In Orange County, of All Places!

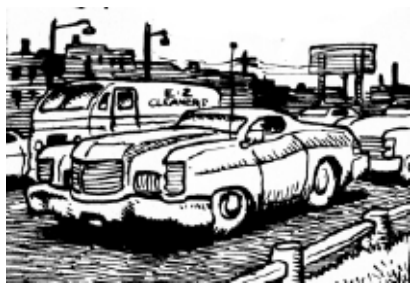
Appeals Court Orders Police to Follow State Law

For the first time in a published opinion, a California court clarified to the local police that it is state law, not federal law, they should be enforcing.

By Joe Elford

In *City of Garden Grove v. Superior Court,* a unanimous panel of three judges on California's Fourth Appellate District issued a 41-page published opinion, which made clear that all superior court judges across the state must return confiscated marijuana to those who demonstrate that they are entitled to possess it under California law. The opinion is written by the Honorable William Bedsworth, whom many consider the "Literary Jurist."

It starts out, "We confront here the facially anomalous request that we approve state confiscation of a substance which is legal in the circumstances under which it was possessed." I take this to mean that the court will not condone police seizing marijuana that is possessed legally under California law. In other words, the police should not have taken Felix Kha's marijuana in the first place.



The court, then, treated seized medical marijuana just like other legally possessed property taken by the police and found that "because Kha is legally entitled to possess it, due process and fundamental fairness dictate that it be returned to him." There would not be an exception to these constitutional principles for medical marijuana patients. Courts must return medical marijuana to qualified patients.

But what about federal law, you wonder? Well, federal law expressly contains an exception to its marijuana laws for law enforcement officers performing their functions. 21 U.S.C. Section 885(d) provides that "no civil or criminal liability shall be imposed [under the federal Controlled Substances Act] upon any... duly authorized officer of any State... who shall be lawfully engaged in the enforcement of any law or municipal ordinance relating to controlled substances." Thus, as did a unanimous court of appeals in Oregon, the Fourth Appellate District held that the courts and police are immune from federal drug laws for returning medical marijuana. Law enforcement's reliance on federal law in refusing to do this is misplaced.

By complying with the trial court's order, the Garden Grove police will actually be facilitating a primary principle of federalism, which is to allow the states to innovate in areas bearing on the health and well-being of their citizens. Indeed, our "federalist system, properly understood, allows California and a growing number of States [that have authorized the use of medical marijuana] to decide for themselves how to safeguard the health and welfare of their citizens."

***Amici* briefs**

The City of Garden Grove was joined in its resistance to court-ordered return of medical marijuana by several *amici* (friends of the court), which included the California Peace Officers' Association and the California District Attorneys' Association. (The Attorney General, on the other hand, filed a brief supporting our side.) The court addressed several of their claims:

"Amici for the City also claim that ordering the return of Kha's marijuana is ill advised as a matter of public policy because local police are held to a high moral standard, they often cooperate with federal drug enforcement efforts, and they are generally charged with enforcing and administering 'the law of the land,' which includes federal law.

"We appreciate these considerations and understand police officers at all levels of government have an interest in the interdiction of illegal drugs. But it must be remembered it is not the job of the local police to enforce the federal drug laws as such. For reasons we have explained, state courts can only reach conduct subject to federal law if such conduct also transcends state law, which in this case it does not. To the contrary, Kha's conduct is actually sanctioned and made 'noncriminal' under the CUA.

The court emphasized to the police that medical marijuana patients are not criminals:

"Amici argue the police should not have to return Kha's marijuana to him, even though he is qualified to use the drug for medical reasons under California law. Characterizing Kha as a 'criminal defendant,' *amici* claim the CUA only provides him with a 'defense' to certain offenses and does not make his possession of medical marijuana 'lawful.' But Kha is clearly not a criminal defendant with respect to the subject marijuana. Since the prosecution dismissed the drug charge he was facing, he is nothing more than an aggrieved citizen who is seeking the return of his property. The terms 'criminal' and 'defendant' do not aptly apply to him."

Joe Elford

For the first time in a published opinion, a California court clarified to the local police that it is state law, not federal law, they should be enforcing. It was a pleasure to read this thoughtful, well-reasoned decision which strongly vindicates the right of medical marijuana patients everywhere. It will be cited often.

Joseph Elford is chief counsel of Americans for Safe Access and co-counsel in Ross vs. RagingWire.

... And Stop Faking Expertise

By O'Shaughnessy's News Service

In a case called *"People vs. Christopher James Chakos,"* published Dec. 21 —the beginning of the end of darkness— the Fourth District Court of Appeal ruled that a narcotics officer had no expertise enabling him to distinguish between marijuana possessed legally and illegally. The opinion by Justice David G. Sills, in which Justices Richard Aronson and Richard Fybel concurred, is written in a tone of restrained disgust.

Back in December, 2004, Chakos, a phlebotomist in his late twenties, was stopped while driving home from the lab where he worked in Santa Margarita. He permitted Orange County Deputy Sheriff Christopher Cormier to search his car. In Chakos's backpack Cormier found seven grams of marijuana, a letter from Robert Sullivan, MD, confirming that Chakos used cannabis for medical purposes, and $781 in cash. There followed a search of the apartment that Chakos shared with his mother and half-brother, and which had a videocamera trained on the front door. Chakos led Cormier to his bedroom closet, where there was a glass jar with 25 grams of marijuana, ziplock bags with 90 and 42 grams respectively, a digital scale, and 99 baggies.

The Orange County District Attorney charged Chakos with possession for sale. Chakos was convicted by a jury solely on the testimony of Deputy Cormier, who appeared both as a percipient witness (to Chakos possessing marijuana) and as an expert (who could deduce from "the totality of the circumstances" that Chakos was dealing).

Chakos was sentenced to three years probation. An appeal to the Fourth District was then made on Chakos's behalf by attorney Kristin A. Erickson. The prosecution was defended by the state Attorney General's office.

The key precedent was a 1971 case called *People v. Hunt,* which involved a man who had a prescription for methedrine but was convicted of illegal possession for sale nonetheless. The California Supreme Court ultimately ruled for Hunt on the grounds that the narcotics officer who testified against him "did not have sufficient expertise with the lawful use of the drug."

Precisely analogous cases

The *Chakos* case was precisely analogous to *Hunt,* according to the Fourth District judges, who found no evidence in the record that Deputy Cormier "had any expertise in differentiating citizens who possess marijuana lawfully for their own consumption, as distinct from possessing unlawfully with intent to sell."

Cormier's alleged expertise was based on "680 hours of 'general' training at the academy and 270 hours of 'narcotics' training which included 'packaging, different types of drug identifications, growing marijuana, selling marijuana' and 'packaging marijuana.' He had been in the county sheriff's narcotics unit for six years. He had assisted more than a hundred 'investigations for possession of [sic] sale of narcotics.' He had spoken to people who sell narcotics and to people who buy narcotics, including the amounts bought, sold and used. He had seen marijuana before, and could tell the plant just by looking at it, as well as knowing the plant's 'unique odor.' He had seized 'indoor grows' between one small plant and 150 plants."

Versions of this narcotics officer's resume get recited at every drug-related trial in California and beyond. One hears occasional reference to training seminars held in Las Vegas, Honolulu, and other venues where, one assumes, the intense coursework can be interlarded with a bit of R&R.

Justice Sills' ruling accuses the state attorney general of "misreading" the *Hunt* precedent. The AG had tried to distinguish the methedrine in *Hunt* from the marijuana in *Chakos* because Hunt had a prescription. "The Attorney General relies on a distinction without a difference," wrote Justice Sills. "*Hunt* was decided under state law, and the case involved a prosecution under state laws that forbid possessing certain drugs for sale.

Will California narcotics officers now get training in the medical use of marijuana? Who will design the course content and give the lectures?

"*Hunt's* rationale depended on the possibility of lawful use under state law and therefore the need of an officer-expert to be able to distinguish patterns of lawful from otherwise unlawful use. The fact that the Compassionate Use Act may allow lawful possession under state law pursuant to a physician's 'recommendation,' as distinct from a formal 'prescription, has nothing to do with what the *Hunt* case said about expert witnesses, since, in 2007, regardless of whether marijuana is possessed pursuant to a 'prescription' or pursuant to a 'recommendation,' it can be possessed lawfully under state law the same as the defendant in Hunt could lawfully possess his methedrine under state law."

Under cross examination Deputy Cormier had said "I don't think I've actually arrested anybody with" a doctor's approval to use marijuana. "I've had contact with investigations, but for me to personally arrest somebody with one, I think this might be the first one."

Justice Sills wrote: "Mere and undefined 'contact' with undefined 'investigations' is manifestly not substantial evidence that an officer is in any way familiar with the patterns of individuals who, under state law, may lawfully purchase marijuana pursuant to a physician's certificate under the Compassionate Use Act, nor does it show any expertise in the ability to distinguish lawful from unlawful possession.

"Indeed, Cormier's lack of expertise in distinguishing lawful from unlawful possession is revealed in some of his own testimony. He laid great stress on the fact that about a quarter ounce of marijuana was found in Chakos' backpack when he was arrested. And, of course, intuitively, such a precise amount would seem consistent with drug dealing... But what are we to make of Cormier's percipient testimony that Chakos was found to have irregular amounts found in his closet? Taking Deputy Cormier's own testimony at face value, a reasonable trier of fact

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photo by Lisa Schamberger

Kristen Erickson

might infer that the irregular amounts of marijuana were inconsistent with dealing and were consistent with lawful use under the Compassionate Use Act."

Justice Sills also noted that possession of a scale does not a dealer make. "Anyone with the lawful right to possess marijuana will need to take precautions not to insure that he or she does not get 'ripped off' by a dealer, but that he or she does not possess more than the eight ounces contemplated by the Act. Practical difficulties of obtaining the drug also explain why a patient entitled to possess it under state law might want to keep an extra supply on hand within the legal amount, since supplies would not be reliable.

"The record fails to show that Deputy Cormier is any more familiar than the average layperson or the members of this court with the patterns of lawful possession for medicinal use that would allow him to differentiate them from unlawful possession for sale. In other words, Cormier was unqualified to render an expert opinion in this case. Under *Hunt,* that means there was insufficient evidence to sustain the conviction."

Dr. Sullivan Comments

Robert Sullivan, MD, was called to testify for the defense when *People v. Christopher James Chakos* was tried on Jan. 11, 2006, in Orange County Superior Court. Sullivan confirmed that he had authorized Chakos's use of cannabis, and estimated the appropriate dosage to be 1/8 to 1/4 ounce per week.

About the appellate court ruling, Sullivan commented: "Good for Chris! Good for him for seeing it through. I feel heartened by the rationality of these judges. Too many of our patients get harassed, and this seems like a decision their lawyers can put to good use."

Inappropriate prosecution of medical cannabis users affects doctors as well as their patients. "We spend a lot of time writing letters confirming that our patients are legitimate," Sullivan says. He has been called to testify five to eight times a year, and so has his partner, Philip Denney, MD.

"It's not as simple as it sounds," Sullivan notes. We have to cancel our patients for the day, travel to the courtroom, and very often we find out that the trial has been delayed for one reason or another."

Sullivan thinks the *Chakos* ruling will compel law enforcement agencies in California to provide training that satisfies the Fourth District's standard of expertise. "Who gives the training and what it consists of will be important," he says.

To date the California Narcotics Officers Association informs its members that marijuana has no medical uses whatsoever. Training in what doctors and scientists have learned —and what the state Health & Safety code says— can only make the situation better for all concerned.

From Attorney Kristen Erickson:

"Chris had far less than the 8 oz. he was entitled to have under the CUA, yet the officer emphasized the quantity as being indicative of sales. This is typical narc testimony. Whatever the amount in the particular case is what they will testify is indicative of sales. The difference here is that the amount possessed was also indicative of lawful use, which isn't the case with other drugs.

"Also, just for the record, Chris was totally cooperative and took the cops to his house to search, which he had every right to refuse! They didn't have a warrant and were not in close proximity to his house when he was stopped. He certainly exhibited 'consciousness of innocence' here.

"Overall, I am so pleased with the decision. Law enforcement has done nothing but 'dis' the voters that supported the CUA. They have applied the same cookie-cutter approach to these cases as they do to every other case and have refused to become educated about the needs and practices of legitimate marijuana users. Hopefully this decision will bring some much-needed change to law enforcement's approach to these cases and these clients."