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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

RANDALL HARRIS WOOD,

Defendant and Appellant.

A116693

(San Mateo County
Super. Ct. No. SC60825)

Defendant Randall Harris Wood appeals a judgment entered upon a jury verdict finding him guilty of transporting marijuana. (Health & Saf. Code,¹ § 11360, subd. (a).) This case returns to us after the California Supreme Court transferred it with directions to vacate our previous decision in this matter and reconsider the cause in light of *People v. Kelly* (2010) 47 Cal.4th 1008 (*Kelly*). After considering *Kelly*, we conclude the jury was incorrectly instructed and the error was prejudicial. Accordingly, we shall reverse.

I. BACKGROUND

A. Facts and Procedure Below²

Gary D'Souza, a South San Francisco police officer, stopped the car defendant was driving on October 19, 2004, because he noticed a loud exhaust noise. While he was speaking with defendant, he noticed the odor of unburnt marijuana. He asked defendant

¹ All statutory references are to the Health and Safety Code.

² This part (I.A.) is quoted from our original opinion in this action, *People v. Wood* (May 1, 2008, A116693) [nonpub. opn.] pp. 1-3 (*Wood I*).

if there was any marijuana in the car. Defendant said there was, and removed from the glove compartment a plastic [Z]iplock bag containing marijuana. D'Souza asked defendant if he had a medicinal marijuana card. Defendant said he did, and gave D'Souza a card, which he said he had because of chronic back and neck pain. D'Souza asked defendant if he had any more marijuana in the car, and defendant took two more plastic bags of marijuana from the glove compartment. Additional officers arrived, and one of them asked defendant if there was more marijuana in the car and said he would like to search the car. Defendant said there was no more marijuana in the car, and after some reluctance, agreed that the officers could search the vehicle. He then told the officers that he had "caregiver status," and that he had two pounds of marijuana in the back of his vehicle. In the trunk of the car, the officers found two 5-gallon buckets, each filled with a large plastic bag of marijuana. Defendant told D'Souza he planned to sell or give the marijuana in the trunk of his car to marijuana establishments.

The amount of marijuana in the car (more than two pounds) would be enough for approximately 1,600 "joints," and at a rate of 10 joints per day—an unusually large number—would last about five months.

Hanya Barth, the doctor who recommended the use of marijuana to defendant for treatment of chronic pain, insomnia, and anxiety, testified at trial. She had not recommended any particular amount to use, instead following her usual practice of stating in her recommendation and telling defendant that he should use no more than was required to alleviate his symptoms. She did not have an opinion as to how much marijuana Wood should use, and when asked whether she was required to recommend a particular amount to a patient, she explained that she was not allowed to do so. Barth did not have defendant's chart with her, and could not recall the details of his visits with her. Nor could she give an opinion at trial about whether it would be appropriate for defendant to smoke 10 joints of marijuana a day to treat his conditions.

Defendant testified in his own defense at trial. He acknowledged that he was carrying the marijuana in his car and that the marijuana in the back weighed two pounds. According to defendant, he had grown and harvested the marijuana in Grass Valley and

was returning home with it. He intended to keep it for his own use. He smoked five to ten marijuana cigarettes a day, and said the amount in his car would have lasted him about half a year. He grew his own marijuana because he could not afford to buy it, and believed he was legally entitled to “grow a crop for a year.”

The jury found defendant not guilty of possession of marijuana for purposes of sale (§ 11359) and guilty of transporting marijuana (§ 11360, subd. (a)).

B. Appellate Procedure

We affirmed the judgment in our original decision in this matter, rejecting defendant’s contention that the trial court erred when it instructed the jury as follows (*Wood I, supra*, at pp. 3, 10): “The possession or transportation of marijuana is lawful, one, where its medical use is deemed appropriate and has been recommended or approved, orally or in writing, by a physician; two, the physician has determined that the person’s health would benefit from the use of marijuana in the treatment of [certain conditions]; three, the marijuana possessed or transported was for the personal medical use of the patient; and, four, the quantity of marijuana possessed and the form in which it was possessed were reasonably related to the patient’s then current medical needs, not exceeding eight ounces of dried marijuana per qualified patient unless the qualified patient or primary caregiver has a doctor’s recommendation that this quantity does not meet the qualified patient’s medical needs[,] in which case the qualified patient or primary caregiver may possess an amount of marijuana consistent with the patient’s needs.” We also rejected defendant’s contention that his counsel rendered ineffective assistance. (*Id.* at pp. 9-10.)

Our Supreme Court granted review and deferred briefing pending consideration of *Kelly, supra*, 47 Cal.4th 1008. On March 10, 2010, after issuing its decision in *Kelly*, the court transferred the matter back to us with directions to reconsider in light of *Kelly*.

II. DISCUSSION

In 1996, the electorate approved Proposition 215 and adopted the Compassionate Use Act (CUA). (*Kelly, supra*, 47 Cal.4th at p. 1012.) As pertinent here, the CUA provides: “Section 11357, relating to the possession of marijuana, and Section 11358,

relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician." (§ 11362.5, subd. (d).)

