State v. Fry (*Jason Lee*)

No. 81210-1

CHAMBERS, J. (concurring) — As a compassionate gesture, the people of this state, by initiative, allowed patients afflicted with medical conditions that might be eased by marijuana to use it under limited circumstances. Generally, whether a patient has a medical condition that qualifies under the Washington State Medical Use of Marijuana Act (the act), ch. 69.51A RCW, is a question of fact, not law. I disagree with the lead opinion's holding that as a matter of law Jason Fry did not have a qualifying condition under the act simply because the words used by Fry's doctor in issuing the authorization may have been inartful. The lead opinion approves the trial court's pretrial application of the law to the facts, its weighing of the evidence, and its decision as a matter of law that the compassionate use of marijuana defense was unavailable to Fry. In my view, a defendant in Fry's position should have the opportunity to offer evidence that he in fact had a qualifying condition and that his doctor issued the medical marijuana authorization for that condition. Criminal defendants have a due process right to have their defenses heard. *State v. Lord*, 161 Wn.2d 276, 301, 165 P.3d 1251 (2007) (citing *Taylor v. Illinois*, 484 U.S. 400, 408, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988)); *accord Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). And their right to a trial by a jury must remain inviolate. Wash. Const. art. I, § 21. However, because I agree in result, I concur.

FACTS

Fry was smoking marijuana. Two Stevens County police officers smelled marijuana burning as they approached Fry's house. When questioned, Fry acknowledged the use of marijuana, and his wife, Tina, produced a form entitled "Documentation of Medical Authorization to Possess Marijuana for Medical Purposes in Washington State" issued by Fry's physician, Dr. Thomas Orvald. Clerk's Papers (CP) at 67, 20. The authorization stated that Dr. Orvald was treating Fry for "a terminal illness or debilitating condition as defined in RCW 69 51A.010." CP at 20. On a separate page under a section marked "Documentation of debilitating medical condition from previous healthcare provider," Dr. Orvald wrote, "severe anxiety, rage, & depression related to childhood." Under the "subjective" section of his own notes detailing Fry's background Dr. Orvald wrote, "Severe anxiety!!! Can't function." CP at 22. The authorization also included notes from Dr. Orvald's physical examination of Fry where he noted a scar behind Fry's right ear and on his chin from being injured by a horse. These notes also reflect that Fry suffered from neck and lower back pain. In the comments section Dr. Orvald wrote: "Pt has found use of medical cannabis allows him to function [with] self control of anger, rage, & depression. Pt has been kicked in head 3 times by horse." CP at 23.

After a hearing on a motion in limine, the trial judge determined that Fry did not have a terminal or debilitating medical condition as defined under the act, was not a qualifying patient as a matter of law, and refused to allow Fry to proceed with his affirmative defense. The trial judge believed that precedent required him, instead of the jury or other trier of fact, to make this determination at this stage of

the proceedings. This belief was based partially upon an unintended reading of an opinion of this court and an earlier Court of Appeals opinion. *See State v. Tracy*, 158 Wn.2d 683, 147 P.3d 559 (2006); *State v. Shepherd*, 110 Wn. App. 544, 41 P.3d 1235 (2002).

ANALYSIS

In 1998, Washington voters approved Initiative 692, codified as chapter 69.51A RCW, often referred to as the compassionate use of medical marijuana act. Under the act "qualifying patients" are entitled to present an affirmative defense if charged with a violation of state law relating to marijuana. Former RCW 69.51A.040 (1999); *Tracy*, 158 Wn.2d at 688. A "qualifying patient" is defined as anyone who:

> (a) Is a patient of a physician licensed under chapter 18.71 or 18.57 RCW;
>
> (b) Has been diagnosed by that physician as having a terminal or debilitating medical condition;
>
> (c) Is a resident of the state of Washington at the time of such diagnosis;
>
> (d) Has been advised by that physician about the risks and benefits of the medical use of marijuana; and
>
> (e) Has been advised by that physician that they may benefit from the medical use of marijuana.

Former RCW 69.51A.010(3) (1999).

Former RCW 69.51A.010 also provides the following definitions:

> (4) "Terminal or Debilitating Medical Condition" means:

> (a) Cancer, human immunodeficiency virus (HIV), multiple sclerosis, epilepsy or other seizure disorder, or spasticity disorders; or
>
> (b) Intractable pain, limited for the purpose of this chapter to mean pain unrelieved by standard medical treatments and medications; or
>
> (c) Glaucoma . . . .
>
> (d) Any other medical condition duly approved by the Washington state medical quality assurance board [commission] as directed in this chapter.[1]
>
> (5) "Valid documentation" means:
>
> (a) A statement signed by a qualifying patient's physician, or a copy of the qualifying patient's pertinent medical records, which states that, in the physician's professional opinion, the potential benefits of the medical use of marijuana would likely outweigh the health risks for a particular qualifying patient; and
>
> (b) Proof of Identity such as a Washington state driver's license or identicard, as defined in RCW 46.20.035.

(Second alteration in original.)

There seems to be no question that Fry's physician was qualified, that he advised Fry of the risks and benefits of medical marijuana use, and that Fry was a resident of the state of Washington. Further, Fry possessed what would appear to be a valid authorization as defined by the statute. The issue before us is whether Fry could have had a qualified condition. The statute defines "Terminal or

[1] Since Fry's arrest, the statute has been revised to include qualifying "Diseases . . . which result in nausea, vomiting, wasting, appetite loss, cramping, seizures, muscle spasms, or spasticity" as "terminal or debilitating medical conditions" covered under the statute. RCW 69.51A.010(4)(f).

