

Case No. 22504-6-III

Case No. 22466-0-III

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,
Respondent,

v.

GARY D. ACKERSON,
Appellant.

STATE OF WASHINGTON,
Respondent,

v.

LEE FINKELMAN
Appellant.

**MEMORANDUM OF AMICUS
AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON
IN SUPPORT OF DISCRETIONARY REVIEW**

Thomas Nedderman
WSBA # 28944
Floyd & Pflueger
2505 - 3rd Ave., Ste. 300
Seattle, WA 98121
(206)441-4455

Andrew W. Ko, # 27940
Drug Reform Policy Project Director
Nancy Talner, # 11196
Staff Attorney
ACLU of Washington
705 Second Ave, Suite 300
Seattle, WA 98104
(206)624-2184

Attorneys for Amicus
American Civil Liberties Union of Washington

TABLE OF CONTENTS

A. IDENTITY AND INTEREST OF AMICUS..... 1
D. STATEMENT OF THE CASE..... 3
E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED..... 4
F. CONCLUSION..... 9

TABLE OF AUTHORITIES

Cases

<i>In re Young</i> , 24 Wn.App. 392, 397, 600 P.2d 1312 (1979).....	5
<i>Keegan v. Grant County PUD</i> , 34 Wn.App. 274, 28361 P.2d 146 (1983).....	4, 5
<i>Seybold v. Neu</i> , 105 Wn.App. 666, 680, 19 P.3d 1068 (2001).....	5
<i>State v. Ortiz</i> , 119 Wn.2d 294, 308-11, 831 P.2d 1060 (1992).....	5
<i>State v. Rangitsch</i> , 40 Wn. App. 771, 778-79, 700 P.2d. 382 (1985).....	5
<i>State v. Shepherd</i> , 110 Wn. App. 544, 552, 41 P.3d 1235 (2002).....	1, 4, 6, 7, 9
<i>Walker v. Bangs</i> , 92 Wn. 2d. 854,01 P.2d 1279 (1979).....	4

Statutes

RCW 69.50.401	3
RCW 69.51A.....	1, 2
RCW 69.51A.010.....	4
RCW 69.51A.040.....	3, 6, 7, 8

A. IDENTITY AND INTEREST OF AMICUS

The American Civil Liberties Union of Washington ("ACLU") is a statewide, non-partisan, non-profit organization with over 20,000 members dedicated to the preservation and defense of civil liberties. The ACLU endorsed Washington's Medical Use of Marijuana Act ("the Act"), which was approved as ballot measure I-692 by 60% of the state's voters in 1998.¹

The ACLU is familiar with the record and the parties' briefs in these cases, as well as the parties' motions for discretionary review. The ACLU also has special expertise in the broad legal issues and policy concerns that affect the hundreds of seriously ill individuals throughout the state who treat debilitating and terminal illnesses with medical marijuana. We provide the public with information regarding the Act in our website brochure entitled "The Washington Medical Use of Marijuana Act: A Guide for Patients, Caregivers, Physicians, Law Enforcement, and the Public" and regularly consult with patients, caregivers, government officials and defense attorneys concerning medical marijuana issues.

The trial court in these prosecutions violated well-established law regarding the admissibility of expert testimony, imposed proof requirements not set forth in the statute, and misapplied this Court's decision in *State v. Shepherd*, 110 Wn. App. 544, 552, 41 P.3d 1235 (2002). In doing so, the trial court wrongly deprived the defendant-patients' of their statutory and constitutional right to

¹ The Act is codified at RCW 69.51A.

present evidence of their defense to a jury, wholly undermining the protections enacted into law by the voters of Washington. The ACLU urges the Court to accept discretionary review.

B. DECISION

The petitioners, Gary Ackerson and Lee Finkelman, seek discretionary review of a ruling made by the Superior Court of Stevens County granting the State's motion *in limine* to bar petitioners from asserting their statutory defense as protected medical marijuana patients under RCW 69.51A. A copy of the trial court's decision has been submitted with the petitioners' motions for discretionary review.

C. ISSUES PRESENTED FOR REVIEW

1. Whether the Superior Court committed obvious error by excluding admissible testimony and requiring proof beyond what is required by the Medical use of Marijuana Act (Chapter 69.51A RCW), and on that basis mistakenly barred medical marijuana patients from presenting to a jury admissible evidence of their statutory defense, which frustrated the explicitly stated purpose of the Act and would render further proceedings useless.

2. Whether the Superior Court committed probable error and the decision of the Superior Court substantially alters the status quo or limits the freedom of the petitioners to act by barring the petitioners from presenting proof of their protected status to a jury, where petitioners made an offer of proof addressing

each element of the medical marijuana statute relevant to the statutory defense for patients.

