IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JASON LEE FRY, Petitioner.	)	No. 81210-1 En Banc Filed January 21, 2010

J.M. JOHNSON, J.—Two police officers were informed of a marijuana growing operation at the residence of Jason and Tina Fry. When the officers approached the home, the smell of burning marijuana was apparent. Jason Fry did not consent to a search, and Tina Fry presented a document purporting to be authorization for medical marijuana. The officers obtained a telephonic search warrant, entered the Frys' home, and seized over two pounds of marijuana.

At trial, Jason Fry (Fry) argued the marijuana evidence should have been suppressed because presentation of a medical marijuana authorization automatically negates probable cause. The judge denied the motion to suppress and also declined to allow Fry to present a compassionate use defense on other grounds. Fry appealed both rulings.

We affirm the Court of Appeals, which upheld the trial court's decision to allow the evidence seized at the Frys' home pursuant to a warrant and declined to allow Fry to claim the compassionate use defense at trial.

Facts and Procedural History

On December 20, 2004, Stevens County Sheriff Sergeant Dan Anderson and Deputy Bill Bitton (officers) went to the residence of Jason and Tina Fry. The officers had received information there was a marijuana growing operation there.

The officers walked up to the front porch and smelled the scent of burning marijuana. Jason Fry opened the door, at which time the officers noticed a much stronger odor of marijuana. Fry told the officers he had a legal prescription for marijuana and told the officers to leave absent a search warrant. Tina Fry gave the officers documents entitled "medical marijuana

authorization." The authorization listed Fry's qualifying condition as "severe anxiety, rage, & depression related to childhood." Clerk's Papers (CP) at 20-23.

The officers obtained a telephonic search warrant and found several containers with marijuana, growing marijuana plants, growing equipment, paraphernalia, and scales in the Frys' home. The marijuana was found to weigh 911 grams (more than 2 pounds).

Prior to trial, Fry made a motion to suppress the evidence seized by the officers pursuant to the search warrant. The motion also indicated Fry would assert the affirmative defense of medical marijuana authorization (compassionate use defense) pursuant to former RCW 69.51A.040 (1999).

After hearing arguments, the superior court judge denied Fry's motion to suppress. The court concluded the officers demonstrated probable cause to search the Frys' home based on the strong odor of marijuana and other facts described in the telephonic affidavit. The court also concluded that Fry did not qualify for the compassionate use defense because he did not have a qualifying condition.[1]

[1] Because the court found Fry was not a "qualifying patient," it declined to reach the State's other arguments. The State also argued Fry would not qualify because the amount of marijuana in his possession, over 2 pounds, exceeded the 60-day supply the statute

After a stipulated facts bench trial, Fry was convicted of possession of more than 40 grams of marijuana. The court sentenced him to 30 days of total confinement, converted to 240 hours of community service. Fry appealed, and Division Three of the Court of Appeals held that Fry's production of a document purporting to be a marijuana use authorization did not prohibit the search of Fry's home by police officers who had probable cause and obtained a warrant. *State v. Fry*, 142 Wn. App. 456, 461, 174 P.3d 1258 (2008). The Court of Appeals also agreed with the trial court that Fry was not a "qualifying patient" and therefore was not able to claim the affirmative defense for medical marijuana use. *Id*. at 462-63. Fry appealed the decision, and we granted review. *State v. Fry*, 164 Wn.2d 1002, 190 P.3d 55 (2008).

Issues

1. Whether a telephonic search warrant was supported by probable cause when police officers were informed that marijuana was being grown at a certain residence, the officers smelled marijuana upon arriving, but the defendant provided a medical authorization form for marijuana

2. Whether the trial court erred in disallowing Fry's medical marijuana defense

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allowed. CP at 103.

Analysis

A. Whether a telephonic search warrant was supported by probable cause when police officers were informed that marijuana was being grown at a certain residence, the officers smelled marijuana upon arriving, but the defendant provided a medical authorization form for marijuana

Fry argues the marijuana evidence seized by the officers should have been suppressed. We review a trial court's conclusion of law pertaining to the suppression of evidence de novo. *State v. Eisfeldt*, 163 Wn.2d 628, 634, 185 P.3d 580 (2008) (quoting *State v. Carneh*, 153 Wn.2d 274, 281, 103 P.3d 743 (2004)). As the findings of fact in this case were stipulated and uncontested, they are verities on appeal. *State v. Levy*, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006) (citing *State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003)).

