3-1-2016

State v. Meyer Respondent's Brief Dckt. 43332

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**No. 43332**
Plaintiff-Respondent,	)	
	)	**Ada Co. Case No.**
v.	)	**CR-2014-12367**
	)	
DOUGLAS EARL MEYER,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

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Nature Of The Case

Douglas Earl Meyer appeals from the judgment entered upon his conditional guilty plea to possession of marijuana in excess of three ounces. Meyer contends the district court erred by concluding Meyer would not be entitled to a necessity defense instruction if his case proceeded to trial.

Statement Of Facts And Course Of Proceedings

Meyer was driving through Idaho on his way to California from Washington when an officer stopped him for speeding. (R., pp.86, 93.) During the traffic stop, Meyer reported that he had "1/4 pound of marijuana in the vehicle," but indicated "he had a medical marijuana card." (R., p.93.) Meyer told law enforcement he grew the marijuana himself and was taking it to his uncle because his uncle "wanted to try this different kind" that Meyer had. (R., p.93.) Meyer was arrested and a search incident to arrest revealed a large amount of cash ($2,605.00) in Meyer's pocket,[1] which Meyer stated was from "settlement on a pension," paraphernalia, and "six zip lock style clear plastic bags" of marijuana inside a cooler. (R., pp.93, 97.) "Each bag had a label in it with a name and weight." (R., p.93.) The six bags were labeled as follows: (1) "Bubba Kush – 30g – relaxing"; (2) "Jack Frost – 16g – Energetic"; (3) "Skywalker – 31g – Stress/Sleep"; (4) "White Russian – 15g – Sleep/Pain"; (5) "White Russian – 30g – Sleep/Pain"; and (6) "Sour Diesial." (R., p.97.)

[1] Meyer also had a much smaller amount of cash in his wallet ($142.00). (R., p.97.)

When interviewed by law enforcement, Meyer said he was "traveling from his home in Tri City to his father's residence in Jerome," where he was going to pick his father up, and "they were then going to drive together to California for a family reunion." (R., p.97.) Meyer denied he intended to sell any of the marijuana, but instead claimed it was a "donation system," and it was up to the recipient whether to pay anything for the marijuana. (R., p.97.) Meyer also stated some of the marijuana was for his personal use. (R., p.97.)

The state charged Meyer with possession of marijuana with intent to deliver or, in the alternative, possession of marijuana in excess of three ounces. (R., pp.7-8, 43-44, 48-49.) The state also filed an Information Part II alleging Meyer is a persistent violator based on three prior felony convictions, including convictions for violating Washington's Uniformed Controlled Substance Act and for conspiracy to deliver marijuana. (R., pp.81-82.)

Prior to trial, Meyer filed a motion asking the court to provide the jury with a necessity defense instruction. (R., pp.77-78.) The state filed a written objection to Meyer's request (R., pp.85-113), and the court denied Meyer's motion after a hearing (R., p.115). Meyer thereafter entered a conditional guilty plea to possession of marijuana in excess of three ounces, reserving the right to appeal the district court's ruling denying his request for a necessity defense instruction. (R., pp.116-125.) The court imposed a unified three-year sentence with six months fixed. (R., pp.178-181.) Meyer filed a motion to reduce his sentence, which the district court denied. (R., pp.187, 195.)

Meyer filed a timely notice of appeal from the judgment. (R., pp.184-186.)

ISSUE

Meyer states the issue on appeal as:

> Whether the district court erred when it denied Mr. Meyer's request for a jury instruction on his necessity defense.

(Appellant's Brief, p.5.)

The state rephrases the issue on appeal as:

To the extent State v. Hastings, 118 Idaho 854, 801 P.2d 563 (1990), stands for the proposition that a defendant is entitled to a necessity defense instruction whenever a defendant presents evidence that he possesses marijuana for medicinal purposes, should Hastings be overruled because a jury cannot make legal what the law explicitly prohibits, and because it is well-settled that a district court has discretion to decide whether the evidence supports a requested necessity defense instruction?

