FILED
NOV. 20, 2012
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,	)	No. 30295-4-III
Respondent,	)	
v.	)	UNPUBLISHED OPINION
JAMISON BRUCE ZELLER,	)	
Appellant.	)	

Kulik, J. — Jamison Zeller appeals his conviction for unlawful possession of a firearm in the second degree. He contends that the evidence found in his car should have been suppressed because he was unlawfully seized and because officers omitted material information from the affidavit supporting the search warrant. Of most importance, he contends that his possession of a medical marijuana authorization card is a fact that should have been disclosed when the officer applied for the search warrant. Mr. Zeller requests this court to overrule the holding in *State v. Fry*, 168 Wn.2d 1, 228 P.3d 1 (2010). In *Fry*, the court held that a medical marijuana authorization card does not negate probable cause. *Id.* at 6. We are bound by the decisions of our Supreme Court. We

affirm the denial of the motion to suppress and the conviction for unlawful possession of a firearm.

FACTS

On June 23, 2010, Mr. Zeller parked his car in the parking lot of a building in Kennewick, Washington. Ismael Diaz and Raoul Diaz, companions of Mr. Zeller, parked their car next to Mr. Zeller.

Located on the second floor of the building was the Metro Drug Task Force office. Detective Trevor White, a 16-year member of the Kennewick police department who was assigned to the task force, saw the two cars and three men in the parking lot. He noticed that the cars were not in stalls and were parked next to the road. This unusual placing drew Detective White's attention because the cars were "flashy vehicles," "sitting there like they were showing off." Report of Proceedings (RP) at 10. Detective White recognized one of the men from gang contacts and previous crime investigations; the recognizable man was not Mr. Zeller.

Using binoculars, Detective White noticed that one of the men with Mr. Zeller was clutching the waistband of his baggy pants. Based on Detective White's experience with other gang contacts, this indicated that this person was carrying a weapon. Detective White then observed Mr. Zeller enter his car for a short time, get out, and hand another

individual something very small. Detective White could not see the item but believed it was something small like a pill.

In the past, Detective White observed approximately 500 to 1,000 drug transactions while working on the task force. Based on his training and experience, Detective White suspected that he witnessed a drug transaction. Because Detective White was undercover, he requested that the criminal apprehension team make contact with the three individuals.

Detective Roman Trujillo and at least five other officers arrived at the parking lot. The officers immediately detained, patted down, and handcuffed all three individuals. In detaining Mr. Zeller, Detective Trujillo smelled marijuana coming from Mr. Zeller's car. Detective Trujillo applied for a telephonic search warrant for Mr. Zeller's car.

Meanwhile, Detective Juan Dorame advised Mr. Zeller his *Miranda*[1] rights. Mr. Zeller told Detective Dorame that he had marijuana in his possession and had a medical marijuana authorization card. Mr. Zeller gave permission to search the passenger compartment of his car. Detective Dorame declined the offer to search because Detective Trujillo had already begun the search warrant process. Detective Dorame did not tell Detective Trujillo of Mr. Zeller's statements.

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

To support the search warrant, Detective Trujillo advised the magistrate of Detective White's credentials and reported that Detective White observed a hand-to-hand exchange between two of the men. Detective Trujillo also presented his own training and experience in detecting marijuana and reported the marijuana odor coming from the car. Detective Trujillo requested permission to search Mr. Zeller's car and seize any marijuana or drug paraphernalia. The magistrate authorized the search warrant to Detective Trujillo.

The officers found two bags of marijuana, a burnt marijuana cigarette, and Mr. Zeller's medical marijuana authorization card. Inside the trunk of Mr. Zeller's car, officers found a loaded gun. Police headquarters informed detectives that Mr. Zeller was a convicted felon. Benton County charged Mr. Zeller with unlawful possession of a firearm.

Mr. Zeller appeals. He asserts that the trial court should have suppressed the evidence found in his car as the fruit of an unlawful search and seizure. He contends that the initial interaction with police unlawfully exceeded the scope of a *Terry*[2] stop and that the officers recklessly and intentionally omitted information from the affidavit that was material to the finding of probable cause.

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[2] *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

ANALYSIS

<u>*Seizure.*</u> "When reviewing the denial of a suppression motion, an appellate court determines whether substantial evidence supports the challenged findings of fact and whether the findings support the conclusions of law." *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). Evidence is substantial if it is enough "'to persuade a fair-minded person of the truth of the stated premise.'" *Id.* (quoting *State v. Reid*, 98 Wn. App. 152, 156, 988 P.2d 1038 (1999)). Conclusions of law relating to the suppression of evidence are reviewed de novo. *Id.* "Further, the question of whether an investigatory stop, or warrantless seizure, is constitutional is a question of law reviewed de novo." *State v. Diluzio*, 162 Wn. App. 585, 590, 254 P.3d 218, *review denied*, 272 P.3d 850 (2011).

