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Supreme Court No. 90589-4

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IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

TYLER J. MARKWART,
Petitioner.

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

The Honorable John David Frazier, Judge

MARKWART'S SUPPLEMENTAL BRIEF

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I.
ISSUES PRESENTED FOR REVIEW

1. Does this conflation of the two defenses conflict with this Court's decision in *State v. Lively*?¹
2. Did Markwart present sufficient evidence of entrapment such that the jury should have been instructed on that statutory defense?

II.
STATEMENT OF THE CASE

As the Court of Appeals opinion points out, Pullman Police have known since February 2011 that Tyler Markwart is an authorized medical marijuana user. At that time, he gave the police permission to enter and search his apartment. CP 4. Detective Scott Patrick admits:

Markwart presented his Medical Marijuana paperwork to Pullman Police Officer Breshears, which appeared to be valid. According to Breshears two of the bedrooms in the apartment have been converted to be used as a growing area and the number of marijuana plants were within compliance with RCW 69.51A. Markwart's roommate, David E. Nichols, is also a qualifying patient. Breshears also said Markwart had a 12 gauge shotgun and a pistol in the apartment to protect his operation.

Id. See also CP 305-308.

¹ *State v. Lively*, 130 Wn.2d 1, 921 P.2d 1035 (1996).

In addition, the police learned that Markwart had given several interviews to local media and “had a meeting with the president of Washington State University regarding ‘cannabis’ research.” CP 323. Despite evidence that Markwart was not committing any crimes under Washington law, Detective Patrick was not satisfied. He wanted to perform a “controlled buy from Markwart. But WCPA Denis Tracy wanted to meet with Markwart first and determine what Markwart was actually doing.” CP 5. So Patrick called Markwart in for a meeting with Whitman County Prosecuting Attorney Denis Tracy and Deputy Prosecutor Bill Druffel. CP 5.

The purpose of the meeting was to provide Markwart with a copy of RCW 69.51A and discuss what specifically he was doing as a care provider and director of Allele Seeds Research and determine if he was in compliance with the statute.

Id. According to Officer Patrick,

The meeting lasted for over an hour and a variety of topics related to RCW 69.51A were discussed. It is my belief that Markwart was advised and understood what would constitute a violation of RCW 69.51A and subject him to arrest and prosecution.

Id.

It appears that no one believed Markwart had committed or was committing a crime because Patrick concluded by stating: “At the conclusion of the meeting I was directed by Druffel and Tracy to continue

with the investigation.” CP 4-5; *see also* 323. Patrick apparently still believed that some of what Markwart said “was outside of what RCW 69.51A allows for.” *Id.* at 99.

Patrick recruited Christopher J. Turner, a student at WSU. He had been arrested for marijuana distribution. 12/12/11 RP 21. The arresting officer told him that if he could “give someone higher up the food chain, that it would, you know, help my odds, I guess, of reducing my sentence.” Turner explained that: “I was kind of reluctant to offer somebody I knew, so you know, he said we had to find someone, anyone.” *Id.* at 22. So Turner found Markwart’s business online. He contacted Markwart and told him that he had received an authorization to use medical marijuana. In reality, Patrick made up a medical marijuana authorization, signed a phony doctor’s name and gave it to Turner to show to Markwart. *Id.* at 26. Markwart sold him marijuana after reviewing the documentation. Patrick sent Turner back to complete two more buys. *Id.* at 34-36.

Patrick also sent fellow officer Aase to try to buy marijuana from Markwart. *Id.* at 75. Markwart refused to sell to Aase because, even though Aase had one of Patrick’s counterfeit authorizations, he did not have his Washington State driver’s license. *Id.* at 78.

After Markwart’s meeting with Aase, the police obtained a search warrant for his apartment. The police found bank records demonstrating

that Markwart's bank account had no money in it between October 2010 and April 2011. *Id.* at 145. They found 20 to 32 marijuana plants. *Id.* at 146. Detective Patrick stated that each qualifying medical marijuana patient may have 15 plants and up to 24 ounces of marijuana. *Id.* at 150.

The State charged Markwart with 5 counts related to marijuana. In Counts I, II and III, the State alleged that Markwart delivered marijuana between March 6, 2011 and April 19, 2011. In Count IV, the State alleged that Markwart possessed marijuana with the intent to deliver it between March 6, 2011 and April 19, 2011. In Count V, the State alleged that Markwart manufactured marijuana between March 6, 2011 and April 19, 2011. CP 13-17.