ARGUMENT

The Offer Of Proof Did Not Support Meyer's Request For A Necessity Defense Instruction, And This Court Should Disavow *Hastings* To The Extent It Holds That Anytime A Defendant Presents Evidence That He Uses Marijuana For Medicinal Reasons, He Is Entitled To A Necessity Defense Instruction

A. Introduction

Meyer contends the district court erred in denying his pre-trial motion requesting a necessity defense instruction. (Appellant's Brief, pp.7-16.) The district court's rejection of Meyer's request for a necessity defense instruction was consistent with the legal principle that a defendant is not entitled to such an instruction when the instruction is unsupported by a *prima facie* case relevant to the instruction. To the extent the Court's opinion in State v. Hastings, 118 Idaho 854, 801 P.2d 563 (1990), holds otherwise, it should be overruled.

B. Standard Of Review

Jury instruction claims are questions of law over which the appellate court exercises free review. State v. Gleason, 123 Idaho 62, 65, 844 P.2d 691, 694 (1992); Miller v. State, 135 Idaho 261, 265, 16 P.3d 937, 941 (Ct. App. 2000). A defendant is not entitled to a jury instruction that is an erroneous statement of the law, is not supported by the evidence, is an impermissible comment on the evidence or is adequately covered by other instructions. State v. Johns, 112 Idaho 873, 881, 736 P.2d 1327, 1335 (1987); State v. Turner, 136 Idaho 629, 632-33, 38 P.3d 1285, 1288-89 (Ct. App. 2002); State v. Camp, 134 Idaho 662, 665-66, 8 P.3d 657 (Ct. App. 2000). Whether a reasonable view of the evidence supports an instruction is a matter within the trial court's discretion. State v.

Bush, 131 Idaho 22, 32, 951 P.2d 1249 (1997); State v. Howley, 128 Idaho 874, 878, 920 P.2d 391, 395 (1996).

C. The Offer Of Proof Did Not Support Meyer's Request For A Necessity Defense Instruction, And This Court Should Disavow *Hastings* To The Extent It Holds That Anytime A Defendant Presents Evidence That He Uses Marijuana For Medicinal Reasons, He Is Entitled To A Necessity Defense Instruction

In Idaho, it is illegal to possess marijuana whether for personal use or with the intent to deliver. I.C. § 37-2732(a), (e); see also ICJI 402A, 402B. Nevertheless, Meyer seeks to avoid Idaho's legal prohibition on the possession and distribution of marijuana by claiming a necessity defense when the marijuana is allegedly used or distributed for medicinal purposes. (Appellant's Brief, pp.6-16.) The district court correctly rejected Meyer's request for a necessity defense instruction.

It is well-settled that a district court may properly refuse a requested instruction, which is not supported by the evidence. State v. Beavers, 152 Idaho 180, 183, 268 P.3d 1, 4 (Ct. App. 2010). To be entitled to an instruction on an affirmative defense, a defendant must "present facts sufficient to make out a *prima facie* case relevant to [the] defense." State v. Camp, 134 Idaho 662, 665-66, 8 P.3d 657, 660-61 (Ct. App. 2000). A *prima facie* case relevant to a necessity defense required Meyer to show a specific threat of immediate harm, which he did not bring about, that rendered it necessary for him to possess marijuana. State v. Howley, 128 Idaho 874, 879, 920 P.2d 391, 396 (1996); State v. Hastings, 118 Idaho 854, 855, 801 P.2d 563, 564 (1990); ICJI 1512.

Meyer failed to meet his burden of showing he was entitled to a necessity defense instruction.

The offer of proof provided to the district court in relation to Meyer's request for a necessity defense instruction supports the conclusion that there was no evidence there was a specific threat of *immediate* harm that compelled Meyer to possess marijuana. The pattern instruction for the necessity defense that Meyer requested reads:

> The defendant cannot be guilty [of (name of crime)] if the defendant acted because of necessity. Conduct which violates the law is justified by necessity if:
>
> 1. there is a specific threat of immediate harm to [the defendant] [name of person],
>
> 2. the defendant did not bring about the circumstances which created the threat of immediate harm,
>
> 3. the defendant could not have prevented the threatened harm by any less offensive alternative, and
>
> 4. the harm caused by violating the law was less than the threatened harm.
>
> The state must prove beyond a reasonable doubt that the defendant did not act because of necessity. If you have a reasonable doubt on that issue, you must find the defendant not guilty.

(R., pp.77-78 (quoting ICJI 1512).)