D. STATEMENT OF THE CASE

Petitioners Ackerson and Finkelman are both authorized to use marijuana medicinally by their treating physicians pursuant to the Medical use of Marijuana Act. They were charged in February of 2003 with manufacturing marijuana in violation of RCW 69.50.401(a)(1)(iii) and, in turn, notified the State that they would assert at trial their protected status under the Act. The State then moved *in limine* to preclude the defendants from presenting to a jury evidence of their statutory defense under the Act, and the trial court required Ackerson and Finkelman to make a *prima facie* showing of their ability to present evidence of their protected status. In response, Ackerson and Finkelman offered their own factual and lay opinion testimony, the factual and expert medical testimony of their treating physicians, and documentary proof that they individually met each criterion of the medical marijuana defense, including: status as qualifying patients, presentation of their valid documentation to law enforcement officials, and possession of no more marijuana than necessary for their personal, medical use, during a 60-day period. *See* RCW 69.51A.040(2)(a)-(c). The Superior Court granted the State's motion and barred the jury from hearing proof of Ackerson and Finkelman's authorization to use medical marijuana. Ackerson and Finkelman then sought discretionary review.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This Court should accept review pursuant to RAP 2.3(b) and reverse the trial court's order barring medical marijuana patients Ackerson and Finkelman from presenting their medical marijuana defense to the jury. The trial court committed obvious error by misreading the plain language of the statute, misinterpreting this Court's holdings in *Shepherd*, misapplying law applicable to the testimony of lay opinion witnesses and physicians testifying as medical experts, and deciding questions of fact that the petitioners are entitled to have determined by a jury. These errors would render further proceedings useless. *See* RAP 2.3(b)(1). The trial court, for these same reasons, committed probable error that substantially altered the status quo and substantially limited petitioners' freedom to act in raising their statutory defense at trial. *See* RAP 2.3(b)(2).

A first basis for granting discretionary review is error by the trial court in excluding medical testimony by Ackerson and Finkelman's physicians and lay opinion testimony by the petitioners themselves. There was no basis for the trial judge to exclude the petitioners' treating physicians from testifying as experts, where both are licensed medical doctors authorized by the Act to advise patients on the medical use of marijuana. *See Walker v. Bangs*, 92 Wn. 2d 854, 858-59, 601 P.2d 1279 (1979); *Keegan v. Grant County PUD*, 34 Wn.App. 274, 283, 661 P.2d 146 (1983); RCW 69.51A.010(3)(d) and (e). As licensed medical doctors, Ackerson and Finkelman's treating physicians possess the "knowledge, skill,

experience, training, or education” under ER 702 to provide expert testimony on the relevant medical issue here. *See State v. Rangitsch*, 40 Wn. App. 771, 778-79, 700 P.2d. 382 (1985). Moreover, the record shows that the physicians had specialized knowledge and experience regarding medical marijuana. *See, Seybold v. Neu*, 105 Wn.App. 666, 680, 19 P.3d 1068 (2001) (“So long as a physician with a medical degree has sufficient expertise to demonstrate familiarity with the procedure or medical problem at issue, he or she will ordinarily be considered qualified to express an opinion with respect to such procedure or problem,”) Any doubts that the trial judge might have had regarding the physicians’ certitude or the literature that the physicians consulted affects the weight rather than the admissibility of their testimony. *In re Young*, 24 Wn.App. 392, 397, 600 P.2d 1312 (1979) (rejecting a claim that expert’s testimony was “speculative”); *Keegan, supra*, 34 Wn.App. at 283-84.

The testimony of Ackerson, Finkelman and their physicians was also admissible under the established test for opinion testimony. *State v. Ortiz*, 119 Wn.2d 294, 308-11, 831 P.2d 1060 (1992). In *Ortiz*, this Court recognized that a tracking expert’s experience qualified him to testify both as a lay witness about inferences he had drawn from observable facts and as an expert about his opinions reached based on “practical experience and acquired knowledge.” *Id.* The same conclusion is inescapable in these cases. The two questions relating to usable amount and their personal treatment needs over a 60-day period are completely

within the practical experience and acquired knowledge of Ackerson and Finkelman and their treating physicians.

Second, the grounds for discretionary review are met with respect to the trial court's errors in applying *Shepherd* and the plain language of the Act in relation to proof of each patient's 60-day supply of medical marijuana. Under RCW 69.51A.040(2)(b), Ackerson and Finkelman must show by a preponderance that they "possess no more marijuana than is necessary for the patient's personal, medical use, not exceeding the amount necessary for a sixty-day supply..." This Court, in *Shepherd*, stated that there are two variables in proving a particular patient's 60-day supply amount: (1) a calculation of the actual usable amount of medication in the patient or caregiver's possession and (2) the patient's treatment needs over a 60-day period. *See Shepherd* at 552.

