

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
Respondent)	MOTION FOR
)	RECONSIDERATION
v.)	
)	
MONICA LORRAINE GINN,)	
Appellant)	

1. IDENTITY OF MOVING PARTY

Respondent, State of Washington, by and through James C. Powers, Deputy Prosecuting Attorney.

2. STATEMENT OF RELIEF SOUGHT

Pursuant to RAP 12.4, the State respectfully requests reconsideration of the court's decision vacating the defendant's conviction for possession of a controlled substance with intent to deliver. The State is not asking the Court to reconsider the vacating of the conviction for manufacture of a controlled substance. The State asks that the conviction for possession with intent to deliver be

affirmed, but remanded to the trial court for re-sentencing in the light of the court's decision with regard to the manufacture of a controlled substance charge.

3. FACTS RELEVANT TO MOTION

On May 16, 2002, the defendant was charged by Information with one count of unlawful manufacture of a controlled substance, to wit: marijuana, and one count of possession of marijuana with the intent to deliver, both alleged to have occurred on or about the 14th day of May, 2002. CP 4. On May 20, 2002, a First Amended Information was filed which maintained the same charges but alleged that the manufacture of controlled substance had taken place within one thousand feet of a school bus stop. CP 5.

On April 30, 2002, Detective Ditrich of the Thurston County Narcotics Task Force had been invited by the defendant to come to her home to inspect the marijuana grow she had there. The defendant claimed that the marijuana was being

grown for legal, medical purposes. The defendant gave the detective her consent to his search of a trailer where she was growing the marijuana plants. The detective observed 21 plants at various stages of growth, 5 to 10 plants in germination. Trial RP 190-192.

The detective returned to the property on May 14, 2002, with a search warrant. At that time, he observed that there were 23 marijuana plants being grown in the trailer. Trial RP 204-205.

The detective spoke to the defendant about this grow operation both on his first visit to the property on April 30th, and after he had served the search warrant on May 14th. On both occasions, the defendant explained that it was her intent to consume some of the marijuana for her own medical purposes, to give some of it to an individual named Robert Otterson, who lived in King County, and to give the rest to Green Cross, with some compensation for her expenses. The defendant stated on April 30th that her plan was to expand her

marijuana grow to 50 plants. On May 14th, she told Ditrich she wanted to expand the grow to 100 plants. Trial RP 204-206, 215, 224.

A jury trial in this case began on January 12, 2004. The State presented a motion in limine to prevent the defendant from arguing at trial an affirmative defense that the defendant's manufacture and possession of marijuana were for medical use, pursuant to Chapter 69.51A RCW. CP 35-50.

In response, the defense contended that the defendant was a qualifying patient able to legally consume marijuana for her own medical purposes, and that as of May, 2002, she was a primary caregiver for Robert Otterson, able to also possess marijuana for the purpose of providing it to Otterson. CP 16-34. In support of this latter contention, the defendant attached to her response a contract dated April 2, 2002, purportedly written by Robert Otterson, designating the defendant as his primary caregiver and making her responsible for providing

Otterson with the necessary amount of marijuana to ease his pain and alleviate his symptoms. CP 29. Thus, the defendant's affirmative defense, as outlined in the defendant's response to the State's motion in limine, included the assertion that her intent as of May 14, 2002, was to deliver marijuana to Otterson, but that she could do so legally as his primary caregiver.

The trial court granted the State's motion in limine after hearing testimony from several witnesses and argument from both parties, concluding that there was not sufficient evidence from which a reasonable fact finder could determine that the defendant was a qualifying patient, or a primary caregiver for Robert Otterson, and therefore no basis to argue the affirmative defense to the jury. CP 91-94. Among other factual determinations, the trial court found that "[d]efendant Ginn's only service for Robert Otterson was growing delivering marijuana to Robert Otterson. There was no evidence the defendant was

'responsible for the housing, health, or care of the patient.'" Finding of Fact No. 11, CP 92.

