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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Appellant, v. TIMOTHY JOHN ARBACAUSKAS, Defendant and Respondent.	C044110 (Super. Ct. No. 02F07919)

APPEAL from an order of the Superior Court of Sacramento County, Joseph A. Orr, Judge. Affirmed.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Senior Assistant Attorney General, Stephen G. Herndon, Supervising Deputy Attorney General, Rachelle A. Newcomb, Deputy Attorney General, for Plaintiff and Appellant.

Scott Concklin, under appointment by the Court of Appeal, for Defendant and Respondent.

Following a preliminary hearing, the magistrate dismissed a complaint against defendant Timothy John Arbacauskas, charging him with cultivating marijuana. (Health & Saf. Code, § 11358.) The People appeal from the order of the superior court denying their motion to reinstate the complaint pursuant to Penal Code section 871.5.[1]

At the preliminary hearing, defendant presented evidence he was a qualified patient under the Compassionate Use Act of 1996, an initiative measure adopted by the voters as Proposition 215. That act added Health and Safety Code section 11362.5 (hereafter section 11362.5). Subdivision (d) of that section provides limited immunity to patients who cultivate or possess marijuana for personal medical purposes upon the recommendation or authorization of a physician.

On appeal, the People contend the magistrate's order dismissing the complaint must be reversed because the evidence demonstrated a strong suspicion of defendant's guilt that he was cultivating marijuana with the intent to sell. They argue that because the magistrate did not make findings of fact, we must review his ruling under the independent standard of review.

We disagree with the People and find the magistrate made express findings of fact that are supported by substantial

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[1] All further section references are to the Penal Code unless otherwise specified.

evidence. We shall therefore affirm the superior court's order denying the People's motion to reinstate the complaint.

FACTUAL AND PROCEDURAL BACKGROUND

A. Underlying Facts[2]

1. The Search

On September 13, 2002, Sacramento County Sheriff's Narcotics Detective Scott Hyatt went to defendant's residence in Sacramento. When he peered into the backyard, he saw defendant spraying marijuana plants. A sign on the fence indicated the garden was authorized under Proposition 215. Hyatt called out to defendant by name and defendant invited him in. When Hyatt entered the yard, he observed 12 very healthy marijuana plants growing in the garden. They stood six to seven feet tall, were three to five feet in diameter, and had large buds on them giving off the pungent aroma of fresh marijuana. Additionally, there were five marijuana plants growing in individual flowerpots. These plants were also very healthy with buds and the same aroma, although they were smaller than the ones growing in the ground. In the garage were 12 small marijuana plants, six to nine inches high.

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[2] In setting forth the facts, we draw every legitimate inference in favor of the magistrate's ruling on the credibility or weight of the evidence, without substituting our judgment for that of the magistrate's. (*People v. Massey* (2000) 79 Cal.App.4th 204, 210, quoting *People v. Woods* (1993) 12 Cal.App.4th 1139, 1147-1148.)

Inside the residence, Hyatt seized an electric scale from the kitchen, a cellular phone from the bedroom, and eight empty baggies from the closet. The baggies contained marijuana residue and were inscribed with a medical symbol from a cannabis club. Defendant showed Hyatt a document signed by Claudia Jensen, M.D. that recommended the medical use of cannabis under the Compassionate Use Act. He also told Hyatt that he had been doing research on the cultivation of marijuana and had been growing it for about a year.

Hyatt uprooted the 17 outdoor plants, as well as the indoor plants, and placed them in grocery bags. The gross weight of the plants, including the root balls, dirt, and the bags, was 244 pounds. Hyatt estimated that the outdoor plants would yield about a pound of useable marijuana per plant or 17 pounds total. Hyatt advised defendant of this yield and suggested that he could not smoke that much in one year. Defendant agreed with Hyatt's estimate and that it was more than he could smoke, and indicated that if he had more marijuana than he could use, he would give the excess to a cannabis club.

Hyatt asked defendant how much marijuana he used per day, but defendant indicated he did not know. Hyatt pressed him on the issue and repeatedly suggested that it was about an eighth of an ounce per day. Defendant finally agreed, stating that he used that amount on days when he did not have a lot of back pain, but said that on days when he had more pain, he would

smoke more.[3] Defendant explained he was experimenting by growing several strains to see how they would help him.