Regarding the "actual usable amount" permitted under the Act, RCW 69.51A.040(2)(b) clearly permits patients to have, on-hand, a reasonable supply of medication, defined as enough to meet the patient's needs for an ongoing sixty days, based on the patient's "personal, medical use." For this reason, the trial court's statement that "the sticking point ... is ... the number of plants that constitutes a sixty day supply" was in error. Under the Act, any estimate of the amount of medication that plants might produce prospectively is legally irrelevant to the question of how much medication a patient may have on hand to be in compliance with RCW 69.51A.040(2)(b). The Act instead sets a

defined amount of usable medication that a patient may possess: enough medication to last 60-days. Based on a plain reading of the Act, plant material not usable in the patient's treatment cannot be counted as part of the patient's permitted 60-day supply. *See* RCW 69.51A.040(2)(b). To count unusable plant matter as a part of a patient's 60-day supply would, in fact, prevent any patient from ever retaining the statutorily permitted amount of medication.

Regarding proof of the patients' treatment needs over a 60-day period, the trial court committed error by excluding evidence offered to address their treatment practices and use of medication over a 60-day period. The trial court erred in stating that, "The Court of Appeals has already ruled that [a patient's 60 day supply] must be established by medical testimony." Ackerson Petition, exhibit 3; Finkelman Petition, appendix A. The panel in *Shepherd*, however, held that patients seeking protection under the Act must submit "...some statement as to how much [medication] he or she needs."² *Shepherd* at 552 (emphasis added). There is no holding in *Shepherd* that requires expert testimony to prove the amount of a patient's 60-day supply.

² Stating in *Shepherd* that "nothing in the Act requires the doctor to disclose the patient's particular illness," this Court observed the fact that the *Shepherd* record contained no evidence of the patient's personal medical use. *Shepherd* at 552. In reference to the sufficiency of the *Shepherd* defendant's evidence of 60-day need, it was held only that a 1998 report by the Public Safety Committee of the Oakland City Council submitted by the defense failed, by itself, to establish the particular patient's anticipated 60-day needs. While the Oakland report "referenced a scientific, analytical method for calculating an actual *usable amount*," the report failed to prove how much the patient would need during a 60-day period to meet *his* treatment needs." *Id.*

Nor would such a holding have been in harmony with the Act itself. The testimony of patients and others with direct knowledge of how much medication patients use in their treatment, including that of their treating physicians, is clearly admissible for the purpose of proving the patient's treatment needs over time. See ER 803(a) (medical diagnosis and treatment exception to the hearsay rule)." Ackerson and Finkelman clearly met their burden by offering their own testimony and that of their treating physicians regarding their treatment needs over a 60-day period.

These multiple probable and obvious errors by the Superior Court judge would render further proceedings useless and would substantially alter the status quo or substantially limit the freedom of Ackerson and Finkelman to act in their defense. The statutory defense provided by the Act is ordinarily the only protection that patients and caregivers have against unwarranted criminal prosecution and conviction. As individuals seeking to assert their protected status, patients are required to make what is essentially an admission of marijuana use to law enforcement officials. See RCW 69.51A.040(c) (requiring patients to "[p]resent his or her valid documentation to any law enforcement official who questions the patient regarding his or her medical use of marijuana."). Ackerson and Finkelman, as required by the Act, presented their valid documentation to law enforcement officers. If they are denied the opportunity to prove their protected status to a jury, they will almost inevitably be convicted. The trial judge, after

granting the State's motion to bar Ackerson and Finkelman's defense, was quite correct when she said to the petitioners, "[i]f you go to trial without having the benefit of this defense, you may know that the handwriting may be on the wall with any jury that you have." Ackerson Petition, exhibit 3; Finkelman Petition, appendix A.

Currently, there is widespread confusion regarding the medical marijuana defense among trial courts, prosecutors and parties entitled to protected status. There is urgent need for a clear statement by this Court that the purpose of the Act requires that protected individuals be permitted to present their admissible evidence at trial and that sets out the types of evidence that may be used to prove protected status as a medical marijuana patient.

F. CONCLUSION

The Superior Court erroneously interpreted the Act, this Court's decision in *Shepherd*, and evidentiary rules applicable to testimony offered by petitioners and their physicians. If allowed to stand, these errors will leave petitioners Ackerson and Finkelman without the protections to which they are entitled and frustrate the fundamental purpose of the Medical Use of Marijuana Act. We ask the Court to accept the petitioners' motion for discretionary review.

Respectfully submitted this _____st day of June, 2005.

Thomas B. Nedderman
WSBA # 28944
Floyd & Pflueger
2505 - 3rd Ave., Ste. 300
Seattle, WA 98121
(206) 441-4455

Andrew W. Ko, # 27940
Drug Reform Policy Project Director
Nancy Talner, # 11196
Staff Attorney
ACLU of Washington
705 Second Ave, Suite 300
Seattle, WA 98104
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