Under the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution, warrantless searches and seizures are per se unreasonable. *State v. Kennedy*, 107 Wn.2d 1, 4, 726 P.2d 445 (1986). Evidence obtained in violation of these constitutional provisions must be suppressed, and evidence obtained as a result of a subsequent search must also be suppressed as the fruit of the poisonous tree. *Kennedy*, 107 Wn.2d at 4 (citing *Wong Sun v. United States*, 371 U.S.

471, 487-88, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963)). However, evidence will not be excluded if it falls into one or more of the narrowly drawn exceptions to the warrant requirement. *Garvin*, 166 Wn.2d at 249-50. The State has the burden to show that a warrantless search falls within one of the exceptions. *Id*. at 250.

Under an exception to the warrant rule, a police officer can conduct a *Terry* investigative stop. *Id.* The *Terry* stop exception allows officers to briefly seize a person if specific and articulable facts, in light of the officer's training and experience, give rise to a reasonable suspicion that the person is involved in criminal activity. *State v. Glover*, 116 Wn.2d 509, 514, 806 P.2d 760 (1991) (quoting *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)).

In evaluating the lawfulness of the *Terry* stop, this court inquires whether the temporary seizure was justified at its inception, and whether the stop was reasonably related in scope to the circumstances which justified the initial interference. *State v. Williams*, 102 Wn.2d 733, 739, 689 P.2d 1065 (1984).

A *Terry* stop must be reasonable under the circumstances. *State v. Doughty*, 170 Wn.2d 57, 62, 239 P.3d 573 (2010). The reasonableness of the officer's actions is viewed in light of the facts the officer knew at the time of the stop. *Kennedy*, 107 Wn.2d at 6. A court may consider factors such as the officer's training and experience, the

location of the stop, and the conduct of the person detained. *State v. Pressley*, 64 Wn. App. 591, 596, 825 P.2d 749 (1992).

To determine whether the scope of the stop was excessively intrusive, relevant factors include "the purpose of the stop, the amount of physical intrusion upon the suspect's liberty, and the length of time the suspect is detained." *Williams*, 102 Wn.2d at 740. Officers may frisk and handcuff a person during a *Terry* stop if the officer has a reasonable fear of danger, such as a reasonable belief that the person is armed. *State v. Mitchell*, 80 Wn. App. 143, 145-46, 906 P.2d 1013 (1995).

Officers may expand the scope of a *Terry* stop to encompass events occurring during the stop. *State v. Santacruz*, 132 Wn. App. 615, 620, 133 P.3d 484 (2006).

"Any police officer having probable cause to believe that a person has committed or is committing a misdemeanor or gross misdemeanor . . . involving the use or possession of cannabis . . . shall have the authority to arrest the person." RCW 10.31.100(1). The odor of marijuana creates probable cause to arrest if the officer has training and experience in the detection of marijuana. *State v. Cole*, 128 Wn.2d 262, 289, 906 P.2d 925 (1995).

The *Terry* stop of Mr. Zeller was justified from its inception. A reasonable suspicion of criminal activity existed to support the detention based on Detective White's

observations. Detective White first noticed Mr. Zeller and his companions because their cars were parked in an unusual manner in the business parking lot. Detective White recognized one of the men from prior gang activity. In the 20 minutes that Detective White watched the men, he observed Mr. Zeller enter his car for a short time, get out, and hand another individual something very small, like a pill. Detective White suspected that he witnessed a hand-to-hand drug transaction. Detective White's past experience included witnessing 500 to 1,000 drug transactions and belonging to the drug task force. The actions of Mr. Zeller and his companions, when combined with Detective White's expertise, provided specific and articulable facts that warranted the investigation of a possible drug transaction. The officers conducted a reasonable *Terry* stop under the circumstances.

The officers did not exceed the scope of the stop by handcuffing and patting down Mr. Zeller. The officers' actions resulted from a reasonable belief that Mr. Zeller and his companions could be armed. The reasonable belief arose from Detective White's comment that one of the men was repeatedly pulling up the waistband of his baggy pants which indicated, from past experiences and training, that the man was carrying a gun. The amount of physical intrusion was justified to protect the officers, based on the circumstances.