Prior to trial, Markwart moved to dismiss two counts on the grounds that the police "entrapped" him. CP 27-28. Markwart was initially represented by a public defender. Several months before trial, however, Markwart asked to proceed pro se. 09/30/11 RP 1-3. Markwart explained that he and his appointed counsel could not agree on how the case should proceed. *Id.* at 4. The judge then informed Markwart that he would have to follow the law just as any lawyer would. *Id.* at 5. Markwart explained that he had attended college. *Id.* He had never represented himself before. *Id.* at 7. The judge informed Markwart of the charges and potential maximum terms.

During pretrial motions, the State admitted that Markwart is a qualifying patient under Washington Medical Marijuana Act. 11/29/11 RP 33. The State also admitted that it was clear that Markwart, who was given permission to represent himself, was claiming that his actions were legal under the Act. Thus, the State moved pretrial to prohibit Markwart from raising that issue on three grounds. First, the prosecutor argued that Markwart could not be a designated provider for more than one other medical marijuana patient under any circumstances. *Id.* at 22. Second, he argued that the confidential informant used by the police presented medical marijuana documents that were counterfeited by the police and thus, were not on tamper resistant paper. Third, he argued that the medical marijuana documentation was signed by the detective masquerading as a doctor. The prosecutor conceded that the second two arguments were “very technical” violations and said that his “primary” argument was that Markwart could only be a “designated provider to one patient at one time.” 11/29/11 RP 22. The State argued that at the time Markwart sold to the confidential informant and undercover deputy he had “over a dozen other purportedly qualifying patients that he was a designated provider for.” *Id.* at 23. The State also argued that Markwart had more plants than he was authorized to possess under his own patient documentation. *Id.* at 35. Markwart argued that under the statute he could serve as a designated

provider to more than one patient so long as he dealt only with one patient at a time. *Id.* at 30.

The trial judge concluded that Markwart could not claim that he was a designated provider of medical marijuana to anyone because he was a designated provider for more than one patient and because the documents presented to him by the confidential informant and the undercover officer were counterfeit. *Id.* at 63-65. The trial judge also gave an instruction that told the jury that it had ruled, as a matter of law, that Markwart was not entitled to raise the defense. CP 239.

The jury convicted Markwart as charged. CP 256-61.

After the jury returned its verdict, Markwart hired counsel and filed a motion for new trial. New counsel argued that Markwart was entitled to a new trial because Druffel, the trial prosecutor, and his superior, Tracy, were potential witnesses, yet they did not recuse themselves from charging or prosecuting the case. Defense counsel pointed out that this meeting was part of the investigation, but that no one gave Markwart his *Miranda* rights. Moreover, the prosecutors advised Markwart regarding his activities. RP 295. Prosecutor Tracy told Markwart that providing information or assisting patients' providers was not a violation of the law. RP 332. The Detective stated that Markwart was "advised and understood what constituted a violation of RCW 69.51A

and subject him to arrest and prosecution.” RP 332. New counsel argued that testimony regarding that meeting was relevant to Markwart’s entrapment defense. RP 298. New counsel also argued that the trial court erred in failing to permit the jury to decide whether or not Markwart could prove his medical marijuana defense by a preponderance of the evidence. RP 304. Defense counsel also argued that, even though Markwart represented himself, he was still entitled to a fair trial. RP 300-24.

The State argued that Markwart had chosen to represent himself and the fact that he did a bad job of it was not grounds for a new trial. RP 324. The State argued that “there could be no entrapment” in this case. RP 326. The prosecutor said that the only thing “on the record” regarding the meeting with Markwart was “what Detective Patrick testified to.” RP 326.

The trial court found that Markwart did a “miserable job” of representing himself. RP 335. He said:

Most of the issues I have heard today, which are very valid issues that probably did effect [sic] his ability to have a fair trial and did effect [sic] his ability to have meritorious issues raised and argued to the jury were never brought before the Court, were not briefed, were not argued.

RP 335. The Court stated that Markwart failed to raise the issue of prosecutorial misconduct. RP 336. The Court did find that Markwart had

raised the issue of entrapment, but said that he had rejected that because the police were permitted to engage in a “ruse.” RP 337.

The trial court stated that Markwart was “stuck with the record” he had made, that he could make his argument on appeal and denied the motion for new trial. RP 339.