As we explained in our earlier decision in this matter, "[a]lthough [the CUA] provides an affirmative defense to the crimes of possessing marijuana (§ 11357) and cultivating marijuana (§ 11358), it does not provide a defense to the crime of transporting marijuana. (§ 11362.5, subd. (d); *People v. Wright* (2006) 40 Cal.4th 81, 84 (*Wright*); *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1543-1544 (*Trippet*).) Nevertheless, the court in *Trippet* concluded that the CUA provided an implied defense to a charge of transporting marijuana, subject to the requirement that 'the quantity transported and the method, timing and distance of the transportation are reasonably related to the patient's current medical needs.' (*Trippet, supra*, 56 Cal.App.4th at pp. 1550-1551.) After a conflict arose as to whether the CUA provided a defense to transportation of marijuana in a vehicle (see *People v. Young* (2001) 92 Cal.App.4th 229, 237), the Supreme Court granted review in *Wright* to resolve the issue. (*Wright, supra*, 40 Cal.4th at pp. 84-85.) [¶] In 2003, while *Wright* was pending before the Supreme Court, the Legislature enacted the Medical Marijuana Program (the MMP) (§ 11362.7 et seq.), which was intended in part to address issues not included in the CUA. (Stats. 2003, ch. 875, No. 13, West's Cal. Legis. Service; *Wright, supra*, 40 Cal.4th at p. 85.) [Several] provisions of the MMP are particularly relevant here. First, the MMP provides that a 'qualified patient' or the holder of a medical marijuana identification card shall not be criminally liable for transporting marijuana 'for his or her own personal use.' (§ 11362.765, subds. (a) & (b)(1).) Second, section 11362.77 provides that: '(a) A qualified patient or primary caregiver may possess no more than eight ounces of dried marijuana per qualified patient. . . . [¶] (b) If a qualified patient or primary caregiver has a doctor's recommendation that this quantity does not meet the qualified patient's medical needs, the qualified patient or primary caregiver may possess an amount of marijuana consistent with the patient's needs.' " (*Wood I, supra*, at pp. 3-4.) A qualified patient is defined as "a person who is entitled to

the protections of [the CUA], but who does not have an identification card issued pursuant to this article.” (§ 11362.7, subd. (f).)

Our Supreme Court granted review in *Kelly* to decide whether the MMP’s limitation on the amount of marijuana a qualified patient may possess or cultivate is invalid as improperly amending the CUA without approval of the electorate, and concluded that “insofar as section 11362.77 burdens a defense under the CUA to a criminal charge of possessing or cultivating marijuana, it impermissibly amends the CUA and in that respect is invalid under [California Constitution] article II, section 10, subdivision (c).” (*Kelly, supra*, 47 Cal.4th at p. 1012.) In doing so, the court reasoned: “By extending the reach of section 11362.77’s quantity limitations beyond those persons who voluntarily register under the MMP and obtain an identification card that provides protection against arrest—and by additionally restricting the rights of all ‘qualified patients’ and ‘primary caregivers’ who fall under the CUA—the challenged language of section 11362.77 effectuates a change in the CUA that takes away from rights granted by the initiative statute. [Citations.] In this sense, section 11362.77’s quantity limitations conflict with—and thereby substantially restrict—the CUA’s guarantee that a qualified patient may possess and cultivate *any amount of marijuana reasonably necessary for his or her current medical condition*.” (*Id.* at p. 1043.)

The court declined, however, to sever section 11362.77 entirely from the MMP, instead ruling that the appropriate remedy was “to disapprove, or disallow, *only the unconstitutional application* of section 11362.77, thereby preserving any residuary constitutional application with regard to the other provisions of the MMP.” (*Kelly, supra*, 47 Cal.4th at p. 1048.)³

³ Section 11362.77 provides in full: “(a) A qualified patient or primary caregiver may possess no more than eight ounces of dried marijuana per qualified patient. In addition, a qualified patient or primary caregiver may also maintain no more than six mature or 12 immature marijuana plants per qualified patient. [¶] (b) If a qualified patient or primary caregiver has a doctor’s recommendation that this quantity does not meet the qualified patient’s medical needs, the qualified patient or primary caregiver may possess an amount of marijuana consistent with the patient’s needs. [¶] (c) Counties and

With *Kelly* in mind, we consider whether the trial court erred in instructing the jury that transportation of marijuana was not lawful unless the quantity and form of the marijuana possessed “were reasonably related to the patient’s then current medical needs, *not exceeding eight ounces of dried marijuana per qualified patient unless the qualified patient or primary caregiver has a doctor’s recommendation that this quantity does not meet the qualified patient’s medical needs*[,] in which case the qualified patient or primary caregiver may possess an amount of marijuana consistent with the patient’s needs.” (Italics added.)