While the purpose of the *Terry* stop was to investigate the drug transaction, the focus of the stop quickly changed. Upon contact with Mr. Zeller, Detective Trujillo smelled marijuana coming from Mr. Zeller's car. The marijuana smell created probable cause to arrest. Thus, the *Terry* stop expanded into a lawful arrest and resulted in the detention of Mr. Zeller. Because the initial *Terry* stop quickly proceeded to a lawful arrest, the length of the initial seizure was not excessive and the officers did not unjustly exceed the purpose of the stop.

The officers did not unlawfully seize Mr. Zeller. The court did not err by denying Mr. Zeller's motion to suppress evidence found as a result of the seizure.

Franks *Hearing—Medical Marijuana Authorization Card.* An affidavit supporting a search warrant is presumed valid. *State v. Atchley*, 142 Wn. App. 147, 157, 173 P.3d 323 (2007). "A trial court's finding on whether an affiant deliberately excluded material facts is a factual determination, upheld unless clearly erroneous." *State v. Clark*, 143 Wn.2d 731, 752, 24 P.3d 1006 (2001).

In limited circumstances, a defendant is entitled to a *Franks* hearing to challenge the truthfulness of the factual statements made in an affidavit supporting a search warrant. *Franks v. Delaware*, 438 U.S. 154, 171-72, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978). As a threshold matter, a defendant must make a "substantial preliminary showing that a false

statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause." *Id*. at 155-56.

The same *Franks* test used for allegations of material representations also applies to allegations of material omissions of fact. *State v. Garrison*, 118 Wn.2d 870, 872, 827 P.2d 1388 (1992). In examining whether an omission rises to the level of a misrepresentation, the proper inquiry is not whether the information tended to negate probable cause or was potentially relevant but, rather, the court must find that the challenged information was necessary to the finding of probable cause. *Atchley*, 142 Wn. App. at 158.

The defendant must offer proof of the allegation of a deliberate omission or of a reckless disregard for the truth. *Garrison*, 118 Wn.2d at 872. Mere assertions of negligence or innocent mistake are insufficient. *Id*. (quoting *Franks*, 438 U.S. at 171.)

If the defendant succeeds in a preliminary showing of a deliberate omission, the omitted material is considered part of the affidavit. *Id*. at 873. If the affidavit remains sufficient to support probable cause after the omitted information is included, the suppression motion fails and no hearing is required. *Id*. However, if the court finds that the altered content is insufficient, the defendant is entitled to an evidentiary hearing.

Reckless disregard for the truth occurs when the affiant "'in fact entertained serious doubts as to the truth' of facts or statements in the affidavit." *Clark*, 143 Wn.2d at 751 (quoting *State v. O'Connor*, 39 Wn. App. 113, 117, 692 P.2d 208 (1984)). "Such 'serious doubts' are 'shown by (1) actual deliberation on the part of the affiant, or (2) the existence of obvious reasons to doubt the veracity of the informant or the accuracy of his reports.'" *Id.* (quoting *O'Connor*, 39 Wn. App. at 117).

The parties do not dispute that the affidavit, as presented to the magistrate, established probable cause. "When an officer who is trained and experienced in marijuana detection actually detects the odor of marijuana, this by itself provides sufficient evidence to constitute probable cause justifying a search." *State v. Olson*, 73 Wn. App. 348, 356, 869 P.2d 110 (1994).

Instead, Mr. Zeller contends that the officers omitted information that was material to a finding of probable cause. He challenges the trial court's conclusions that Mr. Zeller failed to show that the officer intentionally withheld information from the affidavit and that the probable cause determination would not have differed with the addition of the omitted information. Mr. Zeller maintains that the omitted facts at issue are that Mr. Zeller denied giving drugs to the other men; that Mr. Zeller gave Mr. Diaz a flyer, which officers found on Mr. Diaz; that the pat-down search did not uncover illegal substances

on Mr. Zeller or his companions; that Mr. Zeller told officers that he had a medical marijuana authorization card; and that Mr. Zeller gave permission to search the vehicle. Mr. Zeller also challenges the trial court's conclusions that a *Franks* hearing was not necessary.

We conclude that information Mr. Zeller challenges was not necessary for a finding of probable cause. Mr. Zeller's statements to the officer denying the drug transaction and explaining his actions did not remove the possibility that a drug transaction took place. The same can be said about Mr. Zeller's consent to search his car. The pat-down search and the brief search for weapons was not a full search that decisively ruled out the presence of drugs. While this omitted information provided a more complete picture of the officers' interaction with Mr. Zeller, it was not material to a finding of probable cause.