Hyatt concluded defendant was cultivating marijuana to sell. He based his opinion on the number of plants growing, the health of the plants, the scale, the plastic baggies, which could be used to package the marijuana to sell or transport it, the cellular phone, and his statement that he was going to give the excess away to a cannabis club.

2. The Defense

In 1994 through 1995, when defendant was working with the fire service, he injured his lower back and was on medical leave for two months. At that time, he began using street-purchased marijuana to alleviate the pain and regain flexibility in his back. In 1999, he sold marijuana to friends to defray some of his costs and attempted to grow a small marijuana garden. However, the police seized the plants before they could be harvested. Although defendant advised the officers he used the marijuana for medical purposes, he had no medical authorization at the time and as a result he was arrested, convicted of maintaining a place for the purpose of unlawfully selling, giving away or using a controlled substance (Health & Saf. Code, § 11366), and placed on probation.

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[3] Defendant testified that when he agreed with Hyatt on that amount, it was "just a guesstimation."

Defendant did not use marijuana again until May 2001, when he injured his back a second time in a work-related automobile accident. He suffered severe mid-back pain and was placed on disability for a year and one-half. During that time he was often bedridden. He testified that he had never experienced pain at that level before.

He saw six doctors who prescribed various pain medications, including Vicodin, Flexeril, and Tylenol with Codeine Number 3. He also saw Dr. Marion Frye who provided him with a one-year written recommendation for medical marijuana for his back pain. He tried the traditional pain medications, but found they were ineffective at controlling his pain and had serious adverse side affects that left him groggy or incoherent. As a result, he tried using medical marijuana and found it alleviated a lot of his back spasms without interfering with his mental functions.

He purchased his medical marijuana from a cannabis club in Oakland. The marijuana from the club was packaged in baggies labeled with a red cross and other markings indicating it was medical marijuana. He retained the empty baggies so he would have a distinctively marked container to hold his marijuana when he traveled with it.

Because his disability payments were $911 per month, he was only able to buy one to two "eighths" per visit, at a cost of $40 to $60 a piece. This amount was not enough to meet his medical needs, so he rationed his dosages and decided to grow marijuana.

Defendant began with one outdoor plant and 17 indoor plants. Officers conducting probation searches in 2001 observed these plants but took no action. The outdoor plant was harvested in October and produced two ounces of medical marijuana. The indoor plants were harvested in January and produced a total of two to three ounces of useable medical marijuana.

Cold weather aggravated defendant's back and he suffered a great deal of pain during the winter of 2001-2002. He smoked marijuana on a daily basis during that period to alleviate the pain. Although he did not know how much he used, he still did not have enough to meet his needs and had to ration what he had. In February 2002, he planted 15 indoor plants, which when harvested, produced a total of two to three ounces of medical marijuana, which again did not meet his medical needs.

On May 4, 2002, defendant consulted with Dr. Claudia Jensen. He complained of back pain and stress and she provided him with a written authorization to use medicinal cannabis for his medical condition.

In mid-May 2002, defendant's uncle and primary caregiver allowed him to use part of his garden to grow marijuana. Because defendant's supply of marijuana had never been sufficient since his automobile accident, he did not know how much he would use if he had an unlimited supply. Different varieties of marijuana provided different degrees of pain relief. In an effort to learn which strain would best meet his

medical needs, he obtained clones of 16 different varieties from the cannabis club. He also planned on experimenting with various means of preparing marijuana, to see which method gave him the most relief.

He and his uncle planted 12 of the clones in the ground and the other five in flowerpots. At the time they planted those 17 plants, he had no idea what their yield would be, but he had no intent to use the marijuana for anything other than his own personal medical needs.

In mid-July, he underwent a painful disco gram procedure on his spine that left him bedridden for two to three weeks. It took him another two weeks to regain mobility. Meanwhile, the weather in the summer of 2002 proved exceptional for growing marijuana. By the time he was able to tend his garden in mid-August, he realized it was going to produce a large quantity of marijuana. However, he did not know how much useable medical marijuana he would have until the plants were harvested, culled, dried, and cured, a process that took three to four weeks.