The warrant clause of the Fourth Amendment to the United States Constitution and article I, section 7 of our own constitution requires that a search warrant be issued upon a determination of probable cause. *State v. Vickers*, 148 Wn.2d 91, 108, 59 P.3d 58 (2002).[2] "The probable cause requirement is a fact-based determination that represents a compromise

[2] Article I, section 7 provides greater privacy protection than the Fourth Amendment, and an analysis under *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986) is not necessary. *Vickers*, 148 Wn.2d at 108 n.43.

between the competing interests of enforcing the law and protecting the individual's right to privacy." *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008) (citing *Brinegar v. United States*, 338 U.S. 160, 176, 69 S. Ct. 1302, 93 L. Ed. 1879 (1949)). "Probable cause exists where there are facts and circumstances sufficient to establish a reasonable inference that the defendant is involved in criminal activity and that evidence of the criminal activity can be found at the place to be searched." *State v. Maddox*, 152 Wn.2d 499, 505, 98 P.3d 1199 (2004) (citing *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999)). "It is only the probability of criminal activity, not a prima facie showing of it, that governs probable cause." *Maddox*, 152 Wn.2d at 505.

There is no contention that the facts, including the information and smell of marijuana, do not support a finding of probable cause to search the Frys' residence.[3] However, Fry contends the probable cause was negated once he produced the authorization. Although there was a later dispute over the validity of the authorization, there is no indication in the record that the

[3] *See, e.g., State v. Olson*, 73 Wn. App. 348, 356, 869 P.2d 110 (1994) ("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.") (citing *State v. Huff*, 64 Wn. App. 641, 647-48, 826 P.2d 698 (1992)).

officers or the magistrate questioned the validity at the time the search warrant was issued. Nevertheless, the officers' search and arrest were supported by probable cause, and a claimed authorization form does not negate probable cause.

Former chapter 69.51A RCW (1999) (the Act)

By passing Initiative 692 (I-692), the people of Washington intended that

> [q]ualifying patients with terminal or debilitating illnesses who, in the judgment of their physicians, would benefit from the medical use of marijuana, shall not be found guilty of a crime under state law for their possession and limited use of marijuana.

Former RCW 69.51A.005 (1999). Additionally,

> [*i*]f *charged with a violation* of state law relating to marijuana, any qualifying patient who is engaged in the medical use of marijuana, or any designated primary caregiver who assists a qualifying patient in the medical use of marijuana, *will be deemed to have established an affirmative defense to such charges* by proof of his or her compliance with the requirements provided in this chapter. 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.

Former RCW 69.51A.040(1) (emphasis added). Based on I-692 and the derivative statute, we have recognized that Washington voters created a compassionate use defense against marijuana charges. *See State v. Tracy*,

158 Wn.2d 683, 691, 147 P.3d 559 (2006). An affirmative defense admits the defendant committed a criminal act but pleads an excuse for doing so. *State v. Votava*, 149 Wn.2d 178, 187-88, 66 P.3d 1050 (2003) (citing *State v. Riker*, 123 Wn.2d 351, 367-68, 869 P.2d 43 (1994)). The defendant must prove an affirmative defense by a preponderance of the evidence. *State v. Frost*, 160 Wn.2d 765, 773, 161 P.3d 361 (2007). An affirmative defense does not negate any elements of the charged crime. *Id.*

Possession of marijuana, even in small amounts, is still a crime in the state of Washington. *See* RCW 69.50.4014. A police officer would have probable cause to believe Fry committed a crime when the officer smelled marijuana emanating from the Frys' residence. Fry presented the officer with documentation purporting to authorize his use of marijuana. Nevertheless, the authorization only created a potential affirmative defense that would excuse the criminal act. The authorization does not, however, result in making the act of possessing and using marijuana noncriminal or negate any elements of the charged offense. Therefore, based on the information of a marijuana growing operation and the strong odor of marijuana when the officers approached the Frys' home, a reasonable inference was established

that criminal activity was taking place in the Frys' residence. Therefore, the officers had probable cause and the search warrant was properly obtained.

This conclusion is supported by *McBride v. Walla Walla County*, 95 Wn. App. 33, 975 P.2d 1029, 990 P.2d 967 (1999). In *McBride*, a police officer arrested McBride for hitting his son. The officer had substantial facts and information to indicate McBride acted in self-defense. Nevertheless, the officer arrested McBride as mandated by the domestic violence section in former RCW 10.31.100(2)(b) (1996).