We conclude this instruction was erroneous in light of *Kelly*. The MMP provides that “[a] qualified patient or a person with an identification card who transports or processes marijuana *for his or her own personal medical use*” is not subject, on that sole basis, to liability for transportation of marijuana. (§ 11362.765, subds. (a) & (b)(1), italics added, § 11360.) This provision does not by its terms limit its application to the amounts specified in section 11362.77. And as we have noted, the MMP’s limitations on the amount of marijuana a patient may possess for his or her own personal use have been invalidated by *Kelly*. It follows that under the current understanding of the MMP, the amount of marijuana a qualified patient or person with an identification card may transport for his or her personal medical use is not subject to the limitations of section 11362.77.

cities may retain or enact medical marijuana guidelines allowing qualified patients or primary caregivers to exceed the state limits set forth in subdivision (a). [¶] (d) Only the dried mature processed flowers of [the] female cannabis plant or the plant conversion shall be considered when determining allowable quantities of marijuana under this section. [¶] (e) The Attorney General may recommend modifications to the possession or cultivation limits set forth in this section. These recommendations, if any, shall be made to the Legislature no later than December 1, 2005, and may be made only after public comment and consultation with interested organizations, including, but not limited to, patients, health care professionals, researchers, law enforcement, and local governments. Any recommended modification shall be consistent with the intent of this article and shall be based on currently available scientific research. [¶] (f) A qualified patient or a person holding a valid identification card, or the designated primary caregiver of that qualified patient or person, may possess amounts of marijuana consistent with this article.”

The Attorney General points out, however, that our Supreme Court declined to invalidate section 11362.77 in its entirety, instead “preserving any residuary constitutional application with regard to the other provisions of the MMP.” (*Kelly, supra*, 47 Cal.4th at p. 1048.) The Attorney General contends that *Kelly* does not apply to transportation cases, pointing out that the CUA did not expressly offer a defense to charges of transportation, and argues that in enacting the MMP and expanding protection from prosecution, the Legislature was entitled to define those added protections in any reasonable manner. The Attorney General goes on: “Admittedly, the Legislature was attempting to place some quantitative limits on the amount of marijuana that could be possessed and cultivated under the CUA. However, the fact that those limits are no longer applicable in possession and cultivation cases does not mean they lack import in transportation cases.”

This argument might have more force if the Legislature had provided that a qualified patient or caregiver could transport only the amount of marijuana specified in section 11362.77. Indeed, section 11362.765, subdivision (b)(2), includes such a limitation, providing that “[a] designated primary caregiver who transports . . . marijuana for medical purposes, *in amounts not exceeding those established in subdivision (a) of Section 11362.77*” (italics added) to the qualified patient or person with an identification card is not subject to criminal liability for certain offenses, including unlawful transportation. The provision at issue here, on the other hand, refers only to a patient who transports or processes marijuana *for his or her own personal medical use*; it does not refer to the limitations of section 11362.77. (§ 11362.765, subd. (b)(1).) After *Kelly*, there is no basis to conclude that a qualified patient or person with an identification card is limited to possession of the amounts specified in section 11362.77 of the MMP. Accordingly, we conclude the trial court wrongly instructed the jury on the amount of marijuana defendant could possess or transport.

We cannot conclude that this error was harmless.⁴ Defendant admittedly possessed more than eight ounces of marijuana, and there was no evidence that a doctor had recommended a larger amount to meet his medical needs. As instructed, the jury was virtually bound to convict defendant of transporting marijuana. However, defendant presented evidence that he grew his own marijuana because he could not afford to buy it, that he was returning home after harvesting the marijuana, that the marijuana in his car was for his own use, that he smoked five to ten marijuana cigarettes a day, and that he expected the amount in the car to last him about half a year. We recognize that the story defendant told the police could be seen as inconsistent with this defense, and might lead to the conclusion that the marijuana was not entirely for defendant's own use. As we have noted, however, the jury acquitted defendant of the charge of possession of marijuana for sale, and there was evidence from which it could conclude he possessed and transported the marijuana for his own personal medical use, in an amount, form, and manner that were reasonably related to his current medical needs. (See *Trippet, supra*, 56 Cal.App.4th at p. 1549; see also *Kelly, supra*, 47 Cal.4th at pp. 1023-1024, 1043.) As explained in *Trippet*, "What precisely are the 'patient's current medical needs' must, of course, remain a factual question to be determined by the trier of fact." (*Trippet, supra*, 56 Cal.App.4th at p. 1549.) In the circumstances, defendant is entitled to a new trial with a properly instructed jury.

Because we reverse on this ground, we need not address defendant's contention that his counsel rendered ineffective assistance at trial.

⁴ Our Supreme Court has left open the question of whether instructional error involving a CUA defense should be evaluated under the standard of prejudice for federal constitutional error, which asks whether an error was harmless beyond a reasonable doubt (*Chapman v. California* (1967) 386 U.S. 18, 24), or under the state standard, under which we reverse if "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error" (*People v. Watson* (1956) 46 Cal.2d 818, 836). (*Wright, supra*, 40 Cal.4th at p. 98.) Under either standard, we would conclude the error was prejudicial.

III. DISPOSITION

The decision entered in this case on May 1, 2008, is vacated. The judgment is reversed.

RIVERA, J.

We concur:

RUVOLO, P.J.

SEPULVEDA, J.