IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	**No. 1 CA-CR 16-0703**
Appellee,	**Yavapai County Superior Court No. P1300CR201400328**
vs.	
RODNEY CHRISTOPHER JONES,	
Appellant.	

APPELLANT'S OPENING BRIEF

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STATEMENT OF THE CASE

On April 9, 2014, an Indictment was filed, which charged the Appellant with:

Count I: Possession or Use of a Narcotic Drug. On or about March 1, 2013, **RODNEY CHRISTOPHER JONES**, knowingly possessed or used a narcotic drug, to-wit: cannabis, in violation of A.R.S. §13-3408, a class 4 felony.

Count II: Possession or Use of Drug Paraphernalia. On or about March 1, 2013, **RODNEY CHRISTOPHER JONES**, used or possessed with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body an illegal drug, in violation of A.R.S. §13-3415, a class 6 felony.

On October 13, 2014, the Appellant filed his Motion to Dismiss, which argued that the Appellant possessed a valid Arizona Medical Marijuana Card at the time of his arrest. Per the Arizona Medical Marijuana Act (AMMA), codified as A.R.S. §36-2801[1], the use of marijuana and "any mixture or preparation thereof" was decriminalized for medical use. (Motion to Dismiss, pg. 2).

On November 14, 2014, the state's "Response to Defendant's Motion to Dismiss" was filed. The state agreed that at the time of the Appellant's arrest he possessed a valid AMMA card. (Response pg. 1). The state argued that although

[1] §36-2801(8), states: "Marijuana" means all parts of any plant of the genus cannabis whether growing or not, and the seeds of such plant.

medical marijuana is legal in the state of Arizona, *hashish* is not. (Response, pg. 9).

On April 28, 2015, the Court held an Evidentiary. The Court ruled:

> The Court does not want to minimize what the Department of Health Services is doing, however, their rules and regulations may provide a due process violation but not a basis for the Defendant's Motion to Dismiss. The Department of Health Services is relying on a decision made that has not yet been addressed by the higher Courts. The Court has read the *Welton*[2] decision and understands the analysis made there. However, this Court has concerns that Judge Cooper's ruling does not address the fact that the statute defines the extract of cannabis separately as a narcotic drug, and not as marijuana. The Court accepts the State's position that the Arizona Medical Marijuana Act was not specifically written in a way that addresses this issue. The Court is not as clear as Judge Cooper that the Arizona Medical Marijuana Act includes what the legislature defines as cannabis. Therefore, based on this Court's review of the statutes and the information presented, the Motion to Dismiss is **DENIED**.

(MEO Evidentiary Hearing, pg. 2, italics added).

A Special Action was filed on July 23, 2015. On August 28, 2015 jurisdiction was denied.

A Bench Trial was held on September 14, 2016. The Appellant waived a trial by jury and stipulated that the evidence would be presented by Trial Memorandum. The Court found the Appellant guilty on all counts.

Sentencing was held on October 3, 2016. The Appellant was sentenced to

[2]Welton v. State of Arizona, Maricopa County Superior Court case #CV2013-014852

2.5 years in the Arizona Department of Correction with credit for 366 days time served. A timely Notice of Appeal was filed on October 3, 2016.

STATEMENT OF FACTS

On November 2, 2010, Arizona voters passed the Arizona Medical Marijuana Act (AMMA) decriminalizing marijuana for qualified patients. Appellant was issued a valid medical marijuana card on June 9, 2012.

On March 1, 2013, Officers responded to a noise complaint at the Prescott Resort, room 422. When the door was opened, the Officer smelled the odor associated with marijuana. The Appellant told the Officer that he had a Medical Marijuana card for the marijuana. The Appellant had two jars of marijuana. In one of the jars wrapped in paper was cannabis. According to the Yavapai-Prescott Tribal Police Dept. Report that was attached to the Bench Trial Memorandum, the substance tested negative for hashish. The DPS lab tested and weighed the substance. The Scientific Examination Report said that it was 1.43 grams of cannabis, a narcotic drug.

STATEMENT OF THE ISSUE PRESENTED:

I. Did the Trial Court Err, or Abuse its Discretion, when it found that extract of cannabis is a narcotic drug and not marijuana pursuant to the Arizona Medical Marijuana Act.