Like the compassionate use defense, self-defense is an affirmative defense. *See City of Kennewick v. Day*, 142 Wn.2d 1, 10, 11 P.3d 304 (2000). McBride argued it was the officer's duty to evaluate the self-defense claim and determine whether it negated the existence of probable cause to arrest him. *McBride,* 95 Wn. App. at 39. The court concluded, "[t]he officer is not judge or jury; he does not decide if the legal standard for self-defense is met." *Id*. at 40. The court determined the affirmative defense "did not vitiate probable cause." *Id*.

Fry attempts to distinguish *McBride*. He notes that the officers in that case were required to arrest an individual involved in a domestic violence

dispute. There was no statutory requirement compelling the officers to search Fry's residence and seize the marijuana. However, probable cause is not created or negated by statutory mandate to search or arrest (or lack thereof). In most cases, including the one before us, officers have discretion as to whether they will conduct a search or make an arrest once they have probable cause. However, this discretion has no impact on whether probable cause exists.

Under the Act, a person "charged with a violation of state law relating to marijuana . . . will be deemed to have established an affirmative defense to such charges by proof of his or her compliance with the requirements provided in this chapter." Former RCW 69.51A.040(1). One of the requirements is that a qualifying patient "[p]resent his or her valid documentation to any law enforcement official who questions the patient regarding his or her medical use of marijuana" (presentment requirement). Former RCW 69.51A.040(2)(c).

An amici brief[4] calls our attention to the "presentment" requirement in the Act. It is argued that if the presentment requirement is to have meaning,

[4] Washington Association of Criminal Defense Lawyers and American Civil Liberties Union of Washington.

presentation of a patient's authorization must establish lawful possession of marijuana, and thereby the absence of criminal activity that would provide probable cause for a search or seizure. Amici Br. at 7-8.

The presentment requirement must be read in context. It is only triggered when someone is "charged with a violation." Former RCW 69.51A.040(1). A person who meets the presentment requirement (and all other requirements) will "be deemed to have established an affirmative defense." *Id*. Additionally, the requirements, taken together, do not indicate that the Act created more than an affirmative defense. One of the other requirements mandates that the charged individual "[p]ossess no more marijuana than is necessary for the patient's personal, medical use, not exceeding the amount necessary for a sixty-day supply." Former RCW 69.51A.040(2)(b). It would be impossible to ascertain whether an individual possesses an excessive amount of marijuana without a search.

Instead, the presentment requirement facilitates an officer's decision of whether to use his or her discretion and seize the marijuana and/or arrest the possessor. Once the officer has searched the individual and established that the individual is possessing marijuana in compliance with the Act (i.e.,

appropriate documentation, limited supply, etc.) the officer would then have sufficient facts to determine whether an arrest is warranted. This view is supported by the 2007 amendment to RCW 69.51A.040. The current version reads, "[i]f a law enforcement officer determines that marijuana is being possessed lawfully under the medical marijuana law, the officer may document the amount of marijuana, take a representative sample that is large enough to test, but not seize the marijuana." RCW 69.51A.040(1). It is difficult to imagine how a law enforcement officer, having been presented with a medical marijuana authorization, would be able to determine that the marijuana is otherwise being lawfully possessed (and take a sample) without some kind of search.

I-692 did not legalize marijuana, but rather provided an authorized user with an affirmative defense if the user shows compliance with the requirements for medical marijuana possession. *See* former RCW 69.51A.005, .040. As an affirmative defense, the compassionate use defense does not eliminate probable cause where a trained officer detects the odor of marijuana. A doctor's authorization does not indicate that the presenter is totally complying with the Act; e.g., the amounts may be excessive. An

affirmative defense does not per se legalize an activity and does not negate probable cause that a crime has been committed. We therefore affirm the Court of Appeals on this issue.

B. Whether the trial court erred in disallowing Fry's medical marijuana defense

Prior to trial, the State argued Fry was not a "qualifying patient" and could not, therefore, assert the compassionate use defense. The State also argued Fry could not claim the affirmative defense because the amount of marijuana in his possession exceeded a 60-day supply. The trial court concluded Fry was not a "qualifying patient" and declined to reach the State's other arguments. CP at 102-03. The Court of Appeals agreed with the trial court's ruling.