Additionally, Mr. Zeller maintains that the presence of a valid medical marijuana authorization card is a material fact that must be disclosed to a magistrate for the purpose of finding probable cause. To reach this conclusion, Mr. Zeller also asks this court to overrule the holding in *Fry* and hold that the legislature intended for a medical marijuana authorization card to negate probable cause when presented to law enforcement.

The presence of a medical marijuana authorization card was also not a material

fact that needed to be disclosed to the magistrate because the presence of an authorization card does not negate probable cause. The holding in *Fry* is crucial to this determination.

In *Fry*, the Washington Supreme Court determined that a medical marijuana authorization card does not eliminate a finding of probable cause to search for marijuana. *Fry*, 168 Wn.2d at 6. In *Fry*, a judge granted permission to search a residence for marijuana, even though the judge knew that the defendant possessed a medical marijuana authorization card. The court concluded that probable cause still existed despite the authorization card because the authorization card did not decriminalize the use and possession of marijuana or negate any element of the charged offense. *Id*. at 8. Instead, the Medical Use of Marijuana Act, chapter 69.51A RCW, established an affirmative defense to excuse the criminal act. *Id*. at 7. Because of the continuing illegality, the court determined that the officers had probable cause to search based on a reasonable inference that criminal activity was taking place. *Id*. at 8.

Mr. Zeller requests that we ignore the holding in *Fry*, based on the 2011 legislative amendments to the Medical Use of Marijuana Act. He contends that these changes illustrate the legislature's disapproval of the holding in *Fry*. And he argues that this court should not follow *Fry* but instead develop a new reading of the act. He further contends that the version of the act, which was in place on the date of his crime, is also at odds

with the holding in *Fry*.

We are not in a position to ignore *Fry*. Until and unless our Supreme Court overrules *Fry*, we are bound to follow it. *State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984).

In 2007, the legislature stated its intent that qualifying patients shall not be found guilty of a crime under state law for their possession and limited use of marijuana. Laws of 2007, ch. 371, § 1. The act also stated that qualifying patients using medical marijuana have an affirmative defense to a violation of state law relating to marijuana, and that persons meeting the requirements of the chapter shall not be penalized in any manner. Former RCW 69.51A.040(2) (2007).

In 2011, the legislature changed RCW 69.51A.005 to state that "[q]ualifying patients with terminal or debilitating medical conditions who, in the judgment of their health care professionals, may benefit from the medical use of cannabis, shall not be arrested, prosecuted, or subject to other criminal sanctions or civil consequences under state law based solely on their medical use of cannabis, notwithstanding any other provision of law." Laws of 2011, ch. 181, § 102. The legislature also enacted changes to the section governing qualifying patients, RCW 69.51A.040, rewriting the section so that the medical use of cannabis in accordance with the Medical Use of Marijuana Act does

not constitute a crime and a person in compliance with the act may not be arrested, prosecuted or subject to other criminal sanctions or civil consequences for possession, manufacture, or delivery of marijuana. Laws of 2011, ch. 181, § 401.

The prior and current versions do not legalize marijuana or address the search of a person with a medical marijuana authorization card. Instead, both versions of the act generally state that a person using marijuana in accordance with the act shall not be guilty of a crime or be subject to criminal sanctions. Because officers need to determine whether a person using marijuana for medical purposes is in accordance with the act, it would be unreasonable to conclude that officers do not have the ability to search for lawful compliance. Therefore, the prior and current versions do not contradict the holding in *Fry*. Even in the presence of a medical marijuana authorization card, officers continue to have probable cause to search in order to confirm the lawful use of marijuana.

Marijuana continues to be an illegal substance for which officers may conduct a search when the odor of marijuana is detected by a trained officer. Because the presence of a medical marijuana authorization card does not negate probable cause, Mr. Zeller's possession of a medical marijuana authorization card was not a material fact that needed to be disclosed to the magistrate when applying for a search warrant.

In addition to not being material information, Mr. Zeller also fails to show that the

officers intentionally or recklessly omitted the information. Mr. Zeller makes bare assertions that the officers were motivated to arrest him and that the officers knew that the magistrate would not allow the search if the omitted information was included. As proof, he cites the officers' testimony that they could not remember when they learned of the information and that Detective Dorame admitted that he could have easily relayed information to Detective Trujillo for inclusion in the affidavit. This evidence does not prove that the officers intentionally omitted the information.

Mr. Zeller contends that if not intentional, this omission is certainly reckless. Mr. Zeller fails to show actual deliberation on the part of the officers that the information was material to the affidavit.