STANDARD OF REVIEW

The appellate standard of review regarding statutory construction is:

> We review the issue de novo because it is "a question of statutory construction." State v. Estrada, 201 Ariz. 247, 250, ¶ 15, 34 P.3d 356, 359 (2001). When interpreting a statute, we follow the rules of statutory construction and first look to the statutory language. State v. Williams, 175 Ariz. 98, 100, 854 P.2d 131, 133 (1993); Patterson v. Mahoney, 219 Ariz. 453, 456, ¶ 9, 199 P.3d 708, 711 (App. 2008). If the language is clear and unequivocal, it is determinative. Patterson, 219 Ariz. at 456, ¶ 9, 199 P.3d at 711.

(State ex rel. Montgomery v. Woodburn, 231 Ariz. 215, 216, 292 P.3d 201, 202 (Ct. App. 2012)).

> Reversible error based on insufficiency of the evidence occurs only where there is a complete absence of probative facts to support the conviction. The credibility of witnesses is an issue to be resolved by the jury; as long as there is substantial supporting evidence, we will not disturb their determination.

(State v. Soto-Fong, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996)).

The appellate standard of review regarding sustaining the verdicts is:

> However, on appeal, we are obligated to view the evidence in the light most favorable to upholding the verdicts ... and must make all reasonable inferences which support the verdict.

(State v. Mathers, 165 Ariz. 64, 73, 796 P.2d 866, 875 (1990)).

The appellate standard of review regarding the Trial Court's rulings on evidentiary issues is abuse of discretion:

> We review evidentiary rulings for an abuse of discretion. State v. Tucker, 215 Ariz. 298, 314, P 58, 160 P.3d 177, 193 (2007). Evidentiary rulings based on constitutional law or statutory

> construction, however, are reviewed de novo. See *id.* at 315, P 61, 160 P.3d at 194. Because Armstrong objected below, we will review any error under the harmless error standard. Henderson, 210 Ariz. at 567 P 18, 115 P.3d at 607. "Harmless error review places the burden on the state to prove beyond a reasonable doubt that the error did not contribute to or affect the . . . sentence." *Id.*

(State v. Armstrong, 218 Ariz. 451, 458, 189 P.3d 378, 385 (2008)).

ARGUMENT AND THE LAW

I. Did the Trial Court Err, or Abuse its Discretion, when it found that extract of cannabis is a narcotic drug and not marijuana pursuant to the Arizona Medical Marijuana Act?

On November 2, 2010, Arizona voters passed the AMMA in order to "protect patients with debilitating medical conditions, as well as their physicians and providers, from arrest and prosecution, criminal and other penalties and property forfeitures if such patients engage in the medical use of marijuana." Prop. 203 § 2(G).

A.R.S.§ 36-2801(8) states "Marijuana" means *all parts of any plant of the genus cannabis* whether growing or not, and the seeds of such plans. (Italics added).

A.R.S. § 36-2801(15) "Usable Marijuana" means the dried flowers of the marijuana plant, *and any mixture or preparation thereof*, but does not include the seeds, stalks and roots of the plant and does not include the weight of any non-

marijuana ingredients combined with marijuana and prepared for consumption as food or drink. (Italics added). As pointed out in the Appellant's Motion to Dismiss:

> Both the plain language of the AMMA and the proponents' and voters' broad intent in passing it demonstrate that Mr. Jones is entitled to dismissal because the AMMA protects patients' ability to treat their debilitating medical conditions with marijuana extracts. The plain language of the AMMA includes extracts from the marijuana plant.

(Motion to Dismiss, pg. 2).

Despite the fact that §36-2801(8) clearly defined marijuana as "all parts of any plant of the genus cannabis whether growing or not, and the seeds of such plant," A.R.S. §13-3401(4),(19),(20) provides that marijuana extract, or cannabis, is a narcotic drug, thus outside of the protections of the AMMA. The definition of marijuana under the AMMA, which includes marijuana extract, trumps the definition of cannabis, or marijuana extract under A.R.S. 13-3401, because it is the more recently enacted and more specifically worded statute.

