijuana and its usefulness and its effectiveness, what his obvious intent here was is to be a for-profit businessman.” 8/24/2012 RP 370-71. The trial court found that Mr. Markwart’s “primary intent” was to make money. *Id.* The trial court concluded stating, “to that reason, I am going to impose a \$10,000 fine as a deterrent to efforts to exploit this law for personal financial gain.” *Id.*

ARGUMENT

1. THE TRIAL COURT PROPERLY RULED TO DENY MR. MARKWART THE OPPORTUNITY TO PRESENT THE AFFIRMATIVE DEFENSE OF BEING A DESIGNATED PROVIDER UNDER THE MEDICAL MARIJUANA ACT.

The Appellant’s attorney properly restates the law in her argument under this section. The State argued at the pre-trial motion that the defense was not available. WPIC 52.11 sets forth that:

It is a defense to a charge of possession, delivery, or manufacturing of marijuana that:

- (1) The defendant is eighteen years of age or older; and
- (2) The defendant was designated as a designated provider to a qualifying patient prior to assisting the patient with the medical use of marijuana; and

- (3) The defendant possessed no more marijuana than necessary for the qualifying patient's personal, medical use for a sixty-day period; and
- (4) The defendant presented a copy of the qualifying patient's valid documentation to any law enforcement official who requested such information; and
- (5) The defendant did not consume any of the marijuana obtained for the use of the qualifying patient for whom the defendant is acting as designated provider; and
- (6) The defendant was the designated provider to only one qualifying patient at any one time.

The defendant has the burden of proving this defense by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty as to this charge.

WPIC 52.11

The rule requires that a "designated provider" provide only to a "qualifying patient". A "qualifying patient" must have "valid documentation". RCW 69.51A.010(7) states that:

"Valid documentation" means: (a) A statement signed and dated by a qualifying patient's health care professional written on tamper-resistant paper, which states that, in the health care professional's professional opinion, the patient may benefit from the medical use of marijuana; and (b) Proof of identity such as a Washington state driver's license or identocard, as defined in RCW 46.20.035."

The State contends that the documentation used by Mr. Turner was neither tamper-resistant nor signed by a health care professional, therefore Mr. Markwart cannot raise an affirmative defense to the three controlled buys.

As for the attempted sale to Deputy Aase, Mr. Markwart was, in addition to fourteen other individuals, the “designated care provider” for Christopher Turner – hence he could not also be the provider for Aase.

This is also true of the manufacturing charge. At the time of the execution of the search warrant, Mr. Markwart had within his possession the authorizations from no less than fourteen individuals designating him as their respective care provider. CP 155-180. This is a clear violation of “only one patient at any one time”.

The problem with Mr. Markwart’s argument is that it fails to provide any evidence that he was a qualifying patient under the law much less a designated provider. The trial court determined that Mr. Markwart made no response to the legal arguments presented by the State at the pre-trial motion. The trial court indicated “[T]hat’s a dangerous tack to take, not to respond, because a failure to respond to legal issues can sometimes and

very often result in a waiver or an inability of to raise issues that you didn't raise at the trial level on appeal." 12/2/2011 RP 59. The trial court went on to state that the Defendant must provide some evidence. The trial court indicated that it has to be "very lenient and interpret and construe the evidence in a manner that's most favorable to the defendant and give him the opportunity, if there is evidence, of potential defense, give him an opportunity to present that evidence to the jury and to present that issue to the jury for their deliberation." 12/2/2011 RP 59-60. The trial court determined that there was no evidence before the court to support a designated provider defense. 12/2/1011 RP 65. The trial court went on to let Mr. Markwart present the defense if he can provide some evidence that he was only a designated provider to one patient at a time on April 19, 2011 in defense of Count V. 12/2/2011 RP 66. The argument may have been available to the Defendant had he provided any evidence or legal argument.

A. The Manufacturing Charge

The Appellant's attorney misstates the facts in her argument regarding this charge. In *Shupe* there was at least some support for the notion that the "clinic" served "one patient at a time".

State v. Shupe, 172 Wn.App. 341 (Division III, 2012) *petition for*

review pending. But those are not the facts in Mr. Markwart's case. Mr. Markwart had posted on the wall of one of his grow rooms the designations from no less than fourteen different people. CP 155-184. Virtually all of the individuals had been signed up on one of two days and none of the authorizations had expiration dates. *Id.* The only evidence before the trial court at the time of decision was that Mr. Markwart was providing for fourteen people all at the same time out of the grow operation in his home. There were 32 plants within the grow operation.