Christopher Conrad testified on defendant's behalf as an expert witness concerning the cultivation, medical use, and possession for sale of marijuana. He explained that marijuana is used to manage pain and nausea. The bud from the female plant contains the highest level of THC, the active pain relieving ingredient. The bud is generally smoked. However, marijuana may also be ingested by cooking the leaf in butter, vaporizing it, or using a sublingual tincture. A larger

quantity of marijuana is used with these three methods, although when eaten, the analgesic effect lasts longer.

The typical user of medical marijuana requires three to nine pounds of marijuana per year for pain management. The federal medical marijuana program provides patients with six to nine pounds of marijuana cigarettes per year. A person possessing less than 20 pounds of useable marijuana would most likely possess it for personal medical use, assuming there were no indicia of sales. Additionally, a person who grows his or her own marijuana would use more of it than one who purchased it.

Marijuana that is grown outside can only be harvested once a year, while marijuana that is grown indoors may be harvested several times per year. However the outdoor crop will produce a greater yield of medical marijuana than the indoor crop. There are many variables involved in growing marijuana that affect the size of the plants and the ultimate yield of useable medical marijuana. Plants may produce less than an eighth of an ounce of useable marijuana per plant while other plants may produce up to three pounds of marijuana. The average yield, however, is a quarter of a pound per plant. The variables that affect whether the plant survives, as well as the quantity and potency of the bud produced include weather and soil chemistry, the number of

male plants in the garden,[4] and the presence of insects and animals that eat the plants when they are small and others that eat them when they are larger, as well as molds and mildew that attack the plant and the bud.

Due to favorable weather that year, defendant’s garden produced an above-average yield. But a grower would not know this until the buds matured in late August and an inexperienced grower like defendant would not be able to accurately predict the yield even at that stage. Just looking at defendant’s 17 outdoor plants without taking any measurements, he would have estimated the total yield from them would have been 11 pounds. Based on the square footage of the canopy of the plants, Conrad estimated the actual yield of defendant’s 17 plants at 10.6 pounds, although he acknowledged that since they were especially healthy, it was possible that they could have yielded up to 15.94 pounds. However, these quantities would vary depending on the formula used. Because there are various formulas used to estimate yields, Conrad believed it would have been impossible for defendant to accurately assess his potential yield.

Considering the police reports and Hyatt’s testimony, Conrad opined that defendant was not cultivating marijuana for sale. He based his opinion on the lack of indicia of sale, namely defendant’s innocent state of mind when the officers

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[4] Male plants do not produce buds and are used only for their seeds.

arrived at his residence, the presence of the scale in the kitchen, which he found was typical when cooking marijuana,[5] baggies containing marijuana residue and bearing a cannabis club medical inscription, a doctor's recommendation; the absence of pay-and-owe sheets or other records indicating trafficking, as well as the absence of a large quantity of stored marijuana, luxury items, a police scanner, or any weapons in the residence.

B. Procedural Background

Defendant was charged by complaint with cultivating marijuana. (Health & Saf. Code, § 11358.) After a preliminary hearing, the magistrate made findings of fact and concluded the evidence was insufficient to hold defendant to answer and dismissed the complaint. The People filed a motion to reinstate the complaint pursuant to section 871.5. The motion was denied and the People filed a notice of appeal from the order denying their motion.

DISCUSSION

I.
Jurisdiction to Hear Appeal

We first address defendant's contention that we have no jurisdiction to hear this appeal. He argues that section 871.5 does not apply when a magistrate dismisses an action pursuant to section 11362.5 because that section is not specified in section

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[5] Marijuana butter is made by combining one ounce of marijuana buds with one pound of butter.

871.5, subdivision (a). Thus, according to defendant, the superior court was without jurisdiction to hear the motion to reinstate the complaint under section 871.5, and we are likewise without jurisdiction to review the superior court's ruling.

The People contend their motion to reinstate the complaint was properly heard by the superior court because the magistrate dismissed the complaint pursuant to section 871, which is a section specified in section 871.5. We agree with the People.

