

LYNNWOOD MUNICIPAL COURT
FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	Cause No.: C 60875
)	
Plaintiffs,)	
vs.)	Motion for Return of Property
)	
X, WILLIAM)	
)	
Defendant.)	

Comes now the defendant, William A. X, by and through his attorney of Record, Aaron A. Pelley, and respectfully moves the court to order the return of property seized during a February 27, 2010 arrest in the above captioned matter. This motion is made pursuant to CrRLJ 2.3(g) and the authorities cited in the following memorandum of law. Under CrRLJ 2.3, an evidentiary hearing is required to determine which party has the better claim to possession of the property. CrRLJ 2.3(e)¹.

¹ **Motion for Return of Property.** A person aggrieved by an unlawful search and seizure may move the court for the return of the property on the ground that the property was illegally seized and that the person is lawfully entitled to possession thereof. If the motion is granted the property shall be returned. If a motion for return of property is made or comes on for hearing after an indictment or information is filed in the court in which the motion is pending, it shall be treated as a motion to suppress.

Facts

On February 27, 2010, Mr. X was cited for possession of marijuana (greater than forty ounces) and Violation of the Uniformed Controlled Substance Act. A search incident to arrest yielded, among other item, the following:

- Medical Marijuana

Through negotiations with the Lynnwood Prosecuting Attorney's Office, the case was settled short of trial.

Mr. X is a resident of Washington, as indicated on his medical license (See Exhibit 1), and now seeks the return of those items pursuant to his lawful prescription.

Mr. X, through his attorney, Aaron A. Pelley, respectfully requested Lynnwood Police Department to return the medical marijuana taken. Lynnwood Police Department declined our request, setting forth that they would not return the property without a court order.

Argument

Under the law of Washington State, qualifying patients with terminal or debilitating illnesses who, in the judgment of their physicians, may 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.

The pertinent RCW states:

- 69.51A.050. Medical marijuana, lawful possession--State not liable
- (1) The lawful possession or manufacture of medical marijuana as authorized by this chapter shall not result in the forfeiture or seizure of any property.
 - (2) No person shall be prosecuted for constructive possession, conspiracy, or any other criminal offense solely for being in the presence or vicinity of medical marijuana or its use as authorized by this chapter.

(3) The state shall not be held liable for any deleterious outcomes from the medical use of marijuana by any qualifying patient.

The defense is asking for the return of Mr. X's medical marijuana that was wrongfully confiscated. The Police Department's regularly values the cost of marijuana between 3000 and 3500 dollars per pound. The defense argues that Mr. X is entitled to a return of the medical marijuana, or the corresponding replacement value.

"[A] court may refuse to return seized property no longer needed for evidence only if (1) the defendant is not the rightful owner; (2) the property is contraband; or (3) the property is subject to forfeiture pursuant to statute." *State v. Alaway*, 64 Wash.App. 796, 798, 828 P.2d 591 (1992), *citing United States v. Farrell*, 606 F.2d 1341, 1347 (D.C.Cir.1979); *United States v. Wright*, 610 F.2d 930, 939 (D.C.Cir.1979); *United States v. Wilson*, 540 F.2d 1100, 1101 (D.C.Cir.1976); *United States v. Brant*, 684 F.Supp. 421, 423,(M.D.N.C.1988). "In all cases, the burden of proof is upon the law enforcement agency to establish, by a preponderance of the evidence, that the property is subject to forfeiture." RCW 69.50.505(5). If law enforcement cannot establish a grounds for forfeiture, items are thus to be returned to the defendant upon the court's determination that they are no longer needed for evidentiary purposes. *State v. Pelkey*, 58 Wn. App. 610, 794 P.2d 1286 (1990).

Here, it is clear that Mr. X is entitled to a return of the property at issue.

The case has been resolved with a dismissal, and the property is no longer needed as evidence. Mr. X is plainly the rightful owner of the medical marijuana at issue. It was in his possession at the time he was arrested, and there is no claim in this case that the property did not belong to him. Further, the property cannot be considered contraband,

or subject to forfeiture pursuant to any drug laws, as the property in question consisted solely of marijuana possessed for medical use pursuant to a valid prescription.

RCW 69.51A.040 specifically provides that qualifying patients and caregivers who are in possession of medical marijuana pursuant to a valid prescription, in compliance with the requirements of the chapter, "shall not be penalized *in any manner*, or denied any right or privilege" as a result of the possession. RCW 69.51A.040(2). Clearly, forfeiture of the medical marijuana legally possessed cannot be considered anything other than a penalty for the possession of the marijuana, and that forfeiture cannot therefore be allowed under Washington law.