Mr. Markwart argues that he should get the benefit of a change in the law that occurred after his date of offense. Even if that was proper and allowed under statute or case law, once again the facts get in the way. As soon as July 22, 2011 RCW 69.51A.085 endorsed the concept of the "collective garden". That change allowed for a group of qualifying patients to "create and participate in collective gardens for the purpose of producing, processing, transporting, and delivering cannabis for medical use subject to the following conditions; (a) no more than ten qualifying patients"[.] The Defendant was the designated provider to more than ten people. He was clearly outside the bounds of the change in the statute. Whether or not the trial court

was “required” to give the benefit of the change in the law was rendered moot not only by Mr. Markwart’s failure to so move the court but also by the undisputed facts before the trial court at the motions hearing.

B. The Three Controlled Buys

Within the record as CP 184, also admitted (with no objection) as Exhibit 21, is Christopher Turner’s Designated provider paperwork. RCW 69.51A.010(4) clearly states that a, “[d]esignated provider means a person who has been designated in writing by a patient to serve as a designated provider.” Mr. Turner’s designated provider paperwork was collected from the wall at Mr. Markwart’s home at the time of the execution of the search warrant. While the document purports to indicate Mr. Turner’s willingness to appoint someone to be his designated provider, there is no writing to suggest who that person is to be. Once again, the only evidence before the trial court at the time of the hearing was that Mr. Markwart had not been “designated in writing” to be Mr. Turner’s provider.

C. The Attempted Delivery Count

Mr. Markwart arrived at the meeting location with “Bryson” carrying three mason jars full of marijuana, scales and packaging

material. Mr. Markwart came to the time and place of his choosing only after discussing price and quantity with Detective Aase. 12/12/2011 RP 99-100. As Mr. Markwart never provided any evidence to the trial court that he was a “qualifying patient”, under the only evidence before the court he was possessing marijuana with the intent to deliver on that day.

Arguably, a person who is knowingly committing a felony and who wants to avail himself of a potentially available affirmative defense should make those necessary steps to ensure that he has some protection under the law. A person may only be a designated provider to a qualifying patient.

2. THE TRIAL COURT FOLLOWED THE LAW IN DENYING MR. MARKWART’S MOTION TO DISMISS BASED ON ENTRAPMENT.

“Police officers are allowed to use some deception, including ruses, for the purpose of investigating criminal activity. Generally, ruses are upheld as long as the actions do not violate a defendant's due process rights.” *State v. Athan*, 160 W. 2d 354 at 370 (2007). In *Athan*, Seattle police officers had posed as attorneys in order to acquire Athan’s saliva to be used for DNA analysis. The Court agreed with the trial court and found the ruse was permissible. In Mr. Markwart’s case, law enforcement

created a document to be used to see if the Defendant would rely upon it and sell marijuana to Mr. Turner. On its face, the document violated at least two parts of RCW 69.51A's requirements for 'valid documentation'. Mr. Markwart made the decision to accept the document as genuine and sold Mr. Turner marijuana on three occasions.

The defense of entrapment is defined by statute.

- (1) In any prosecution for a crime, it is a defense that:
 - (a) The criminal design originated in the mind of law enforcement officials, or any person acting under their direction, and
 - (b) The actor was lured or induced to commit a crime which the actor had not otherwise intended to commit.
- (2) The defense of entrapment is not established by a showing only that law enforcement officials merely afforded the actor an opportunity to commit a crime.

RCW 9A.16.070

"Both by statute and court decision, the entrapment defense focuses on the "intent or predisposition of the defendant to commit the crime.'" *State v. Smith*, 101 W. 2d 36, 42 (1984) quoting *Hampton v. United States*, 425 U.S. 484, 488, 96 S.Ct. 1646, 1649 (1976). "Entrapment occurs only when the criminal design originated in the mind of the police officer or informer, and the accused is lured or induced into committing a crime he had no intention of committing." *Id.* In the case at bar, Mr. Markwart gave interviews to the media, maintained a website, advertised types of marijuana, and responded to a email inquiry in writing, and then

communicated telephonically with Mr. Turner and Detective Aase about the delivery of marijuana. 12/12/2011 RP 47-49 & 99-100. Mr. Markwart brought at least two different kinds of marijuana to each buy location at the time and place of his choosing. As soon as Mr. Turner handed over the purported authorization and the money, the transaction was made.