Section 1238, subdivision (a)(9) grants the People the right to appeal from an "order denying the motion of the people to reinstate the complaint . . . pursuant to Section 871.5." Section 871.5, subdivision (a) provides in pertinent part: "When an action is dismissed by a magistrate pursuant to Section . . . 871 . . . of this code . . . the prosecutor may make a motion in the superior court within 15 days to compel the magistrate to reinstate the complaint . . . ." Section 871 authorizes the magistrate to dismiss the complaint "[i]f, after hearing the proofs, it appears . . . there is not sufficient cause to believe the defendant guilty of a public offense . . . ."

After hearing the evidence presented at the preliminary hearing, the magistrate dismissed the complaint. In so doing, he set forth his view of the evidence, concluding, "I don't believe there is sufficient cause to believe that the use was for other than personal medical uses . . . [and] [t]herefore, the defendant is not held to answer."

Defendant argues the dismissal was made pursuant to section 11362.5, and that because that section provides him with immunity from prosecution, once the magistrate found that immunity attached, the superior court was deprived of jurisdiction over the case. This claim ignores the statutory language of section 871, the magistrate's express ruling, and the nature of the immunity under section 11362.5.

As stated, section 11362.5 was added to the Health and Safety Code by Proposition 215. (*People v. Mower* (2002) 28 Cal.4th 457, 463 (*Mower*).) Subdivision (d) of that section provides in pertinent part, "Section 11358, relating to the cultivation of marijuana, shall not apply to a patient . . . who . . . cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician." In *Mower*, the court held that this provision provides "limited immunity from prosecution, which not only allows a defense at trial, but also permits a motion to set aside an indictment or information prior to trial." (*Mower, supra*, 28 Cal.4th at p. 470.)[6] It does not however, operate extrinsic to the criminality of the underlying conduct as defendant asserts. To the contrary, "[e]vidence of a

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[6] Defendant also contends that a motion to reinstate a complaint is itself a form of further prosecution. The Supreme Court rejected this argument, finding that such a motion is merely the means of determining the legal propriety of the magistrate's dismissal of the complaint. (*People v. Toney* (2004) 32 Cal.4th 228, 233.)

defendant's status as a qualified patient or primary caregiver exculpates him or her from guilt of the crimes of possession or cultivation of marijuana, because such a status renders possession and cultivation of marijuana noncriminal." (*Mower, supra*, 28 Cal.4th at p. 473, fn. 5.)

Thus, the court in *Mower* concluded that a defendant seeking to set aside an information or indictment under section 995, based upon his status under section 11362.5, "must show that, in light of the evidence presented to the . . . magistrate, he or she was . . . committed 'without reasonable or probable cause' to believe that he or she was guilty of . . . cultivation of marijuana in view of his or her status as a qualified patient or primary caregiver." (28 Cal.4th at p. 473.)

However, the court in *Mower* also recognized that the defendant may present evidence under section 11362.5 at the preliminary hearing as exculpatory evidence that "would be reasonably likely to . . . negate an element of a crime charged . . . ." (§ 866, subd. (a).) In that situation, "in the absence of reasonable or probable cause to believe that a defendant is guilty of possession or cultivation of marijuana, in view of his or her status as a qualified patient or primary caregiver, . . . the magistrate should not . . . commit the defendant in the first place, but instead should bring the prosecution to an end at that point." (*Mower, supra*, 28 Cal.4th at p. 473.)

In short, evidence of one's qualified status under section 11362.5 negates an element of the offense, namely that the

defendant's cultivation of marijuana was unlawful. (*Mower, supra*, 28 Cal.4th at pp. 480-482.) Because it negates an element of the charged offense, the magistrate's finding below that there was insufficient "cause to believe that the use was for other than personal medical uses" is equivalent to a finding "there is not sufficient cause to believe the defendant guilty of a public offense . . . ." (§ 871; *Mower, supra*, 28 Cal.4th at p. 473.)

We therefore conclude that because the magistrate dismissed the complaint for insufficient evidence pursuant to section 871, the superior court properly considered the People's motion to reinstate the complaint. Accordingly, we have jurisdiction to hear this appeal. (§ 1238, subd. (a)(9).)

II.
Dismissal of the Complaint

The People contend the order dismissing the complaint must be set aside because there was reasonable cause to believe defendant cultivated marijuana for purposes other than his personal medical use. They also contend the magistrate made no findings of fact contradicting that conclusion and therefore we must conduct an independent review of the record to determine whether the magistrate's order was erroneous as a matter of law.