At sentencing the Court imposed six months in jail and a \$10,000 fine. CP 349-58. The judge imposed the fine “as a deterrent to efforts to exploit this law for personal financial gain.” RP 375.

The Court of Appeals reversed Markwart’s convictions for manufacturing marijuana and possession with the intent to sell because the trial court failed to instruct the jury on Markwart’s medical marijuana defense. The Court of Appeals affirmed Markwart’s convictions for three counts of delivery of marijuana.

III. ARGUMENT

A. IN THIS PROSECUTION OF AN AUTHORIZED MEDICAL MARIJUANA USER AND DESIGNATED PROVIDER, THE TRIAL COURT ERRED IN FAILING TO GIVE ENTRAPMENT INSTRUCTIONS

1. Entrapment and the doctrine of outrageous governmental misconduct are two different defenses.

In his opening brief, Markwart argued that the trial court erred when it failed to instruct the jury on his claim that he was entrapped by the

police. But the Court of Appeals conflated that argument with Markwart's second claim that the police engaged in outrageous misconduct in this case. The Court acknowledged that Markwart raised the entrapment issue in the trial court and in his briefing. *State v. Markwart*, 182 Wn. App. 335, 329 P.3d 108, 114 (2014).

The Court of Appeals opinion reads *Lively* as holding that the defense of entrapment is part and parcel of an outrageous governmental misconduct claim. The opinion analyzes them under the same heading – “Government Misconduct.” *Markwart*, 329 P.3d at 115-117. The Court of Appeals even states:

We acknowledge Tyler Markwart's wish to follow the law and his steps taken to comply with the law, but we agree with the trial court that police conduct was not so outrageous as to violate Markwart's constitutional rights.

Markwart, 329 P.3d at 115. Yet, the Court does not consider that this statement entitles Markwart to the entrapment instruction notwithstanding a lack of outrageous governmental misconduct.

In 1975, the Washington Legislature adopted a statutory definition of entrapment which provides:

- (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.

Lively actually recognizes that entrapment is a statutory defense distinct from a claim of governmental misconduct. This is evinced by the fact that this Court rejected *Lively's* claim that she was entitled to entrapment instructions, but reversed on her claim of governmental misconduct.

2. Markwart was entitled to instructions regarding entrapment.

While a defendant need not present that quantity of evidence necessary to create a reasonable doubt in the minds of the jurors to be entitled to an entrapment instruction, some evidence must be adduced to support it. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983). In determining whether the evidence supports giving the instruction, a court should consider the defendant's testimony and the inferences that can be drawn from it. *State v. Morgan*, 9 Wn. App. 757, 759-760, 515 P.2d 829, *review denied*, 83 Wn.2d 1004 (1973). Failure to give an instruction is reversible error if there was evidence to support the defense. *State v. Ladiges*, 66 Wn.2d 273, 276-277, 401 P.2d 977 (1965); *State v.*

Kerr, 14 Wn. App. 584, 587, 544 P.2d 38 (1975), *review denied*, 87 Wn.2d 1001 (1976).

In its analysis of the governmental misconduct claim, the Court of Appeals does say: “Law enforcement did not induce Tyler Markwart to engage in any conduct he was not already willing to perform.” *Markwart*, 329 P.3d at 116. That is true. But Markwart was not willingly engaging in a “criminal design” as required by RCW 9A.16.070. Rather, he thought he was complying with the law. The Court of Appeals acknowledges that point. That Court stated:

We acknowledge Tyler Markwart’s wish to follow the law and his steps taken to comply with the law[.]

Markwart, 329 P.3d at 115. In this case, the evidence that Markwart did NOT wish to engage in criminal activity permeates the record.

In regard to entrapment, the defendant must “demonstrate that he was tricked or induced into committing the crime by acts of trickery by law enforcement agents.” Second, he must demonstrate that he would not otherwise have committed the crime. *Lively*, 130 Wn.2d at 10. “Inducement,” such as might support an entrapment defense, is government conduct which creates a substantial risk that an undisposed person or otherwise law-abiding citizen will commit an offense. *State v. Hansen*, 69 Wn. App. 750, 764 n.9, 850 P.2d 571, *review granted in part*

by State v. Stegall, 122 Wn.2d 1016, 863 P.2d 1352 (1993), *rev'd on other grounds sub nom.*, 124 Wn.2d 719, 881 P.2d 979 (1994).

