IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ROBERT ROY DALTON, Appellant.	)	No. 66638-0-I
	)	DIVISION ONE
	)	UNPUBLISHED OPINION
	)	FILED: July 25, 2011

Grosse, J. — Under the Washington State Medical Use of Marijuana Act, chapter 69.51A, a qualifying patient may present an affirmative defense to a prosecution for marijuana. In order to qualify, a patient with a degenerative disc disease with chronic pain must also establish that such pain was not relieved by standard medical treatments and medications. Here, the defendant failed to do so. Accordingly, we affirm the judgment and sentence.

FACTS

After a bench trial, the trial court convicted Robert Dalton of manufacture of marijuana.[1] There is no dispute that he was growing marijuana. The only issue at trial was whether he could avail himself of the medical marijuana defense set forth in former RCW 69.51A.040 (1999).

The court permitted Dalton to present an affirmative defense for the medical use of marijuana. Dalton presented a facially valid medical marijuana authorization signed by a licensed Washington physician, which he had also

[1] Dalton was also charged with possession of marijuana with the intent to manufacture or deliver marijuana, but that charge was dismissed for insufficient evidence after the State rested.

presented to the police. Dalton also presented expert medical testimony. Dalton's diagnosis was a degenerative disc disease triggered by ageing and trauma, and a right arm fracture, both of which resulted in chronic pain. In the past and concurrent with the marijuana use, Dalton used prescription muscle relaxants to relieve the spasms that cause his pain.

Dr. Thomas Orvald, a thoracic and cardiovascular surgeon employed as a physician by The Hemp and Cannabis Foundation (THCF) group, prescribed the cannabis. Dr. Orvald characterized THCF as pain clinics and described his duties as seeing approximately 40 patients a day. Dr. Orvald testified that his patients typically include a wide spectrum of people who might be helped with the appropriate use of medicinal cannabis.

The patient's medical records are sent to the clinic where Dr. Orvald's nurse screens the records and conducts a physical examination. The patient then sees Dr. Orvald in his office, where the doctor peruses the records, paying particular attention to those highlighted by the nurse. At that time, he has a conversation with the patient regarding his or her past history. Based on those conversations, he decides whether marijuana would be appropriate.

Dr. Orvald saw Dalton on two occasions, once in 2005 and once in 2007. In his testimony during trial, Dr. Orvald was reluctant to testify that Dalton's pain was "unrelieved" by traditional medicines even where there were noxious side effects from those medicines. Dr. Orvald described Dalton's "standard treatment [as] not working as effectively as it might." The trial court concluded that Dalton

failed to establish his affirmative defense because he could not substantiate that he was a qualifying patient under the statute since his pain was relieved by standard medical treatments and medications.

Dalton appeals.

ANALYSIS

In November 1998, Washington voters passed Initiative Measure 692 authorizing patients with "terminal or debilitating illnesses to use marijuana for medical purposes based on their treating physicians' professional medical judgment and discretion."[2] The initiative was codified in chapter 69.51A RCW, the Washington State Medical Use of Marijuana Act (Act). The Act established an affirmative defense for the medical use of marijuana in certain situations. Specifically, the Act provides that a "qualifying patient" who uses medical marijuana has an affirmative defense as long as he or she acts in compliance with the Act.

The Act sets forth the elements of a medical marijuana affirmative defense and requires that a qualified patient be diagnosed by a physician authorized under chapter 18.71 RCW, with a debilitating disease and, additionally, that the disease not be relieved by standard medication.[3] In State v. Fry, the Supreme Court held that medical documentation purportedly authorizing the use of cannabis did not vitiate probable cause to search a

[2] State v. Butler, 126 Wn. App 741, 748, 109 P.3d 493 (2005).
[3] Former RCW 69.51A.010.4(b) (1999) defines a qualifying patient as one who has "[i]ntractable pain, limited for the purpose of this chapter to mean pain unrelieved by standard medical treatments and medications."

residence for marijuana.[4] The authorization created only a potential affirmative defense excusing the criminal act (per J.M. Johnson, J., with three justices concurring, and four justices concurring in result). The Fry court noted that "[a] doctor's authorization does not indicate that the presenter is totally complying with the Act."[5] In Fry, the lead opinion found that the disease listed on the medical authorization was, as a matter of law, not a qualifying disease enumerated under the former Act. But the concurring opinion signed by four justices and in which the lone dissenting justice agreed, held that whether Fry had a qualifying condition under the Act was a question of fact, not law.[6]

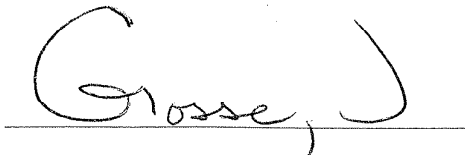
Here, the trial court found that the facts did not substantiate that Dalton was a qualified patient under the Act. The trial court heard evidence from the defendant, his physician, and an expert on the dosage amount. Dalton testified that the side effects from marijuana were less onerous than those of the standard medications and, further, that he was allergic to the medication. But his pain was relieved by standard medications.[7] Dalton's testimony did not establish that no other drug or treatment was available to relieve his pain; rather, it focused on unwanted side effects from those medications. Dr. Orvald and another medical expert testified that there were side effects from standard medication that were not present when one used marijuana and therefore it was the better choice. But when queried whether Dalton's pain was unrelieved by

[4] State v. Fry, 168 Wn.2d 1, 228 P.3d 1 (2010).
[5] Fry, 168 Wn.2d at 10.
[6] Fry, 168 Wn.2d 1 (see concurrence at 14 and dissent at 23).
[7] The only medicine listed in Dalton's medical history was Percocet.

standard medications, Dr. Orvald stated he was not willing to say "unrelieved." He did, however, testify that Dalton qualified under the Act and therefore issued the authorization.

The trial court noted that patients who had certain diseases were not required to establish that their pain could not be relieved by standard medication: cancer, AIDS (acquired immune deficiency syndrome), multiple sclerosis, or epilepsy. The trial court found that the legislature's use of the limiting language "unrelieved by standard medical treatments and medications" for other diseases, including Dalton's intractable pain, clearly indicates that marijuana is a drug of last resort. The trial court noted that the limited language "unrelieved by standard medical treatments and medications" does not apply to all categories or conditions that qualify a patient to use medical marijuana. Thus, the trial court concluded that the legislature intended to treat certain patients differently in permitting the use of cannabis. Substantial facts support the trial court's conclusion that Dalton failed to establish that his pain was "unrelieved by standard medical treatments and medications."

Accordingly, we affirm the judgment and sentence.



WE CONCUR:

Schneller, J. Appelwick, J.