To summarize, we agree with the trial court's conclusion that a *Franks* hearing was not necessary. The omitted information was not material and not necessary to the finding of probable cause. The officers did not need to inform the magistrate of the medical marijuana authorization card because, based on *Fry*, the presence of the authorization card does not negate probable cause. Also, Mr. Zeller failed to make a preliminary showing that the officers intentionally or recklessly omitted the information from the affidavit. Accordingly, we conclude that the trial court did not err by denying Mr. Zeller's motion to suppress evidence found in the car.

<u>Equal Protection.</u> Mr. Zeller contends that interpreting chapter 69.51A RCW to allow police to search persons having a valid medical marijuana authorization card violates the equal protection clause. Mr. Zeller contends that under this interpretation, medical marijuana users with valid authorization are classified and treated differently from persons who have authorization to possess other items. He suggests, as an example, that a person with a valid prescription for medication is not subject to a search for possessing the medication, while a person with authorization to use medical marijuana is subject to a search.

"The equal protection clauses of the Fourteenth Amendment and Washington Const. art. 1, § 12 require that persons similarly situated with respect to the legitimate purpose of the law receive like treatment." *State v. Smith*, 117 Wn.2d 263, 276-77, 814 P.2d 652 (1991).

For an equal protection challenge, the appropriate level of review depends on the nature or classification of the rights involved. *Am. Legion Post No. 149 v. Dep't of Health*, 164 Wn.2d 570, 608, 192 P.3d 306 (2008). If the challenged legislation threatens a suspect class or fundamental right, then strict scrutiny is applied to determine if the legislation is "necessary to accomplish a compelling state interest." *Seeley v. State*, 132 Wn.2d 776, 791-92, 940 P.2d 604 (1997). Absent a fundamental right, suspect class, or

an important right and a suspect class, legislation will receive a rational basis review. *Am. Legion*, 164 Wn.2d at 609. Under the rational basis test, a statute is constitutional if (1) the legislation treats all members of the class alike, (2) there is a rational basis for distinguishing between those who fall within the class and those who do not, and (3) the classification is rationally related to the purpose of the legislation. *Id*. (quoting *O'Hartigan v. Dep't of Pers.*, 118 Wn.2d 111, 122, 821 P.2d 44 (1991)). Social and economic legislation that does not implicate a suspect class or fundamental right is presumed to be rational; this presumption may be overcome by a clear showing that the law is arbitrary and irrational." *Id*.

Selective enforcement of a law does not implicate an equal protection violation, unless the enforcement was "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." *Oyler v. Boles*, 368 U.S. 448, 456, 82 S. Ct. 501, 7 L. Ed. 2d 446 (1962).

Mr. Zeller's equal protection claim does not involve a fundamental right. As stated in *Fry*, the enactment of chapter 69.51A RCW did not legalize the use of marijuana. We cannot conclude that a person has a fundamental right to a controlled substance. Nor does Mr. Zeller's claim implicate a suspect class. Therefore, Mr. Zeller's claim receives a rational basis review. Based on this standard, his claim fails.

First, the Medical Use of Marijuana Act treats all persons possessing medical marijuana authorization cards alike. All in this class are subject to a search if probable cause exists.

Second, there is a rational basis to distinguish persons possessing medical marijuana authorization cards from those outside the class, persons with valid authorizations to possess other items. Marijuana is an illegal substance, and the card only provides an affirmative defense. Also, in regard to an equal protection claim, a legislature does not need to strike at all evils in the same way. *Semler v. Oregon State Bd. of Dental Examiners*, 294 U.S. 608, 610, 55 S. Ct. 570, 79 L. Ed. 1086 (1935). Thus, the legislature may develop laws that treat medical marijuana users differently than users of other items requiring authorization.

Finally, allowing searches of users of medical marijuana is legitimately related to the purpose of the legislation. While RCW 69.51A.005 states that the intent of the act is not to subject a medical marijuana user to criminal sanctions, RCW 69.51A.020 states that nothing in the chapter shall be construed to supersede Washington state law prohibiting the use or possession of marijuana. Therefore, searching medical marijuana users to determine compliance with the statute is rationally related to the purpose of continuing to criminalize the use of marijuana for non-medical purposes.

Thus, chapter 69.51A RCW passes the rational basis test and Mr. Zeller's equal protection claim fails.

Mr. Zeller claims that the contradiction between the holding in *Fry* and the intent of the Medical Use of Marijuana Act violates the due process clause. He contends that the contradiction results in selective enforcement and unequal application of the law. We do not agree that *Fry* and chapter 69.51A RCW are contradictory. Law enforcement may search under both, if probable cause exists. His due process claim also fails.

We affirm the conviction for unlawful possession of a firearm.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Kulik, J.

WE CONCUR:

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Korsmo, C.J.

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Siddoway, J.