Meyer's written offer of proof in support of a necessity defense instruction included a written opinion by Dr. Stephen McLennon concluding that "Meyer is warranted in his use of medicinal cannabis" and noting that Meyer's "healthcare

providers in Washington" "sanctioned his use of it." (Sealed R.[2], p.10.) Dr. McLennon's letter also espoused his personal views on medical marijuana. (R., p.10.) In addition to Dr. McLennon's resume and opinion, Meyer submitted a "Health Care Professional Statement and Recommendation" from Presto Quality Care, a Washington company that apparently "recommends" whether a particular individual is qualified to use marijuana in that state, and a document signed by Tammy Lee Rose designating Meyer as her "Marijuana 'Provider'" pursuant to Washington law. (Sealed R., pp.11-12.) At the hearing on Meyer's motion, when asked what the "immediate harm" was that would warrant giving the instruction, defense counsel stated the "immediate harm would be the symptoms and fallout from being denied their medication." (2/6/2015 Tr.[3], p.9, Ls.1-3, p.14, Ls.2-7.)

Based on the pre-trial offer of proof, the district court correctly rejected Meyer's request for a necessity defense instruction. That Meyer may be allowed to possess and even "provide" marijuana to another person in the State of Washington does not mean it was a necessity for him to transport his marijuana through the State of Idaho in order to avoid "immediate harm," and his offer of proof fell far short of a *prima facie* case that would support a necessity defense instruction. Indeed, Meyer's offer of proof failed the first requirement – a specific

[2] Consistent with Meyer's brief, the state will refer to the sealed documents Meyer submitted as his offer of proof as "Sealed R." (Appellant's Brief, p.1 n.1.)

[3] As noted by Meyer, the transcript of the hearing on his motion for a necessity defense instruction is included in the record rather than as a separately bound transcript; however, the state will cite the transcript as though it was separate, rather than in the record.

threat of immediate harm. Meyer's use of marijuana to treat chronic pain does not constitute a specific threat of immediate harm.

"The necessity defense is based on the premise that 'a person who is **compelled** to commit an illegal act in order to prevent a greater harm should not be punished for that act.'" State v. Tadlock, 136 Idaho 413, 34 P.3d 1096 (Ct. App. 2001) (quoting Hastings, 118 Idaho at 855, 801 P.2d at 564) (emphasis added). In Hastings, the Court catalogued several circumstances in which defendants were allowed to raise a necessity defense, including: (1) "in the context of prison escapes"; (2) in "defense to a charge of driving under the influence because [the defendant] had been assaulted and was driving herself to the hospital"; (3) in defense to a charge of disorderly conduct where the "defendants were engaged in a political protest"; (4) in defense to a speeding charge where the defendant "claimed that he sped up to pass other cars and get back in the right hand lane in order to allow a police officer in pursuit of another vehicle to get around him"; and (5) in defense to burglary, assault, and kidnapping charges "when a mother feared that her daughter was being sexually abused in her grandparents' home." Hastings, 118 Idaho at 855-856, 801 P.2d at 564-565 (citations omitted). Meyer's claim that he was compelled to illegally possess marijuana in order to prevent the possibility that he and others may later "suffer" if they did not smoke it[4] hardly compares to the circumstances previously found appropriate for a necessity defense instruction, and approval of such an

[4] Meyer also had less offensive alternatives to violating Idaho law, like not coming to Idaho, or coming to Idaho without his marijuana supply. That Meyer *wanted* to come to Idaho to pick up his father does not mean he *had* to do so, or that he *had* to bring his marijuana with him when he did.

instruction in circumstances like Meyer's makes a mockery of legitimate uses of the necessity defense.