Defendant contends the trial court properly denied the People's motion to reinstate the complaint and that we must review the magistrate's ruling under the substantial evidence rule because the magistrate made express factual findings.

Additionally, he contends that even in the absence of express or implied findings of fact, the dismissal was proper.

We find the magistrate made express findings of fact and shall apply the substantial evidence standard of review. In so doing, we conclude there is substantial evidence to support those findings.

A. Standard of Review

We review an order denying a motion to reinstate a criminal complaint pursuant to section 871.5 by disregarding the superior court's ruling and directly examining the magistrate's ruling. (*People v. Massey, supra,* 79 Cal.App.4th at p. 210.)

The standard for reviewing a magistrate's ruling under section 871.5 was set forth in *People v. Slaughter* (1984) 35 Cal.3d 629 (*Slaughter*.) Holding that the same standard of review applied under section 739 also applies to challenges under section 871.5 (*id.* at p. 642), the court explained that "[t]he character of judicial review under *section 739* depends on whether the magistrate has exercised his power to render findings of fact. If he has made findings, those findings are conclusive if supported by substantial evidence. [Citations.] If he has not rendered findings, however, the reviewing court cannot assume that he has resolved factual disputes or passed upon the credibility of witnesses. A dismissal unsupported by findings therefore receives the independent scrutiny appropriate for review of questions of law." (*Id.* at p. 638.)

In so holding, the court in *Slaughter* examined the magistrate's role at the preliminary hearing. "'An information will not be set aside or a prosecution thereon prohibited if there is some rational ground for assuming the possibility that an offense has been committed and the accused is guilty of it. [Citations.]' [Citations.] [¶] '*Within the framework of his limited role, . . . the magistrate may weigh the evidence, resolve conflicts, and give or withhold credence to particular witnesses. [Citation.] In other words, in assisting him in his determination of "sufficient cause," the magistrate is entitled to perform adjudicatory functions akin to the functions of a trial judge.* Yet the proceeding is not a trial, and if the magistrate forms a personal opinion regarding the guilt or innocence of the accused, that opinion is of no legal significance whatever in view of the limited nature of the proceedings.'" (*Id*. at p. 637, italics in orig. omitted and italics added.)

The standard of review therefore turns on whether the magistrate made express findings of fact. On that question, the parties disagree. The People contend the magistrate made no factual findings because he did not question the credibility of the People's witness and found there was no "real dispute" over the quantity of marijuana defendant's plants would yield. In the People's view, the magistrate merely substituted his judgment for that of the jury's based upon his own personal opinion about defendant's guilt. Defendant contends the

magistrate made express factual findings that consumed four pages of the reporter's transcript. We agree with defendant that the magistrate made express findings of ultimate fact.[7]

In *People v. Farley* (1971) 19 Cal.App.3d 215 at page 221, relied on by the People, the court stated that "[a] clear example of [a factual finding] would be where the magistrate expresses disbelief of a witness whose testimony is essential to the establishment of some element of the corpus delicti. Where, however, the magistrate either expressly or impliedly accepts the evidence and simply reaches an ultimate legal conclusion therefrom, i.e., whether or not such evidence adds up to reasonable cause that the offense had been committed - such conclusion is open to challenge . . . ."

Although we have no quarrel with the example given in *Farley,* we do not think findings of fact are limited to determinations of witness credibility, as the Attorney General asserts. Findings of fact are the factual determinations made by the magistrate after weighing the evidence, drawing factual inferences, and resolving conflicts in the evidence, as well as by resolving questions of witness credibility. (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 258; *Slaughter, supra*, 35 Cal.3d at p. 637; *People v. Salzman* (1982) 131 Cal.App.3d 676,

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[7] Because we find the magistrate made express findings of fact, we do not address defendant's claim that the substantial evidence standard of review applies even in the absence of express findings of fact.

684.) Such findings may constitute the ultimate elemental facts of the charged offense or the defense. (*People v. Farley*, *supra,* 19 Cal.App.3d at p. 221; *Jones v. Superior Court* (1971) 4 Cal.3d 660, 666 [magistrate's finding of consent in a rape prosecution was a finding of fact triggering the substantial evidence standard of review under section 871.5].)