Whether the trial court erred in disallowing Fry's compassionate use defense is a question of law we review de novo. *See Tracy*, 158 Wn.2d at 687. Fry bears the burden of offering sufficient evidence to support the affirmative defense of compassionate use. *Id*. at 689 (citing *State v. Janes*, 121 Wn.2d 220, 236-37, 850 P.2d 495 (1993)). Fry bore the burden of producing at least some evidence that he was a qualified patient who could assert the compassionate use defense. *Id*. (citing *Janes*, 121 Wn.2d at 237).

The intent of the medical marijuana statute was that "[q]ualifying patients *with terminal or debilitating illnesses* who, in the judgment of their physicians, would benefit from the medical use of marijuana, shall not be found guilty of a crime under state law for their possession and limited use of marijuana." Former RCW 69.51A.005 (emphasis added).

A "qualifying patient" is a person 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). The State argues Fry is not a qualifying patient under the Act because Fry has not been diagnosed as having a terminal or debilitating medical condition under former RCW 69.51A.010(3)(b). Fry's doctor listed "severe anxiety, rage, & depression related to childhood" as the debilitating medical condition qualifying Fry to use medical marijuana. CP at 20-23.[5] These conditions did not qualify

[5] Fry's physical examination lists other ailments such as hearing loss, low back pain and a

under I-692 as enacted.

In 2007, after the search and seizure in this case, the legislature revised the medical marijuana statute to include additional terminal or debilitating medical conditions that would qualify under the Act. RCW 69.51A.010(4). Fry's conditions of severe anxiety and rage are not included in the list of qualifying conditions, even as amended. In 2004, the State of Washington Department of Health Medical Quality Assurance Commission issued a final order denying a petition to include depression and severe anxiety in the list of "terminal or debilitating medical conditions" under RCW 69.51A.010(4). Final Order on Pet., *In re Condrey*, No. 04-08-A-2002MD (Wash. Med. Quality Assurance Comm'n Nov. 19, 2004).

Fry did not actually have a terminal or debilitating medical condition as provided in the Act. The stated intent of the statute was to allow a qualifying patient with a terminal or debilitating illness to be found not guilty of marijuana possession under certain circumstances. Former RCW 69.51A.005. ("The people of Washington state find that . . . [q]ualifying patients *with* terminal or debilitating illnesses . . . shall not be found guilty

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scar from being injured by a horse. However, there is no indication that these conditions were considered as a "qualifying condition." There is no indication that these conditions caused "intractable pain" that was "unrelieved by standard medical treatments."

. . . .”). Conversely, the intent was not to excuse a marijuana user without a terminal or debilitating illness from criminal liability. Former RCW 69.51A.005.

In the only case we have decided under the Act, an otherwise qualifying patient received authorization to use medical marijuana from a doctor in California. *Tracy*, 158 Wn.2d at 686. This court interpreted the provision in the Act defining qualifying doctors as “those licensed under Washington law” to require a doctor formally licensed in Washington. *Id*. at 690. The majority opinion concluded that “[s]ince Tracy was not a patient of a qualifying doctor, she is not entitled to assert the defense.” *Id*. The court stated unequivocally that “[o]nly qualifying patients are entitled to the defense under the act.” *Id*. (citing former RCW 69.51A.005).

This court declined to extend the defense to Tracy, who was not in compliance with the statute because the doctor was not authorized to issue the medical marijuana authorization. Similarly, we will not extend the statute to permit an individual *without* a qualifying illness to claim its benefits.

In order to avail himself of the compassionate use defense, Fry must qualify under the Act. Fry does not have one of the listed debilitating

conditions, and therefore does not qualify. We affirm the Court of Appeals decision to not permit Fry to claim the compassionate use defense.

Conclusion

We interpret chapter 69.51A RCW and its affirmative defense to criminal violations as it was enacted by the people and amended by the legislature. According to the language of the statute, and consistent with the intent of I-692, an authorized user of medical marijuana will have an affirmative defense only if he or she shows full compliance with the Act. However, an affirmative defense does not negate probable cause for a search in the case, conducted with a valid warrant.

The officers in this case had probable cause to search Fry's residence and seize the marijuana, which was in excess of two pounds. The trial court correctly decided that Fry could not avail himself of the compassionate use defense because his claimed health conditions did not qualify under the Act. We therefore affirm the Court of Appeals and uphold Fry's judgment and sentence.

AUTHOR:
Justice James M. Johnson

WE CONCUR:
Chief Justice Barbara A. Madsen

Justice Mary E. Fairhurst

Justice Gerry L. Alexander