At the trial that followed, the defendant testified. She stated that she had been growing marijuana for herself and for another patient. Trial RP 282. She also acknowledged having discussed with Detective Ditrich her donations of marijuana to Green Cross. Trial RP 298. She also acknowledged that she had told Ditrich she intended to deliver some of her marijuana to Mr. Otterson. Trial RP 299. The defendant further admitted that she had intended to increase the number of plants she was cultivating to 100 in order to make the additional marijuana available to other patients. Trial RP 299, 302. Thus, the defendant was very clear in her testimony that the marijuana she possessed was not just for her exclusive use, but was intended, in part, for delivery to others.

At trial, the defendant was convicted of both the unlawful manufacture of marijuana within a school bus zone and unlawful possession of

marijuana with intent to deliver. On appeal, the Court of Appeals affirmed the trial court's determination that the defendant had failed to provide an evidentiary basis for asserting as an affirmative defense that she had been the primary caregiver for Robert Otterson. However, the appellate court ruled that the trial court had erred in finding that the defendant had failed to provide an evidentiary basis for asserting an affirmative defense as a qualifying patient. Both convictions were vacated. However, there was no discussion in the court's opinion as to how the defendant's status as a qualifying patient could amount to an affirmative defense to possession of marijuana with intent to deliver, given the defendant's repeated and explicit admissions that she had the intent to deliver some of the marijuana she possessed, and the lack of any contrary evidence to that intent.

4. GROUNDS FOR RELIEF AND ARGUMENT

As noted by the Court of Appeals in its

decision in this case, a defendant raising an affirmative defense must offer sufficient admissible evidence to justify giving a jury instruction on that defense, but in evaluating whether the evidence is sufficient to support such a jury instruction, the trial court must interpret the evidence most strongly in favor of the defendant. State v. Janes, 121 Wn.2d 220, 236-237, 850 P.2d 495 (1993); State v. May, 100 Wn. App. 478, 482, 997 P.2d 956 (2000). As determined by the trial court and affirmed by the appellate court, the defendant failed to satisfy this requirement for purposes of asserting an affirmative defense to her possession of marijuana with intent to deliver based on her being a primary caregiver to another. While she was found to have presented sufficient evidence to assert a medical marijuana defense as a qualifying patient, possessing marijuana for her own use, such a defense would not negate, excuse, or justify the intent to deliver marijuana which she consistently

acknowledged that she had.

In order to affirmatively defend a criminal prosecution for possession of marijuana with the intent to deliver, this defendant would be required to show by a preponderance of the evidence that she had met the requirements of the law allowing for the medical use of marijuana. State v. Phelps, 118 Wn. App. 740, 744, 77 P.3d 678 (2003); State v. Shepherd, 110 Wn. App. 544, 550, 41 P.3d 1235 (2002).

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 primary caregiver 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(1) (emphasis added). With regard to this legal exception, the phrase "medical use of marijuana" is defined in the following manner:

"Medical use of marijuana" means the production, possession, or administration of marijuana, as defined in RCW 69.50.101(q), for the exclusive benefit of a qualifying patient in the treatment of his or her terminal or

debilitating illness.

RCW 69.51A.010(1) (emphasis added).

Thus, a qualifying patient cannot prove that she was in compliance with the requirements of Chapter 69.51A RCW while at the same time acknowledging her intent to deliver the drug to another person for whom she was not a primary caregiver. Possession of marijuana for the additional purpose of delivering the drug to such other person would be outside the scope of the "medical use of marijuana" defense.

A medical marijuana defense, like other affirmative defenses, does not negate an element of the offense. Rather, it provides a legal excuse or justification for the conduct that would, absent that defense, be illegal. See State v. Riker, 123 Wn.2d 351, 366-368, 869 P.2d 43 (1994). Thus, for example, an unwitting possession defense does not negate the fact the defendant possessed the illegal substance, but rather excuses the possession because it was without knowledge. State v. Cleppe,

96 Wn.2d 373, 380-381, 635 P.2d 435 (1981). Given the nature of an affirmative defense, a jury need not consider such a defense unless and until the jury has found that the State has proved the elements of the charge beyond a reasonable doubt.