The state recognizes that the Court's 1990 opinion in Hastings provides support for Meyer's claim. In Hastings, the defendant wanted to "present a defense of medical necessity" to her possession of marijuana charge "based on the fact that she suffers from rheumatoid arthritis and uses marijuana to control the pain and muscle spasms associated with the disease." Hastings, 118 Idaho at 855, 801 P.2d at 564. The district court declined to "instruct the jury on medical necessity," concluding it was not a "valid defense in Idaho." Id. The district court, however, allowed Hastings to submit an offer of proof regarding what evidence she would present on the issue so the appellate court could "rule on whether or not the defendant would be allowed to present th[e] evidence to a jury." Id. On appeal, the Idaho Supreme Court held Hastings was "entitled to present evidence at trial on the common law defense of necessity. It was for the trier of fact to determine whether or not she has met the elements of that defense." Hastings, 118 Idaho at 856, 801 P.2d at 565. To the extent this holding means a defendant who presents evidence that he uses marijuana for

medical reasons may violate Idaho's marijuana laws, it should be overruled.[5]

The rule of stare decisis dictates that controlling precedent be followed "unless it is manifestly wrong, unless it has proven over time to be unjust or unwise, or unless overruling it is necessary to vindicate plain, obvious principles of law and remedy continued injustice." State v. Dana, 137 Idaho 6, 9, 43 P.3d 765, 768 (2002); State v. Guzman, 122 Idaho 981, 1001, 842 P.2d 660, 680 (1992) ("[P]rior decisions of this Court should govern unless they are manifestly wrong or have proven over time to be unjust or unwise."). If Hastings holds that a defendant who uses marijuana for medical reasons is entitled to a necessity defense instruction in relation to a charge that includes possession of marijuana as an element, it is manifestly wrong for at least two reasons. First, such a holding disregards the requirement that a defendant must present, and a court must find, "facts sufficient to make out a *prima facie* case relevant to [the] defense," Camp, supra, because it would essentially allow the defense as a matter of law in "medical marijuana" situations. Second, such a holding effectively creates a medical exception to Idaho's marijuana laws. It is neither a court's, nor a jury's, province to create a general exception to an unlawful act.

[5] The Court of Appeals has distinguished Hastings on its facts. In Tadlock, 136 Idaho at 415, 34 P.3d at 1098, the Court of Appeals held that Hastings applied only to a possession charge, but did not apply to possession of marijuana with intent to deliver. Almost ten years later, in Beavers, 152 Idaho at 183-185, 268 P.3d at 4-6, the Court of Appeals addressed whether the "necessity defense applies to the crime of trafficking," and ultimately concluded the defendant failed to meet his burden of showing the evidence supported the instruction. If necessary, this case is also distinguishable on the facts because, unlike the defendants in Hastings, Tadlock, and Beaver, Meyer did not live in Idaho and, therefore, was not compelled to be in this state and violate the law when the less offensive alternative of not coming here at all, or not coming here with his marijuana supply, was available to him.

See Sims v. ACI Northwest, Inc., 157 Idaho 906, 342 P.3d 618 (2005) ("The wisdom, justice, policy, or expediency of a statute are questions for the legislature alone. If the statute as written is socially or otherwise unsound, the power to correct it is legislative, not judicial.") (quotations and citations omitted); see also State v. Thayer, 14 A.3d 231, 235 (Vt. 2010) ("The necessity defense is generally not available to excuse criminal activity by those who disagree with the policies of the government.") (quotations and citations omitted). To hold otherwise is inconsistent with the elements of a necessity defense and is contrary to our governmental structure. "An emergency necessity to commit an act otherwise deemed a crime does not turn upon the rationality of the legislative choice." Thayer, 14 A.3d at 235. The United States Supreme Court's decision in United States v. Oakland Cannabis Buyers' Cooperative, 532 U.S. 483 (2001), is instructive on this point.

In Oakland Cannabis, the Court addressed "whether there is a medical necessity to the[] prohibitions" in the federal Controlled Substances Act and held "there is not." 532 U.S. at 486. The facts giving rise to the issue were based on California's Compassionate Use Act of 1996, which "creates an exception to California laws prohibiting the possession and cultivation of marijuana" where "a patient or his primary caregiver . . . possesses or cultivates marijuana for the patient's medical purposes . . . upon the recommendation or approval of a physician." Id. In response to the Compassionate Use Act, "several groups organized 'medical cannabis dispensaries'" – Oakland Cannabis was one of those groups. Id. The United States sued Oakland Cannabis, arguing that

"whether or not [Oakland Cannabis'] activities are legal under California law," they violated federal law, and a federal district court issued a preliminary injunction as part of that lawsuit. Id. at 486-487. Rather than appeal the injunction, Oakland Cannabis "openly violated it by distributing marijuana to numerous persons," which resulted in contempt proceedings. Id. at 487. "In defense, [Oakland Cannabis] contended that any distributions were medically necessary," claiming "[m]arijuana is the only drug . . . that can alleviate the severe pain and other debilitating symptoms of [Oakland Cannabis'] patients." Id. at 487. The district court rejected the defense. Id.