Debilitating Medical Condition" in the disjunctive. One permissible condition is intractable pain, meaning pain unrelieved by standard medical treatments and medications. Former RCW 69.51A.010(4)(b). It may be that Fry's doctor prescribed medical marijuana for chronic pain related to his head or neck injury. Or the authorization may have been to alleviate nausea, vomiting, or appetite loss caused by his severe anxiety and depression. In my opinion, whether Fry was suffering from any of these symptoms can only be determined after a factual inquiry. Without allowing Fry to present a defense, we cannot know whether a fact finder would conclude that Fry had symptoms that would qualify him under the terms defined under the statute. It is the role of the jury to apply the law to facts presented at a trial. *See Champagne v. Dep't of Labor & Indus.*, 22 Wn.2d 412, 419, 156 P.2d 422 (1945).

Procedurally, the trial court struck Fry's medical use of marijuana defense upon the prosecutor's motion in limine, because anxiety was listed in the authorization and the court found as a matter of law that it was not a qualifying condition.[2] Despite the signed authorization from Fry's physician that in his medical opinion "the potential benefits of the medical use of marijuana would likely outweigh the health risks for this patient" and that Fry had "a terminal illness or debilitating condition as defined in RCW 69.51A.010," CP at 20-21, the lead

[2] At the hearing on the motion in limine the trial judge stated, "What I'm finding here as a matter of law [is] that there's no medical marijuana defense available to Mr. Fry and, in turn, Mrs. Fry because this anxiety and other problem is not something that's on the list. And that would appear to [be] a condition, pre-condition to even asserting the affirmative defense." Transcript of Proceeding (TR) at 49.

opinion nevertheless affirms the conclusion of the trial judge that Fry did not have a debilitating condition as a matter of law. In my view, Dr. Orvald's authorization was sufficient to satisfy the threshold showing required of Fry that he was a qualified person under the act. It was not the proper role of the trial judge to review the doctor's records and conclude as a matter of law that Fry did not have a qualifying condition. There is nothing in the act that requires the debilitating condition be listed or described in the authorization, and surely the voters did not intend that whether a person is guilty of a felony should turn on a physician's choice of words when filling out an authorization. *Cf. Shepherd*, 110 Wn. App. at 551. Whether Fry had a qualifying condition under the act was a question of fact, not law.

The lead opinion uses our decision in *Tracy* to bolster its holding that Fry was not entitled to raise a defense. However, in *Tracy*, the issue was much different. In *Tracy*, the doctor was not authorized to issue the medical marijuana authorization. *Tracy*, 158 Wn.2d at 690. Our decision was controlled by the fact that a qualifying patient under the statute is one who has been diagnosed by a Washington-licensed physician and Tracy had been diagnosed only by a California physician not licensed in Washington. *Id.* Tracy presented a clear question of law, a question of statutory interpretation: could a physician not licensed in Washington satisfy the statutory condition of being diagnosed by a Washington licensed physician as required by former RCW 69.51A.010(3)(a)? We did not mean to imply that the issue of whether a person is a qualified person under the statute is always a question of law

to be determined by the court.

When a defendant is charged with a violation of state law involving marijuana, he may assert that he intends to raise a medical marijuana defense under chapter 69.51A RCW. The State may make a motion to preclude the defendant from asserting the defense, arguing that the requirements of the statute have not been met. But in my view, if the defendant is able to present a written authorization from a Washington-licensed physician stating that the defendant has a qualifying condition, then he should be allowed to move forward with the defense. Whether a defendant can meet the burden of proving by a preponderance of the evidence that he in fact has a qualifying condition will of course depend on what is presented at trial to the trier of fact.

Although I conclude that the trial court erred by determining from the authorization alone that Fry did not have a qualifying condition and therefore was not a qualifying patient, I would affirm on alternative grounds. A trial judge has an additional role as a gatekeeper to ensure that there is sufficient evidence to permit any affirmative defense to proceed to trial. An opponent has the right to challenge any claimed defense. Here the prosecutor made a motion in limine to strike Fry's medical marijuana defense, arguing that Fry did not have a qualifying condition and that Fry had well more than a 60 day supply of marijuana. Although Fry was prepared to offer the testimony of a doctor and a botanist on the issue of the quantity of marijuana necessary for a 60 day supply, counsel conceded that Fry did not have a "qualifying condition" under the act.[3] While the trial court erroneously, in my

view, concluded as a matter of law that Fry was not a "qualified person" under the act, when the State moved in limine to exclude the defense Fry failed to offer additional supporting evidence that he had a qualifying condition. Based on Fry's concession and failure to provide any additional evidence to support the medical use of marijuana defense I would affirm.

On the issue of whether probable cause supports the issuance of the search warrant, I concur with the lean opinion in result only. I would affirm the Court of Appeals.

[3] The concession was actually made by counsel for Mrs. Fry who stated that "[the prosecutor] is saying well that wasn't a good authorization because that particular problem isn't covered by the statute. And I think we have to concede that. As we look at the statute, it wasn't. But the client believed it was." TP at 39. Counsel for Fry, present at the hearing, did not disagree and offered no evidence other than that offered by counsel for Mrs. Fry.

AUTHOR:

Justice Tom Chambers

WE CONCUR:

Justice Susan Owens

Justice Charles W. Johnson

Justice Debra L. Stephens