No. 81210-1

SANDERS, J. (dissenting)—Former RCW 69.51A.040(1) (1999) provides, "Any person meeting the requirements appropriate to his or her status under this chapter shall be considered to have engaged in activities permitted by this chapter and *shall not be penalized in any manner, or denied any right or privilege, for such actions*." (Emphasis added.) Under our state constitution we have a right to be free from searches and other invasions of privacy, absent authority of law. Const. art. I, § 7. This authority of law comes in the form of a warrant, which requires probable cause to believe a person is involved in criminal activity and a search will uncover evidence of that criminal activity. *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008); *State v. Puapuaga***,** 164 Wn.2d 515, 522, 192 P.3d 360 (2008).

Here, police officers smelled burnt marijuana at Jason Fry's residence and therefore initially had probable cause to believe Fry was involved in *criminal* activity stemming from the possession of marijuana.[1] However, Fry produced documentation to the officers demonstrating he met the requirements of former RCW 69.51A.040(2) permitting him *legally* to possess marijuana. This documentation alleviated any probable cause to believe Fry was engaged in *criminal* activity based upon the smell of

burnt marijuana. As the lead opinion recognizes, there is no indication the officers questioned the validity of the documentation at the time the search warrant was issued. Lead op. at 6-7. Nevertheless the officers conducted the search, invading Fry's home and his private affairs in violation of article I, section 7 and former RCW 69.51A.040(1).

The lead opinion reads the Washington state medical use of marijuana act to provide only an affirmative defense. Lead op. at 7 (quoting RCW 69.51A.005 (1999); .040(1)). Even so this ignores the protections of the second sentence of former RCW 69.51A.040(1): "Any person meeting the requirements appropriate to *his or her status* under this chapter *shall be considered* to have engaged in activities permitted by this chapter and shall not be penalized in any manner, or denied any right or privilege, for such actions." (Emphases added.) Fry's wife provided documentation to the officers to show Fry's "status" under the chapter—the status of a "qualifying patient." *See* former RCW 69.51A.010(3) (1999).[2] As a facially "qualifying patient" Fry should

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[1] The officers were informed of a marijuana-growing operation at Fry's residence, but the State has provided no additional details regarding that information. The probable cause justifying the search warrant was based entirely on the officers' smelling burnt marijuana. *See State v. Fry*, 142 Wn. App. 456, 460, 174 P.3d 1258 (2008). There is no argument here that additional grounds existed to provide probable cause absent the smell.

[2] "Qualifying patient" means a person who:

> (a) Is a patient of a physician licensed under chapter 18.71 or 18.57 RCW;
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> (b) Has been diagnosed by that physician as having a terminal or debilitating medical condition;

have been "considered to have engaged in activities permitted by this chapter"—a presumption that a qualifying patient is acting in accordance with the chapter. *See* former RCW 69.51A.040(1). The only basis for probable cause was the smell of burnt marijuana. That evidence is consistent with activities permitted for qualifying patients under the chapter.

The requirement under former RCW 69.51A.040(2)(c) supports this reading of the second sentence of former RCW 69.51A.040(1). That provision requires a person asserting compliance with the act to "[p]resent his or her valid documentation to any law enforcement official who questions the patient or provider regarding his or her medical use of marijuana." Doing so provides officers with the basis to determine whether a person meets the requirements for a "qualifying patient" and thus invokes the presumption. Conversely, if former RCW 69.51A.040(1) provides only an affirmative defense after one is charged with a crime, as the majority asserts, the requirement to provide valid documentation to the officer serves no purpose as the officer has no reason to view the documentation relevant only to establishing an affirmative defense in court. Therefore with or without the required documents the

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> (c) Is a resident of the state of Washington at the time of such diagnosis;
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> (d) Has been advised by that physician about the risks and benefits of the medical use of marijuana; and
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> (e) Has been advised by that physician that they may benefit from the medical use of marijuana.

Former RCW 69.51A.010(3).

individual is still arrested and jailed.

The lead opinion clings to the notion that an officer must conduct a search, even when an individual produces documentation of his status, because the search is the only way for the officer to confirm the individual does not possess more than a 60-day supply of marijuana. *See* majority at 11-12 (quoting former RCW 69.51A.040(2)(b)). But this ignores the fact that the officers here did not have probable cause to believe Fry possessed more than a 60-day supply; thus a search on this basis is unconstitutional. Whereas former RCW 69.51A.040(1) provides a reason for an officer to confirm an individual's status and former RCW 69.51A.040(2)(c) provides the means to do it, nothing in the act suspends constitutional privacy rights (nor could a statute trump the constitution in any event) permitting officers to confirm that all criteria in the act are met by searches not supported by probable cause.

Ultimately the lead opinion's interpretation of the act provides an absurd form of protection to qualifying patients. When an officer smells burnt marijuana coming from the home of an individual with a terminal or debilitating illness who benefits from marijuana use, the individual must provide his documentation to the officer to show he is a "qualifying patient." Yet according to the lead opinion, he is still subject to a search of his home and to an arrest. Certainly, at the individual's trial, he can assert the affirmative defense of the lead opinion's neutered version of the Washington state medical use of marijuana act; however this does not cure the unconstitutional

search. Upon release he can return home once again, exhausted and in pain, and use marijuana again to alleviate his pain. However, following another knock on his door from an officer smelling burnt marijuana, the individual is again subject to interrogation, home search, and arrest. I do not find the mercy of the people of Washington for individuals with terminal or debilitating illnesses to be so fickle.

The trial court erred by not suppressing the fruits of a search that was based upon a warrant lacking probable cause. In addition, I agree with the concurrence to the extent it would hold that whether Fry had a qualifying condition is a question of fact that should be decided by a jury. Defendants in Fry's position are entitled to bring in evidence at trial to prove by a preponderance of the evidence that they indeed have a qualifying condition. Fry should not have been precluded from asserting a medical use of marijuana defense.

I dissent.

AUTHOR:
Justice Richard B. Sanders

WE CONCUR: