

DISTRICT COURT, BOULDER COUNTY, COLORADO Court Address: Boulder County Justice Center 1777 Sixth St Boulder, Colorado 80302 Court Phone: (303) 441-3750	
PEOPLE OF THE STATE OF COLORADO vs. SHERRI ANN VERSFELT, Defendant	COURT USE ONLY
Attorney Name: Christopher Estoll, Reg. #36600 Deputy District Attorney Boulder County Justice Center 1777 Sixth St Boulder, CO 80302 Attorney Phone: (303) 441-3816 Attorney Fax: (303) 441-4703 Attorney E-Mail: cestoll@bouldercounty.org	Case No: 08CR1299 Division: 6
MOTION IN LIMINE RE: AFFIRMATIVE DEFENSES	

The People, through District Attorney Stanley L. Garnett, respectfully submit the following Motion in Limine.

Background

Law enforcement officers searched Ms. Versfelt's house on July 15, 2008 and found in excess of 50 marijuana plants and over 12 ounces of usable marijuana. Ms. Versfelt notified officers that she was growing medical marijuana for a registered medical marijuana patient named Kelly Brooks, and she presented them with an expired medical marijuana registry card for Kelly Brooks. That card did not list Ms. Versfelt as a primary care-giver for Dr. Brooks. Ms. Versfelt never indicated that she was using medical marijuana herself. Ms. Versfelt was subsequently arrested and is charged with Cultivation of Marijuana, Possession of more than 8 ounces of Marijuana and Possession of Marijuana with Intent to Distribute.

The Affirmative Defense of the Medical Use of Marijuana

Ms. Versfelt filed her Defense Disclosures on September 14, 2009 and outlined a number of potential defenses and witnesses. Ms. Versfelt seeks to raise the affirmative defense of medical use of marijuana at trial.

The Medical Marijuana defense is outlined in the Colorado Constitution, Article XVIII, Section 14(2)(a) and states that a patient or primary care-giver will be deemed to have established an affirmative defense where:

- (I) The patient was previously diagnosed by a physician as having a debilitating medical

- condition.
- (II) The patient was advised by her physician, in the context of a bona-fide physician-patient relationship, that the patient might benefit from the medical use of marijuana in connection with a debilitating medical condition; and
 - (III) The patient and his or her primary care-giver were collectively in possession of amounts of marijuana only as permitted under this section.

Defendant's Burden to present Evidence of the Affirmative Defense.

The People's evidence will not raise the issue of medical marijuana. Therefore, in order to raise the issue of medical use of marijuana, C.R.S. 18-1-407 requires that the defendant present some credible evidence on that issue. The question of whether there is credible evidence to support an affirmative defense is a question for the court to resolve. Lybarger v. People, 807 P.2d 570 (Colo.1991).

The issues raised in this motion are matters of law and no factual dispute exists between the parties in relation to these issues; however, the People anticipate that Ms. Versfelt will file a written response. The Court's ruling on these issues will significantly impact plea negotiations in this case, as well as the breadth and scope of evidence that will be permitted at the trial scheduled for the week of October 19, 2009. Therefore, both parties request a pre-trial ruling on these issues.

Post-Offense Medical Advice Is Irrelevant, and Should be Excluded.

Subsection (2)(a)(II) of the amendment requires that a "patient was advised by her physician . . . that the patient might benefit from the medical use of marijuana in connection with a debilitating medical condition."

Ms. Versfelt has endorsed Dr. Eisenbud to testify that he recommended medical marijuana to Ms. Versfelt on April 9, 2009, nearly 9 months *after* the date of offense. This evidence is irrelevant to the facts and charges being litigated.

Ms. Versfelt is charged with Cultivation of Marijuana on or about July 15, 2008. Any defense that she seeks to raise must be relevant to that date. If Ms. Versfelt seeks to raise the medical marijuana affirmative defense in this case, she must be able to present evidence that she was advised by her physician, on or before July 15, 2008, that she might benefit from the medical use of marijuana in connection with a debilitating medical condition.

The language of the amendment is clear. The affirmative defense requires evidence that the defendant "was advised" by her physician. The amendment is written in the past tense and does not allow for a person charged with an offense to show that she "was going to be" advised by her physician sometime in the future. Ms. Versfelt's alleged status in April of 2009 is not a justification for actions she took in July of 2008. Ms. Versfelt's can not present evidence that "was advised" to use medical marijuana on or before July 15, 2008. Post-offense medical advice is irrelevant to the question of whether Defendant committed the charged offense.

There is no factual dispute between the parties relating to this issue. Both parties agree that the only physician who advised Ms. Versfelt that she might benefit from the medical use of marijuana was Dr. Eisenbud and that his advisement occurred on April 9, 2009.

Therefore, the People respectfully request that the Court preclude any testimony regarding Dr. Eisenbud, and request that the Court order that Ms. Versfelt is not entitled to raise a medical marijuana affirmative defense at trial.

Ms. Versfelt is not a Designated “Primary Care-Giver”

Under the amendment, a primary caregiver is a predicate for being allowed under state law to possess or cultivate marijuana. Ms. Versfelt does not qualify as a “primary care giver” under the amendment.

In subsection (1)(f), the amendment defines a “primary care-giver” as a “person . . . who has significant responsibility for managing the well being of a patient who has a debilitating medical condition.”

In subsection (3) the amendment describes how a person becomes authorized to act as a primary care-giver for a medical marijuana patient. Subsection (3)(b)(IV) requires that a registered medical marijuana patient include the name and address of the patient’s primary care-giver on the application, if a primary care-giver is designated at the time of the application. If a patient declines to name a primary care-giver at the time of the application, subsection (3)(f) allows the patient to do so in writing at a later time. Importantly, the amendment designates, that “the care-giver may act in this capacity *after such designation.*” Subsection(3)(f) (emphasis added).

Ms. Versfelt was not designated as a “primary care-giver” by any medical marijuana patient on July 15, 2008. Although she presented law enforcement officers with Dr. Brooks’ medical marijuana registry card on the date of the search, she was not named as the primary care-giver on that card.

Under the amendment, the fact that Ms. Versfelt was not designated as a primary care-giver means that she was not authorized to act in that capacity. Thus, regardless of what her testimony may be with regard to giving care of a third party, such testimony would not create a sufficient basis for the affirmative defense without having first been named a “primary care giver” by the patient.

The People anticipate that Defendant will contend that she became a primary care-giver simply by beginning to act as a primary care-giver. However, this reading of the amendment would render meaningless subsections (3)(b)&(f), which require patients to designate who their primary care-givers are.

The Supreme Court has held that in order to reasonably effectuate the legislative intent, a statute must be read and considered as a whole and where possible, the statute should be interpreted so as to give consistent, harmonious, and sensible effect to all its parts. People v. District Court, Second Judicial Dist., 713 P.2d 918 (Colo.1986). The Supreme Court has also held that courts

should attempt to give effect to all parts of a statute, and constructions that would render meaningless a part of the statute should be avoided. People v. Terry, 791 P.2d 374, (Colo.1990).

The only reading of the amendment that would give effect to all subsections is one that recognizes a patient's responsibility to designate who his or her primary caregiver is, and recognizes that, without such designation, a "primary caregiver" defense cannot stand.

Under the defendant's interpretation, anyone who provides marijuana qualifies as a primary caregiver. Under that construction, there would be no need for a separate definition of a primary caregiver, because the affirmative defense would apply to anyone engaging in the provision of medical marijuana. Such an interpretation would lead to absurd results and is contrary to the rules of statutory construction. See AviComm, Inc. v. Colorado Pub. Utils. Comm'n, 955 P.2d 1023, 1031 (Colo. 1998) ("[A] statutory interpretation that defeats the legislative intent and leads to an absurd result will not be followed").

Therefore, the People request that this Court find, as a matter of law, that because Ms. Versfelt had not been designated as a primary care-giver for a medical marijuana patient on July 15, 2008, that she was not authorized to act in that capacity and is precluded from raising the affirmative defense of medical use of marijuana and from presenting any evidence that she was acting as a primary caregiver for a medical marijuana patient at trial.

Other Affirmative Defenses

Choice of Evils

Ms. Versfelt also disclosed a potential defense of "choice of evils" pursuant to C.R.S. 18-1-702. That statute states in relevant part that "conduct which would otherwise constitute an offense is justifiable and not criminal when it is necessary as an emergency measure to avoid an imminent public or private injury which is about to occur . . . and which is of sufficient gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding the injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offense."

The People are unaware of any evidence that would suggest that Ms. Versfelt's cultivation of marijuana constitutes an emergency measure to avoid an imminent injury. The People assume that Ms. Versfelt intends to argue that a debilitating medical condition constitutes an imminent private injury and that her cultivation of medical marijuana constitutes an emergency measure; however, an ongoing medical condition can not be construed as an imminent injury that is about to occur and the cultivation of over 50 marijuana plants in various stages of development can not be construed as an emergency measure.

The People request that the Court preclude Ms. Versfelt from presenting a "choice of evils" defense at trial and prohibit her from seeking to introduce any evidence relating to medical conditions or medical marijuana at trial.

Mistake of Fact or Law

Ms. Versfelt also disclosed potential defenses of “mistake of fact” and “mistake of law” pursuant to C.R.S. 18-1-504.

Subsection (1) of that statute states that a person is not relieved of criminal liability for conduct because she engaged in that conduct under a mistake belief of fact, unless: (a) it negates the existence of a particular mental state essential to the commission of the offense, OR (b) the statute defining the offense expressly provides for a defense based on a mistake of fact, OR (c) the factual mistake supports another justification outlined by statute.

The elements of the offenses charged in this case require that the People prove that Ms. Versfelt knowingly cultivated and possessed marijuana. There is no factual dispute between the parties relating to this issue. Ms. Versfelt’s statements on the date of the search and the primary defense that she seeks to assert acknowledge her admission that she knew she was growing marijuana in her home. There is no evidence to suggest that Ms. Versfelt thought that she was growing something other than marijuana.

Subsection (2) of the statute states in relevant part that a person is not relieved of for conduct because she engaged in that conduct under a mistake belief that it does not, as a matter of law, constitute an offense, unless the conduct is permitted by one of the following: (a) a statute or ordinance binding in this state; (b) an administrative regulation . . .; (c) an official written interpretation of the statute or law relating to the offense, made or issues by a public servant, . . . or judicial decision that is binding in the state of Colorado.

For over fifty years, it has been an axiom of Colorado law that “ignorance of the substantive law is no excuse for a violation thereof”. Kirkendoll v. People, 331 P.2d 809 (Colo.1958). More recently, in People v. Holmes, 959 P.2d 406 (Colo.1998), the Colorado Supreme Court quoted the United States Supreme Court in holding that “where the law imposes criminal liability for certain conduct, the scienter element requires ‘no more than that the person charged with the duty knows what he is doing. It does not mean that, in addition, he must suppose that he is breaking the law.’ United States v. Dashney, 937 F.2d 532, 538 (10th Cir.1991), *dismissal of post-conviction relief rev'd*, 52 F.3d 298 (10th Cir.1995). This general rule is based on the deeply-rooted principle that ignorance of the law or mistake of law is no defense to criminal prosecution. *See, e.g.*, Cheek v. United States, 498 U.S. 192, 199, 111 S.Ct. 604, 112 L.Ed.2d 617 (1991); Lambert v. California, 355 U.S. 225, 228, 78 S.Ct. 240, 2 L.Ed.2d 228 (1957); United States v. Smith, 18 U.S. (5 Wheat.) 153, 182, 5 L.Ed. 57 (1820) (Livingston, J., dissenting). “Based on the notion that the law is *definite* and *knowable*, the common law presumed that every person knew the law.” Cheek, 498 U.S. at 199, 111 S.Ct. 604 (emphasis supplied).^{FNG} In that footnote, the Colorado Supreme Court noted Justice Livingston’s 1820 explanation that “[N]o one is allowed to allege his ignorance in excuse for any crimes he may commit. Nor is there any hardship in this, for the great body of the community have it in their power to become acquainted with the criminal code under which they live.” Smith, 18 U.S. (5 Wheat.) at 182 (Livingston, J., dissenting).

Ms. Versfelt argues that she thought she was allowed to grow, possess and distribute marijuana as medicine pursuant to, Article XVIII, Section 14 of the Colorado Constitution. Her belief that her actions were legal does not negate the fact that she knew that she was growing marijuana.

Nor does her belief that she was legally growing medical marijuana create an affirmative defense to the charges in this case. No statute, ordinance, administrative regulation, written interpretation or judicial decision permitted Ms. Versfelt to grow marijuana. To the contrary, C.R.S. 18-18-406 specifically prevented her from doing so.

If the Court determines, as a matter of law, that Ms. Versfelt is not entitled to raise the affirmative defense of medical marijuana, then Ms. Versfelt must demonstrate that she was relying on one of the specific sources outlined in C.R.S. 18-1-504(2) in order to raise a “mistake of law” defense. Ms. Versfelt has not provided any such authority and should be precluded from raising the mistake of law defense.

Because Ms. Versfelt knew that she was growing marijuana and has not presented any legal authority justifying a “mistake of law” defense, the People move this Court for an order precluding Ms. Versfelt from raising either of the affirmative defenses described in C.R.S. 18-1-504 or from presenting evidence that she was operating under a mistake of fact or law.

Conclusion

Because Ms. Versfelt will be unable to raise the affirmative defenses of medical marijuana, choice of evils or mistake of fact or law, any evidence relating to the medical use of marijuana is irrelevant and has no tendency to make any fact that is of consequence to the determination of the action more or less probable. In addition, any evidence relating to the medical use of marijuana carries a significant danger of unfair prejudice, confusion of the issues and misleading the jury. Without the affirmative defense of medical marijuana, any evidence of medical marijuana has no probative value and should be excluded pursuant to C.R.E. 401 and 403.

Therefore, the People request that the Court preclude Ms. Versfelt from presenting any evidence relating to medical marijuana, choice or evils or a claimed mistake of fact or law.

Respectfully submitted,

STANLEY L. GARNETT
DISTRICT ATTORNEY

By:

Christopher Estoll, Reg. #36600
Deputy District Attorney
September 10, 2009

IT IS SO ORDERED. Done this _____ day of _____, _____.

Judge

CERTIFICATE OF SERVICE

I hereby certify that I mailed a true and correct copy of this motion to:

Robert J. Corry Jr.
600 Seventeenth Street
suite 2800 South Tower
Denver, CO 80202

/s/ _____ Dated: _____