Applying those principles to the present case, there would be no reason for a jury to consider a medical marijuana defense to a charge of unlawful possession of marijuana with intent to deliver until the jury had determined there was proof beyond a reasonable doubt that the defendant had possessed marijuana, and had possessed it with the intent to deliver marijuana to another person. However, once those elements had been proven, there is no way a defendant's status as a qualifying patient could provide the basis for an admissible affirmative defense that the defendant's possession was for the medical use of marijuana. The elements of the offense of possession with intent to deliver and those of such an affirmative defense could not both be true, given the statutory definition of

"medical use of marijuana".

One of the requirements of the medical marijuana defense is that the defendant prove she possessed "no more marijuana than is necessary for the patient's personal, medical use, not exceeding the amount necessary for a sixty-day supply". RCW 69.51A.040(2)(b). This requirement places upper limits on how much marijuana a person, even one with a terminal or debilitating illness, can possess at any point in time. The requirement is obviously designed to further the statutory intent that a qualifying patient's possession of marijuana be solely for the purpose of treating that patient's own condition. However, nothing in Chapter 69.51A RCW suggests that possession of less than a sixty-day supply was intended to constitute a conclusive presumption that the marijuana possessed was solely for personal use, especially when the defendant's own evidence establishes the opposite conclusion without exception.

In its decision in this case, the Court of

Appeals noted that the trial court had found that the defendant had "presented sufficient evidence to satisfy the 'not exceeding the amount necessary for a sixty-day supply' element of the medical marijuana defense". Conclusion of Law No. 12, CP 94. The State did not take exception with this conclusion on appeal, and does not dispute that conclusion. However, that conclusion simply means that this defendant could not be precluded from presenting an affirmative defense to the "possession with intent" charge based on how much marijuana she possessed. At the same time, a qualifying patient who has less than a sixty-day supply may by her own admission also have the intent to distribute some of what she does have to another person, and if so the affirmative defense may be denied on that basis.

In the present case, the trial court erred by precluding the defendant from presenting an affirmative defense, as a qualifying patient, to the unlawful manufacturing of a controlled

substance charge, because her status as a qualifying patient could legally justify her manufacture of the drug. However, the defendant at all times consistently maintained that her intent as of the date of the offense was to deliver marijuana to Robert Otterson. Based on the defendant's acknowledged intent to deliver, the trial court did not err in precluding the defendant from asserting a defense to the possession with intent charge based upon her being a qualifying patient, since a qualifying patient who possesses marijuana with the intent to deliver is no less guilty of that crime.

4. CONCLUSION

In the case of a qualified patient who is not also a primary caregiver for another patient, the medical marijuana defense only applies to possession of marijuana for the treatment of that patient's own medical condition. The defense does not excuse or justify possession of marijuana by a qualified patient with the intent of delivering

that marijuana to someone else. Were it otherwise, a defendant who satisfied the criteria for being a qualifying patient under the statute could acquire marijuana in an amount less than a sixty-day supply and then freely distribute it to others with legal impunity. That most certainly is not the intent of Chapter 69.51A RCW.

As determined by the Court of Appeals, this defendant provided evidence that she was a qualified patient with valid documentation of that fact, and that she possessed less than a 60-day supply of marijuana. However, she also consistently acknowledged her intent to deliver some of the marijuana she possessed to Robert Otterson.

As noted previously, when assessing whether a defendant has presented sufficient evidence to justify presenting an affirmative defense to the jury, the evidence must be interpreted by the court in a manner most strongly in favor of the defendant. However, even completely accepting this

defendant's version of events, she failed to present any evidentiary basis to conclude that she possessed marijuana for her own exclusive benefit in treating her illness. See RCW 69.51A.010(1). By her own admission, that was not the case. Based on that evidence, the trial court did not err in denying the defendant the opportunity to assert a medical marijuana defense to the charge of possession of a controlled substance with intent to deliver.

The State respectfully requests that the conviction for that crime be affirmed, but remanded to the trial court for re-sentencing due to the conviction for manufacture of a controlled substance having been vacated.

DATED this 17th day of August, 2005

EDWARD G. HOLM

Prosecuting Attorney


JAMES C. POWERS/WSBA #12791

Deputy Prosecuting Attorney

Thurston County Prosecuting

Attorney's Office

2000 Lakeridge Drive SW

Olympia, WA 98502

(360) 786-5540