IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 77534-6
	)	
v.	)	En Banc
	)	
SHARON LEE TRACY,	)	
	)	
Petitioner.	)	Filed November 22, 2006
_____	)	

CHAMBERS, J. — In 1998, Washington voters passed Initiative 692 (I-692). I-692 created a compassionate use defense against prosecution for marijuana related crimes, but only for "qualifying patients." Ch. 69.51A RCW. Sharon Lee Tracy challenges her convictions for manufacturing and possessing marijuana on the theory that she was improperly prevented from presenting this defense. We conclude that she did not establish she was a "qualifying patient" entitled to present a compassionate use defense under RCW 69.51A.010(3). We also conclude that the absence of the California medical marijuana card from the record prevents us from reaching her full faith and credit arguments. We affirm the Court of Appeals.

FACTS

After interviewing Tracy's stepdaughter Aimee Tracy, while investigating a domestic violence complaint, Detective Brett Robison accompanied Aimee to the Tracy home to collect some clothes, apparently to facilitate Aimee staying elsewhere. While at the Tracy home, Detective Robison smelled marijuana. Aimee disclosed that her stepmother used it regularly.

Detective Robison returned with a search warrant. About 40 grams of marijuana, four marijuana plants, and a California medical marijuana card were found and confiscated. Tracy admitted the marijuana was hers and stated that no one else in the house used it. About two months after this, Tracy saw an Oregon doctor who agreed with her California physician that she would benefit from the use of medical marijuana.

After being charged with possession and manufacture of marijuana, Tracy informed the prosecution that she intended to present a compassionate use defense based on both the California medical marijuana card she had in her possession on the day her home was searched and on the subsequent authorization she received from the Oregon doctor.[1] A hearing was conducted to determine whether she

[1] We note that the trial court entered a finding that the authorization received by the Oregon doctor, David L. Dodge, met Washington's requirements. His reasoning is not on the record. *See* Clerk's Papers at 36. According to the Department of Health website, no David L. Dodge is licensed to practice medicine in Washington State. *See* Wash. State Dep't of Health, Med. Quality Assurance Comm'n,

possessed "valid documentation" under RCW 69.51A.010(5)(a), providing an evidentiary basis for such a defense. There is no dispute that Tracy possessed a valid California medical marijuana card on the date of her arrest, May 7, 2003. It is also undisputed that no physician who was formally licensed to practice medicine in Washington State had authorized Tracy to use marijuana.

The case proceeded to a bench trial on stipulated facts. The trial court concluded that the evidence Tracy presented did not meet the statutory prerequisites for asserting a compassionate use defense, effectively preventing her from arguing her theory of the case. Subsequently, Tracy was convicted of possession and manufacture of marijuana. The Court of Appeals affirmed. *State v. Tracy*, 128 Wn. App. 388, 115 P.3d 381 (2005). We accepted review, *State v. Tracy,* noted at 156 Wn.2d 1030, 133 P.3d 474 (2006).

ANALYSIS

Only questions of law are before us. Our review is de novo. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). [2]

https://www.fortress.wa.gov/doh/hpqa1/Application/Credential_Search/profile.asp (search for David Dodge) (last visited November 16, 2006). Tracy does not argue that her California doctor was formally licensed in Washington.

[2] The State has made a motion to strike exhibits and arguments from an amici brief filed by the Washington Association of Criminal Defense Attorneys and American Civil Liberties Union. The materials in question relate to amici's argument that prosecutors and courts have interpreted the State Medical Use of Marijuana Act, chapter 69.51A, so over technically as to effectively deny those suffering from serious illnesses (such as AIDS (acquired immune deficiency syndrome), cancer, and chronic pain) the intended benefits of the act. Amici

1. Qualifying Patients

We surmise that Tracy's life has not been an easy one. The Skamania detective's visit to her home was part of a child welfare investigation prompted when Tracy's stepdaughter reported that her father had become enraged and smashed a chair. Tracy herself was staying at a domestic violence shelter at the time of the detective's initial visit with Aimee.

Tracy has also struggled with chronic pain since the 1970s. The record suggests that her medical conditions include a hip deformity, migraine headaches, a series of eight corrective surgeries following a ruptured colon and bowel conditions. As a result of these persistent health problems, Tracy has been disabled since 1998. Over the years, Tracy has been prescribed a number of different drugs including Vicodin and Soma. While visiting family in California, Tracy obtained a California doctor's authorization to possess marijuana for medical purposes.

Tracy may have been exactly the kind of patient the voters of this State had in mind when they enacted the medical marijuana initiative, I-692, in 1999. *See* ch. 69.51A RCW, the "State Medical Use of Marijuana Act." Under the act:

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may be correct that the benefits of the act have not been as great as people intended, but we only address the question before us, and many of amici's arguments are best made to the legislature. Since we do not reach the arguments presented, the motion is denied as moot.

> The people find that humanitarian compassion necessitates that the decision to authorize the medical use of marijuana by patients with terminal or debilitating illnesses is a personal, individual decision, based upon their physician's professional medical judgment and discretion.

RCW 69.51A.005.

But only qualifying patients are entitled to use the defense. This limits it to:

> *Qualifying 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;

Id. (emphasis added). The act defines "qualifying patient" as one 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.