The magistrate here made three findings of fact: "I find that there is insufficient evidence to suggest that the defendant had an intent to sell"; "I don't believe there is sufficient cause to believe that the use was for other than personal medical uses[;] and I believe there is sufficient indication in the record that the defendant had a medical recommendation at the time from a qualified physician." These findings relate to the elemental facts of the defense; they are not the ultimate legal conclusion that the evidence is insufficient to hold defendant to answer.

Moreover, in making these findings, the magistrate set forth a lengthy statement of reasons, which demonstrated that he made the findings of fact after engaging in adjudicatory functions.[8] The factual question in dispute was defendant's

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[8] In making the first two findings of fact, the magistrate considered the indicia of intent to sell, including the quantity of marijuana found and the presence of a scale, as well as the empty baggies and a cell phone, and concluded that "[w]ithout more, those, I don't think, are very good support that the defendant had an intent to sell. [¶] I think it is quite common for people to have scales. I think these days everybody has a [c]ell phone or just about. And the plastic baggies showed residue of marijuana indicating that they had once contained

intent, whether he was cultivating the marijuana in order to sell it or, as defendant testified, only for personal medical purposes. His expert supported this testimony. The prosecution's sole witness, Detective Hyatt, testified to the contrary. In resolving this disputed fact, the magistrate was required to assess defendant's credibility, weigh the evidence, including the experts' testimony, and draw reasonable inferences from the evidence.

Accordingly, we find the magistrate made express findings of fact and shall review the order of dismissal under the substantial evidence standard of review. (*People v. Slaughter, supra,* 35 Cal.3d at p. 638.) Under that standard, we view the evidence in the light most favorable to the respondent (*People v. Lawler* (1973) 9 Cal.3d 156, 160) to determine whether there is any substantial evidence, contradicted or uncontradicted, which will support the finding of fact. (*People v. Underwood* (1983) 139 Cal.App.3d 906, 912.) "'We . . . must draw every legitimate inference in favor of the magistrate's ruling and

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marijuana rather than were being prepared for baggying marijuana. [¶] So those indicia do not, to me, even when considered together indicate an intent to sell, which brings me back to the quantity." He then considered the experts' testimony relating to the yield of defendant's plants, finding that whether defendant knew the yield would be high "seems speculative." While noting that 20 pounds might indicate an intent to sell, he found no other indicia of intent to sell because defendant was open about his plants, he had a Proposition 215 sign on his garden, and his statement that he might give the excess marijuana to the cannabis club was qualified and speculative.

cannot substitute our judgment, on the credibility or weight of the evidence, for that of the magistrate.'" (*People v. Massey*, *supra*, 79 Cal.App.4th at p. 210, quoting *People v. Woods*, *supra*, 12 Cal.App.4th at pp. 1147-1148.)

B. Insufficiency of the Evidence to Support the Charged Offense

Defendant was charged with cultivating marijuana. (Health & Saf. Code, § 11358.)[9] The elements of this offense are (1) the person cultivated a marijuana plant, (2) knowing it was a marijuana plant. (CALJIC No. 12.24; *People v. Villa* (1993) 144 Cal.App.3d 386, 389-390, fn. 3; *People v. Vermouth* (1974) 42 Cal.App.3d 353, 362.)

There is no dispute defendant was cultivating marijuana. Detective Hyatt found 12 large healthy marijuana plants growing in the garden tended by defendant, five more marijuana plants growing in flower pots, and 12 small potted marijuana plants growing in the garage. Defendant advised the officer he had medical authorization to grow the plants to alleviate back pain and had been doing so for about a year.

As previously stated, section 11362.5, subdivision (d) provides limited immunity from prosecution to a patient who cultivates marijuana for personal medical use upon the recommendation of a physician. (*Mower*, *supra*, 28 Cal.4th at

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[9] Health and Safety Code section 11358 provides: "Every person who plants, cultivates, harvests, dries, or processes any marijuana or any part thereof, except as otherwise provided by law, shall be punished by imprisonment in the state prison."

p. 470.) The purpose of that provision is to "ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes" under certain circumstances (§ 11362.5, subd. (b)(1)(A)) and was adopted by the voters "as an act of compassion to those in severe pain." (*People v. Trippet* (1997) 56 Cal.App.4th 1532, 1545.) The immunity does not extend to individuals who supply marijuana to others who use it for medical purposes. (*People v. Galambos* (2002) 104 Cal.App.4th 1147, 1152.)