First, the judge got it wrong as a matter of law. The question of trickery is relevant to the issue of entrapment. While the police can use trickery and a ruse when investigating ongoing criminal activities, they cannot use a ruse to lure a defendant into unknowingly committing a crime. That is what the police did here. The evidence was that Markwart was doing everything in his power to comply with the law. He even voluntarily attended a meeting with the investigating detective and two prosecuting attorneys which, according to the Detective, was to help Markwart understand and comply with the law.

But law enforcement was not happy. Detective Patrick conceived a way to trick Markwart into violating what even the trial prosecutor agreed were "technical" aspects of the law. The "crime," such as it was, arose entirely in the mind of the Detective, who appears to be hostile to the Medical Marijuana Act. All of the evidence showed that Markwart was devoted to the cause of medical marijuana. He made every effort to comply with the statutes and, in fact, actually refused to sell to Officer Aase. It was only after meeting with Markwart and determining that he was actually trying to comply with the law that the Detective forged

documents that would trick Markwart into violating the law. In this case, the crime arose in the mind of the Detective.

Where the trial court has failed to give the instruction, the appropriate standard of review in such cases is whether, considering the evidence in the light most favorable to the State, a rational trier of fact could have found that the defendant failed to prove the defense by a preponderance of the evidence. *Lively*, 130 Wn.2d at 17. Here, a rational trier of fact could have concluded that Detective Patrick simply wanted to trick Markwart into violating the law so he could arrest him and prevent further distribution of medical marijuana – a perfectly legal activity. This is the essence of entrapment.

B. MARKWART'S CONVICTIONS SHOULD HAVE BEEN REVERSED AND DIMISSED BECAUSE THE GOVERNMENT ENGAGED IN OUTRAGEOUS GOVERNMENTAL MISCONDUCT

Charges must be dismissed when the conduct of the State was so outrageous that it violated the defendant's right of due process under the Fifth and Fourteenth Amendments of the federal Constitution. This constitutional error may be raised for the first time on appeal, particularly where the error affects fundamental aspects of due process. *Lively*, 130 Wn.2d at 18-19.

Whether the State has engaged in outrageous conduct is a matter of law, not a question for the jury. *Id.* at 19, citing *United States v. Dudden*, 65 F.3d 1461, 1466-67 (9th Cir. 1995), and *State v. Hohensee*, 650 S.W.2d 268, 272 (Mo.App. 1982) (citing federal cases). In *Lively*, the Court set out the several factors which courts consider when determining whether police conduct offends due process: 1) whether the police conduct instigated a crime or merely infiltrated ongoing criminal activity, 2) whether the defendant's reluctance to commit a crime was overcome by pleas of sympathy, promises of excessive profits, or persistent solicitation, 3) whether the government controls the criminal activity or simply allows for the criminal activity to occur, 4) whether the police motive was to prevent crime or protect the public, and 5) whether the government conduct itself amounted to criminal activity or conduct "repugnant to a sense of justice."

The primary distinguishing factor between this case and all of the other cases cited in the Court of Appeals opinion is this: Markwart was doing everything he could to comply with the law. The police were not "infiltrating ongoing criminal activity," they were tricking Markwart into violating the law. The sale of medical marijuana is not a crime. Markwart had no intention of committing any crimes. He actually met with the Detective and two prosecutors to avoid engaging in any illegality.

Apparently, he naively believed that the Detective and prosecutors were dealing with him in good faith. Detective Patrick counterfeited documents to create an illegality out of whole cloth.

The Detective controlled and manipulated the criminal activity. He even created a second set of counterfeit documents. When Markwart refused to provide any marijuana to the undercover officer who did not present any valid identification, the State still charged Markwart with attempted delivery!

It is abundantly clear that the Detective's motive was not to prevent crime. Until he counterfeited the documents, he had absolutely no evidence that Markwart was engaging in criminal activity. If the State had such evidence, the officer would have arrested Markwart when he appeared for the meeting with the prosecutors. In fact, he had to continue his investigation (at the direction of the prosecutors) by counterfeiting documents and using another unfortunate student as an informant in order to create a crime for which he could arrest Markwart. It appears that the Detective simply did not like Markwart's vocal support of Medical Marijuana. After all, according to the prosecutor, the investigation only started after Markwart's very public statements in support of cannabis.