Washington's Appellate courts of record have not yet had an opportunity to rule on the forfeiture of medical marijuana legally possessed pursuant to statute and a valid prescription within the State. A number of Superior Court's have ruled in favor of Defendant's on this matter. Other jurisdictions, including the State of California, which legalized the use of marijuana for medical purposes long before that action was taken in Washington, have ruled that due process requires the return of medical marijuana, as it constitutes property that the State considers legally possessed and which cannot therefore be subject to forfeiture. *City of Garden Grove v. Kha*, 157 Cal. App. 4th 355, 68 Cal. Rptr. 3d 656 (2007), review denied (2008), cert. denied, _ U.S. _, 129 S. Ct. 623, 172 L. Ed. 2d 607 (2008). In *Kha*, Mr. Kha was found to have a small amount of marijuana in his possession during a traffic stop. Though officers admitted that the documentation provided by Mr. Kha to substantiate his claim that he possessed the marijuana for medical purposes appeared to be legitimate, they nevertheless seized the marijuana and charged Mr. Kha with possession. The drug charge was later

dismissed for lack of evidence, but the City Attorney opposed Mr. Kha's request for the return of the marijuana.

The Court rejected the City's arguments that Mr. Kha did not lawfully acquire the marijuana in his possession, finding that the source of acquisition is irrelevant under California's medical marijuana statute. The Court also rejected the City's contention that Mr. Kha was not sufficiently ill to require medical marijuana, finding that the valid physician's prescription was sufficient to substantiate Mr. Kha's claim to the contrary. *Kha*, at 18 (opinion attached).

Next, the Court rejected the City's claim that Mr. Kha's possession of marijuana was in violation of federal law, and therefore a forfeiture was proper, noting, "[t]he State tribunals have no power to punish crimes against the laws of the United States, as *such*. The same act may, in some instances, be an offense against the laws of both, and it is only as an offense against the State laws that it can be punished by the State, in any event." *Kha*, attached, citing *People v Kelly* (1869) 38 Cal. 145, 150; see also *People v Grososky* (1946) 73 Cal.App.2d 15, 17-18 ." (*People v. Tilehkooh, supra*, 113 Cal.App.4th at pp. 1445-1446, fn. omitted.) Thus, the court concluded, the substance could be forfeited and destroyed only if its possession was prohibited under State, not federal law. *Kha*, attached, at 26.

Finally, the Court rejected the City's arguments that federal law preempted state law, not with respect to the legality of the substance at issue, but only to the extent that State law allows the return of medical marijuana to authorized users. The Court cited the principles of federalism, which allow States great latitude under their police powers to legislate, among other things, the legality or illegality of certain actions. *Kha*,

attached, at 28-29. Therefore, the Court reasoned, any 'consideration of issues arising under the Supremacy Clause "start[s] with the assumption that the historic police powers of the States [are] *not* to be superseded by ... a Federal Act unless that [is] the clear and manifest purpose of Congress.'" *Kha*, attached, at 29, *citing Jevne v. Superior Court* 35 Cal.4th 935, 949, italics added (2005), *citing Cipollone v. Liggett Group, Inc.* 505 U.S. 504, 516 (1992). The Court concluded that Congress' prohibition against marijuana possession was insufficient evidence of a clear and manifest intention to supersede state laws to the contrary, noting in particular that it is "unreasonable to believe returning marijuana to qualified patients who have had it seized by local police will hinder the federal government's enforcement efforts.

"Practically speaking, this subset of medical marijuana users is too small to make a measurable impact on the war on drugs." *Kha*, attached, at 31. The Court also noted that the state law did not bar federal prosecution efforts for the possession of medical marijuana, and concluded that federal supremacy concerns are not implicated in these cases. *Kha*, attached, at 32.

In concluding that Mr. Kha was entitled to the return of his marijuana, the Court admitted that there was no specific provision within the state statute for the return of the property, but relied upon federal due process standards, reasoning that Continued official retention of a qualified patient's marijuana simply cannot be squared with notions of fundamental fairness." *Kha*, attached, at 36. The Court concluded, "Withholding small amounts of marijuana from people like Kha who are qualified patients under the CUA would frustrate the will of the people to ensure such patients have the right to obtain and use marijuana without fear of criminal prosecution or

sanction... It would also, as explained, be inconsistent with due process, as well as other provisions of the law that contemplate the return of lawfully possessed property." *Kha*, attached, at 36-37.

Here, as in *Kha*, Mr. X was in possession of only that amount of marijuana allowed to him under his authorization. He had a valid authorization for the substance that has not been contested by the State. It seems clear, then, that Mr. X was properly and legally in possession of the marijuana found on him on the night of his arrest and State laws mandate the return of legally possessed property, that property should be returned to him.

Defense asks that the medical marijuana seized by the Washington State Patrol be returned to Mr. X, together with any paraphernalia and all other legally possessed items.

DATED this 20th day of May, 2010.

A handwritten signature in black ink, appearing to read 'A. Pelley' with a stylized flourish at the end.

Aaron A. Pelley WSBA 37484
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