In determining whether the defendant is cultivating marijuana for purposes other than personal medical use, the patient's current medical need for marijuana is a factual question to be determined by the trier of fact. The quantity of marijuana being cultivated is a relevant factor when making that determination. (See *People v. Trippet, supra*, 56 Cal.App.4th at p. 1549.) As the court stated in *Trippet*, "[t]he rule should be that the quantity possessed by the patient . . . and the form and manner in which it is possessed, should be reasonably related to the patient's current medical needs." (*Ibid.)* Although the quantity of marijuana being cultivated is affected by variables not relevant to mere possession, the quantity is nevertheless, affected by the patient's medical needs.

The magistrate found the evidence was insufficient to raise a strong suspicion defendant was cultivating the marijuana with the intent to sell it. We find substantial evidence to support this finding. Defendant injured his back in 1994 and began

using marijuana in 1995 to alleviate his back pain. He reinjured his back in 2001, in a work-related automobile accident, which disabled him for a year and a half and left him bedridden for part of that time. After the accident, he was given prescriptions for several different traditional pain medications, but they did not reduce his pain and had various adverse side affects on him. As a result, he sought and received medical authorization from Dr. Marion Frye to use medical marijuana to manage his pain. Initially, he purchased marijuana from the Oakland cannabis club.

However, because he was on disability and had limited funds, he was unable to purchase as much marijuana as he needed. So in 2001, he planted one outdoor marijuana plant and 17 indoor plants. The outdoor plant was harvested in October and yielded two ounces of useable medical marijuana. He harvested the indoor plants in January and reaped a total yield of two to three ounces of medical marijuana. He planted a second crop in February 2002, this time planting 12 plants in the garden and five in flower pots, using 16 different varieties to find one that best met his medical needs. He also placed a sign over the garden indicating it was a Proposition 215 garden. Meanwhile, in May 2002, he obtained a one-year medical authorization from Dr. Claudia Jensen to use medical marijuana to treat his chronic back pain and related stress.

When Detective Hyatt showed up at his residence in September, defendant showed Hyatt his medical authorization and

spoke openly with him about his plants and his use of marijuana to manage his pain.

Although defendant's garden was extremely healthy and could have possibly yielded up to one pound of marijuana per plant, his previous two efforts had yielded no more than two to three ounces per plant.

Defendant testified that the amount of pain he experienced fluctuated and while he did not know how much marijuana he used, he used it daily when his pain was severe. He also testified that he never had enough to meet his needs and that he was experimenting with different varieties of marijuana and different methods of ingesting it to determine which strains and methods of use best met his medical needs. He denied harboring any intent to use the marijuana for any purpose other than his own medical needs.

Defendant's testimony was corroborated by the expert testimony of Christopher Conrad, who concluded that defendant was not cultivating marijuana for sale. Conrad based his opinion on the lack of indicia of sale, defendant's innocent behavior when Hyatt appeared at his residence, defendant's written medical authorization to use marijuana, the size of his garden, which he found would normally yield a quantity of medical marijuana consistent with medical use, i.e. about 11 pounds, and the difficulty in predicting and calculating the yield of useable medical marijuana at the time of planting. In regards to predicting the yield, Conrad explained that there are

many variables affecting the harvest, as well as the number, size, and potency of the buds, which contain the medicinal marijuana. Additionally, the amount of marijuana used by a patient varies depending on the method of ingestion, the amount of pain, and the variety of marijuana used.

In sum, the evidence showed that defendant had the requisite medical authorization and several back injuries that caused him severe pain, which was impervious to traditional pain medications. He credibly denied cultivating marijuana to sell and his prior efforts at growing marijuana only yielded two to three ounces of marijuana per plant. This history, in light of the difficulty of predicting and calculating the yield of useable marijuana, and the vagaries of back pain, constitute substantial evidence that defendant was cultivating marijuana for personal medical use rather than to sell it.

DISPOSITION

The order denying the People's motion to reinstate the criminal complaint is affirmed.

BLEASE, Acting P. J.

We concur:

SIMS, J.

BUTZ, J.