The Detective engaged in illegal conduct. It is a class C felony to fraudulently produce any record purporting to be, or tamper with the

content of any record for the purpose of having it accepted as, valid documentation under RCW 69.51A.010(32)(a), or to backdate such documentation to a time earlier than its actual date of execution. RCW 69.51A.060(7).²

Finally, the police ran up Markwart's offender score. All three buys were initiated and controlled by the police. All three involved the same buyer, the same seller, and no one else. All three occurred within a one-month span of time. All three involved small amounts of drugs that the defendant believed he was properly providing under the Medical Marijuana Act. The second and third buys by Chris Turner had no apparent purpose other than to increase Markwart's presumptive sentence.

These facts are distinguishable from the cases cited in the Court of Appeals opinion. In *State v. Athan*, 160 Wn.2d 354, 378, 158 P.3d 27, 39 (2007), the murder had been committed 20 years before the State used a ruse to get Athan's DNA. The police used the ruse to solve the crime but they did not create the crime. In *State v. Myers*, 102 Wn.2d 548, 549-50, 689 P.2d 38, 40 (1984), *disapproved of by State v. Lively*, 130 Wn.2d 1, 921 P.2d 1035 (1996), the police had probable cause to believe that

² The Court of Appeals euphemistically refers to this as the "ersatz" medical marijuana authorization. *Markwart*, 329 P.3d at 113. It was not a "substitute" for a superior product. It was a fraudulent document.

Myers was committing drug crimes and had a valid warrant but used a ruse to get Myers to open the gates to his property. In *State v. Pleasant*, 38 Wn. App. 78, 81, 684 P.2d 761, 763, *review denied by State v. Hubbs*, 103 Wn.2d 1006, 690 P.2d 1174 (1984), there was no due process violation when the defendant quickly and readily complied with the informant's request for marijuana. In *State v. Jessup*, 31 Wn. App. 304, 306, 641 P.2d 1185, 1187 (1982), the police placed an informant in a business called the Kinky Korner that the police knew was a front for an on-going prostitution enterprise. In *Playhouse Corp. v. Washington State Liquor Control Bd.*, 35 Wn. App. 539, 542, 667 P.2d 1136, 1138 (1983), the tavern was selling alcohol and offering "lewd" dances before the police arrived. The police merely used the ruse to gather the necessary evidence to support a code violation. In *United States v. Ivey*, 949 F.2d 759, 769 (5th Cir. 1991), *cert. denied by Wallace v. United States*, 506 U.S. 819, 113 S.Ct. 64, 121 L.Ed.2d 32 (1992), the government initially contacted the defendants to try and sell them illegal bobcat hides and the defendants initially refused. But, the defendants kept returning even after being told the hides were from Mexico. The federal court held that by returning to purchase the furs, the defendants were active participants in the crime.

These cases all share one distinguishing fact that is not present in this case. In each, the criminal activity had been initiated before law enforcement concocted a ruse to obtain more evidence of the criminal activity. In this case, however, law enforcement had to create evidence of an illegality (that was not at all readily apparent) in order to invent the criminal activity.

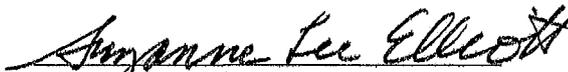
The fact that the Courts rarely reverses cases on the basis of governmental misconduct does not mean that governmental conduct can never be repugnant to a sense of justice. Here, the claim has even greater force than the claim in *Lively*. *Lively* was actually involved in the illegal use of drugs. But the medical use of cannabis in accordance with Washington law 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 or prosecuted. RCW 69.51A.040. In this case the police and prosecutors in Whitman County violated both the spirit and the letter of the law. It is abundantly clear that they do not agree with the statute, but both police and the prosecutor are sworn to uphold the law. It is repugnant when they use trickery (and a student desperate to avoid his own criminal prosecution), to arrest and prosecute Markwart – a man who was doing everything he could to comply with the law.

**IV.
CONCLUSION**

For the reasons stated above, this Court should reverse Markwart's convictions.

DATED this 1st day of December, 2014.

Respectfully submitted,


Suzanne Lee Elliott, WSBA #12634
Attorney for Tyler Markwart

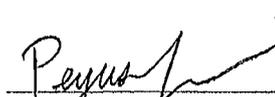
CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by First Class United States Mail, postage prepaid, and by email where indicated, one copy of this brief on the following:

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Dear Sir/Madame:

Enclosed for filing with the Washington Supreme Court is the Supplemental Brief in *State of Washington v. Tyler J. Markwart*, Supreme Court Case No. 90589-4.

Feel free to contact me with any questions or concerns.

Thank you for your kind consideration to this matter.

Best,

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