On certiorari to the Supreme Court, Oakland Cannabis argued that, "notwithstanding the apparently absolute language of [the Controlled Substances Act], the statute is subject to additional, implied exceptions, one of which is medical necessity. According to [Oakland Cannabis], because necessity was a defense at common law, medical necessity should be read into the Controlled Substances Act." Oakland Cannabis, 532 U.S. at 490. The Court "disagree[d]." Id.

The Court first "note[d] it is an open question whether federal courts ever have authority to recognize a necessity defense not provided by statute" since, "under our constitutional system, in which federal crimes are defined by statute rather than by common law," "[w]hether, as a policy matter, an exemption should be created is a question for legislative judgment, not judicial inference." Id. (quotations and citations omitted). "Nevertheless," because the "Court has discussed the possibility of a necessity defense without altogether rejecting it,"

the Court addressed the application of the defense vis-à-vis the Controlled Substances Act, stating:

> We need not decide, however, whether necessity can ever be a defense when the federal statute does not expressly provide for it. In this case, to resolve the question presented, we need only recognize that a medical necessity exception for marijuana is at odds with the terms of the Controlled Substances Act. The statute, to be sure, does not explicitly abrogate the defense. But its provisions leave no doubt that the defense is unavailable.
>
> Under any conception of legal necessity, one principle is clear: The defense cannot succeed when the legislature itself has made a determination of values. In the case of the Controlled Substances Act, the statute reflects a determination that marijuana has no medical benefits worthy of exception (outside the confines of a Government-approved research project). Whereas some other drugs can be dispensed and prescribed for medical use, the same is not true for marijuana. Indeed, for purposes of the Controlled Substances Act, marijuana has no currently accepted medical use at all.

Oakland Cannabis, 532 U.S. at 491 (quotations and citations omitted).

The Court further noted the "structure" of the Controlled Substances Act supported its conclusion because it "imposes restrictions on the manufacture and distribution of the substance according to the schedule in which it has been placed." Oakland Cannabis, 532 U.S. at 491-492. Under the Controlled Substances Act, marijuana is a Schedule I drug, which means it "has no currently accepted medical use in treatment in the United States, has a high potential for abuse, and has a lack of accepted safety for use under medical supervision." Id. at 492 (quotations and citations omitted, ellipses omitted).[6] "For these reasons,"

[6] Marijuana is also classified as a Schedule I drug under Idaho law based on the same considerations. I.C. §§ 37-2704, -2705.

the Court held "medical necessity is not a defense to manufacturing and distributing marijuana." Id. at 494.

This Court should similarly hold that medical necessity is not a defense to Idaho's laws prohibiting the possession or delivery of marijuana. If the Idaho legislature wished to create an exception for medicinal marijuana use, it could follow the lead of several surrounding states and do so. Oakland Cannabis, 532 U.S. at 502 n.4 (noting that, "[s]ince 1996 . . . Alaska, Colorado, Maine, Nevada, Oregon, and Washington have passed medical marijuana initiatives"). Absent such legislative action, judicial endorsement of a defense that would create such an exception should be rejected and, to the extent Hastings stands for such a proposition, the Court should overrule it.

Because Meyer failed to meet his burden of presenting evidence of a *prima facie* case supporting an instruction on the necessity defense, and because the Court cannot and should not authorize a medical marijuana exception to Idaho's marijuana laws, Meyer is not entitled to relief and his conviction should be affirmed.

CONCLUSION

The state respectfully requests that this Court affirm Meyer's conviction.

DATED this 1st day of March, 2016.

/s/ Jessica M. Lorello
JESSICA M. LORELLO
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 1st day of March, 2016, served a true and correct copy of the foregoing BRIEF OF RESPONDENT by emailing an electronic copy to:

BRIAN R. DICKSON
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at the following email address: briefs@sapd.state.id.us.

__/s/ Jessica M. Lorello__
JESSICA M. LORELLO
Deputy Attorney General

JML/dd