There was no “luring” or “inducement”. Mr. Markwart was at a time and place of his choosing. “The defense of entrapment is not established by a showing only that law enforcement officials merely afforded the actor an opportunity to commit a crime.” RCW 9A.16.070(2).

3. THERE WAS NOTHING IMPROPER ABOUT THE INVESTIGATION INTO THE CRIMINAL ACTIVITY OF MR. MARKWART.

The investigation into Mr. Markwart was properly conducted and merely followed the evidence where it led. Mr. Markwart created a business, developed a website, and advertised several products set a price. He went on to meet with several members of the media and even a university president to make sure his story was out. He communicated with potential clients, executed documents with them, and sold to at least one of these new customers while maintaining a business relationship with no fewer than fourteen other customers.

Mr. Markwart held himself out to the public as a person who would provide marijuana. Mr. Turner sent him an email and, following the invitation of Mr. Markwart, called him on the telephone number that he provided. Detective Aase sent an email and then had a conversation about type and price. When Mr Markwart did not have enough product at the third controlled buy he invited Mr. Turner to a party that night where he would be able to “smell him coming.”

The investigation followed the evidence. At virtually every opportunity that Mr. Markwart had the opportunity to comply with the statute, he failed to do so. CP 3-7. *See also* 12/12/2011 RP116-187 & 12/13/2011 RP 197-199. He had too many patients, he had too many plants, he did not have the right paperwork and he relied on clearly faulty paperwork. *Id.* He signed up many of his “patients” on the same day in March five days before he signed up Mr. Turner and sold to him. CP 155-180. Under the totality of the circumstances standard set forth in *Lively* there was no improper conduct by law enforcement in this case.

4. THERE IS NO EVIDENCE TO SUGGEST THAT MR. MARKWART WAS DENIED THE OPPORTUNITY FOR A FAIR TRIAL.

While Mr. Markwart, through his appellate attorney notes an assignment of error regarding a purported denial of a fair trial. No argument is presented.

5. IT WAS WITHIN THE DISCRETION OF THE TRIAL COURT TO SENTENCE MR. MARKWART TO THE LOW-END OF THE STANDARD RANGE.

The Respondent believes that Mr. Markwart has correctly set forth the law regarding the sentencing range. However, the law cited by Mr. Markwart merely allows for the sentencing judge to use his discretion to determine that counts one, two, and three should have counted as a “2” instead of an offender score of “4”. The law cited by Mr. Markwart does not require the sentencing judge to merge.

If the sentencing judge had merged counts in the manner suggested by Mr. Markwart his standard range would have been zero to six months in custody. It still would have been within the discretion of the court and the standard range to impose six months in custody. Because the standard is abuse of discretion, the finding of the sentencing judge was proper and should not be overturned on appeal.

6. THERE WAS NO ERROR IN THE IMPOSITION OF THE FINE AS IT WAS CLEARLY WITHIN THE STANDARD RANGE AVAILABLE TO THE SENTENCING JUDGE

The State believes that contrary to the argument of Mr. Markwart, the trial court made a specific finding that the fine was directly tied to the illegal activity for which Mr. Markwart had been convicted. It was within the discretion of the court to impose such a fine and therefore it is proper and should not be overturned on appeal.

CONCLUSION

For the above reasons, the State respectfully requests that this court deny Mr. Markwart's appeal issues and affirm the decision below.

Dated this 11th day of July, 2013.



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IN THE COURT OF APPEALS, DIVISION III
IN AND FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff,	Court of Appeals No. 311589 No. 11-1-00074-0
v. TYLER JOHN MARKWART, Defendant,	AFFIDAVIT OF DELIVERY

STATE OF WASHINGTON)
COUNTY OF WHITMAN)

AMANDA PELISSIER, being first duly sworn, deposes and says as follows: That on the 11TH DAY OF JULY, 2013, I caused to be delivered a full, true and correct copy(ies) of the original Brief of Respondent on file herein to the following named person(s) using the following indicated method:

- MAILED TO SUZANNE ELLIOT AT HODGE BUILDING, 705 2ND AVE STE 1300, SEATTLE, WA 98104-1797
- MAILED TO TYLER MARKWART AT 5813 4TH AVE NW, SEATTLE, WA 98107

DATED this 11TH DAY OF JULY, 2013. Amanda Pelissier
AMANDA PELISSIER

SIGNED before me on the 11TH DAY OF JULY, 2013
Kristina A Cooper
NOTARY PUBLIC in and for the State of
Washington, residing at: Oakesdale
My Appointment Expires: 03-09-2015