RCW 69.51A.010(3) (emphasis added). It appears that the trial judge prevented Tracy from bringing the defense on the ground that she was not a patient of a "qualified physician" because her California physician was not licensed under chapter 18.71 or 18.57 RCW.[3] It also appears that the

[3] Chapter 18.57 RCW concerns osteopaths and is not before us.

trial judge excluded the authorization received from the Oregon doctor on the ground that it was not received until after the fact.[4]

A defendant asserting an affirmative defense, such as the compassionate use defense, bears the burden of offering sufficient evidence to support that defense. *State v. Janes,* 121 Wn.2d 220, 236-37, 850 P.2d 495 (1993). Tracy bore the burden of producing at least some evidence that she was a qualified patient of a qualified physician before she could assert the compassionate use defense. *Cf. Janes,* 121 Wn.2d at 237; *State v. McCullum,* 98 Wn.2d 484, 488, 656 P.2d 1064 (1983).

We turn to the meaning of "qualified physician" under the statute. Chapter 18.71 RCW establishes the statutory system which regulates physicians. Relevantly, it does two things. It licenses physicians to practice medicine in Washington, and it authorizes licensed physicians from other jurisdictions to practice medicine in Washington so long as they do not open an office, establish a place to meet with patients, or receive calls within the state. RCW 18.71.021, .030(6).

Becoming a licensed doctor in this state is a formal affair. Requirements include successful completion of an examination administered by the Washington Medical Quality Assurance Commission,

[4] We note that this likely accords with the statutory scheme. A defendant seeking to present compassionate use as an affirmative defense must present valid documentation to any officer who questions the presence of marijuana. RCW 69.51A.040(2)(c). However, we need not reach whether the trial judge correctly excluded the Oregon doctor's authorization on review on those grounds, given our disposition of the central issue in the case.

or passing an exam in another state and completing specific procedural requirements. RCW 18.71.070, .090, .095. Tracy's California and Oregon doctors are not formally "licensed" in Washington under chapter 18.71 RCW. The State contends that our inquiry can end here. Since Tracy was not a patient of a qualifying physician, they argue, she is not entitled to present the defense.

Tracy argues that the courts below were not sufficiently expansive in interpreting the voters' intent. She reasons that since out-of-state physicians have licenses *recognized* under chapter 18.71 RCW, we should treat the physicians as being *licensed* under chapter 18.71 RCW. *Cf.* RCW 18.71.021 ("No person may practice . . . medicine without first having a *valid* license to do so.) (emphasis added) (recognizing validity of licenses from other states); RCW 18.71.030(6) ("Nothing in this chapter shall be construed . . . to prohibit [*t*]*he practice of medicine* by any practitioner licensed by another state . . . .") (emphasis added) (explicitly recognizing that other states can license).

But the exception relied upon by Tracy does not include all out-of-state physicians for every purpose; it merely permits out-of-state physicians temporarily within the state, but without an office or similar professional connections, to practice their calling while in Washington. RCW 18.71.030(6). The initiative could have, but did not, define a qualifying doctor as one with a valid license from any state. Instead, it

defined qualifying doctors as those licensed under Washington law. This was a deliberate choice, and Tracy gives us no statutory reason to find that the language does not mean what it appears to say.

Only qualifying patients are entitled to the defense under the act. RCW 69.51A.005. Among other things, qualifying patients must be patients of qualifying doctors. RCW 69.51A.010(3). Since Tracy was not a patient of a qualifying doctor, she is not entitled to assert the defense.[5]

2. Record

We turn now to whether Tracy has provided us with an adequate record to address her argument that the full faith and credit clause of the United States Constitution requires that she be allowed to present her compassionate use defense. She did not include a copy of her California medical marijuana card. While the omission is not explained, it appears likely that the card was never returned to her after the police seized it at the time of the original search. Since it was not admitted into evidence, even under some sort of reservation, it was not made part of the record at trial.

While we are not without sympathy, it is Tracy's responsibility as a petitioner to provide an adequate record for appellate review of her claims. *Story v. Shelter Bay Co.,* 52 Wn. App. 334, 345, 760 P.2d 368 (1988). The

[5] We thank our dissenting colleague for his review of the history and purpose of initiatives. He is certainly correct that the stirring policy statement for Initiative I-692 did not tell the reader which physicians could authorize their patients to use marijuana. But the initiative did. RCW 69.51A.010(3)(a).

appeals court below declined to hear her full faith and credit claim on the ground that the California medical marijuana card was not included in the record. In addition to not knowing what the card said or by whom it was signed or what limitations it may have, we note that a "qualifying patient" may be broader under California law.

We decline to reach the full faith and credit claim based upon the record before us.[6]

CONCLUSION

In I-692, Washington voters created a compassionate use defense against marijuana charges. The voters also limited that defense to qualifying patients. Among other things, a qualifying patient must be a patient of a qualifying doctor. RCW 69.51A.010(3). Tracy's evidence did not establish she was, and therefore the trial court did not err by excluding it. We find the record inadequate to reach her full faith and credit claim.

We affirm Sharon Lee Tracy's convictions.

AUTHOR:

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[6] In addition to an inadequate record, Tracy fails to develop the law relevant to her full faith and credit claim. Although amici attempt to do so, this issue is best left for another time. This issue may be best raised by a true visitor. A true visitor would not be either a former resident of another state who is now a Washington resident nor Washington resident who has obtained a foreign medical marijuana card, but the resident of another state who is temporarily traveling within Washington and relying on a medical marijuana authorization from her state of residence. We note that the Supreme Court of Hawaii recently touched upon this very issue in *State v. Adler*, 108 Haw. 169, 118 P.3d 652 (2005) and found it unnecessary to analyze the full faith and credit issue.

Justice Tom Chambers

WE CONCUR:

Chief Justice Gerry L. Alexander

Justice Charles W. Johnson

Justice Susan Owens

Justice Mary E. Fairhurst

Justice Bobbe J. Bridge