> When "two conflicting statutes cannot operate contemporaneously, the more recent, specific statute governs over an older, more general statute." UNUM Life Ins. Co., 200 Ariz. at 333 ¶ 29, 26 P.3d at 516.

(State v. Jones, 235 Ariz. 501, 503, 334 P.3d 191, 193 (2014)).

Furthermore, the statutory language of A.R.S. § 36-2801(15) of the AMMA defined "Usable Marijuana" as "dried flowers of the marijuana plant, *and any mixture or preparation thereof*." This would necessarily include cannabis.

> When interpreting a statute, we follow the rules of statutory construction and first look to the statutory language. State v. Williams, 175 Ariz. 98, 100, 854 P.2d 131, 133 (1993); Patterson v. Mahoney, 219 Ariz. 453, 456, ¶ 9, 199 P.3d 708, 711 (App. 2008). If the language is clear and unequivocal, it is determinative. Patterson, 219 Ariz. at 456, ¶ 9, 199 P.3d at 711.

State ex rel. Montgomery v. Woodburn, 231 Ariz. 215, 216, 292 P.3d 201, 202 (Ct. App. 2012)

The AMMA did not differentiate between marijuana and cannabis. On the contrary, it combined them with the language "any mixture or preparation thereof."

> In both Estrada and Hatton, the court of appeals justifiably found it irrational to permit incarceration for possession of minor paraphernalia and to prohibit incarceration for the more serious crime of actual drug possession or use. The State has suggested no rationale for this inconsistent result, nor do we perceive any reasonable basis for it. See State v. Rodriguez, 153 Ariz. 182, 186-87, 735 P.2d 792, 796-97 (1987) (finding it "inconceivable" that the legislature could have intended the result that greater punishments attend less serious crimes).

(State v. Estrada, 201 Ariz. 247, 251, 34 P.3d 356, 360 (2001)).

According to the definition of marijuana under the Title 13 Criminal Code, §13-3401, marijuana "means all parts of any plan or genus cannabis, from which the resin has not been extracted. And cannabis means "the resin extracted from any part of a plant of the genus cannabis, and every compound, manufacture, salt, derivative, mixture or preparation of such plant, its seeds or its resin." As noted above, §36-2801(8) defines marijuana as "all parts of any plant of the genus

cannabis whether growing or not, and the seeds of such plant. §36-2801(15) defines usable marijuana as "the dried flowers of the marijuana plant, and any mixture or preparation thereof," but does not include the seeds, stalks and roots of the plant and does not include the weight of any non-marijuana. Clearly, the definitions in §36-2801 are a combination of the definitions of marijuana and cannabis under the criminal code. If there is any question about the clarity of a statute then the Court must look at the plan language of the statute

> In addition, though we most commonly examine legislative history due to statutory ambiguity or absurdity, it is also well established that even where statutory language is "clear and unambiguous," we will not employ a "plain meaning interpretation [that] would lead to . . . a result at odds with the legislature's intent." Resolution Trust Corp. v. Western Techs., Inc., 179 Ariz. 195, 201, 877 P.2d 294, 300 (App. 1994) (McGregor, J.); see also, e.g., Calik v. Kongable, 195 Ariz. 496, 501, 990 P.2d 1055, 1061 P20 (1999) ("Courts should avoid hypertechnical constructions that frustrate legislative intent." (internal quotations omitted)); Mail Boxes, Etc., U.S.A. v. Industrial Comm'n, 181 Ariz. 119, 121, 888 P.2d 777, 779 (1995) ("Where language is unambiguous, it is normally conclusive, absent a clearly expressed legislative intent to the contrary."); Corbin v. Pickrell, 136 Ariz. 589, 592, 667 P.2d 1304, 1307 (1983) ("It is a basic tenet of statutory construction that where the statutory language is unambiguous, that language must ordinarily be regarded as conclusive, absent a clearly expressed legislative intent to the contrary.").

State v. Estrada, 201 Ariz. 247, 251, 34 P.3d 356, 360 (2001).

The AMMA did *not* dictate that patients can only use plant materials that have *not* been manipulated.

The Arizona Supreme Court held:

> Statutes should be construed sensibly to avoid reaching an absurd conclusion. Mendelsohn v. Super. Ct. in and for Maricopa Cnty., 76 Ariz. 163, 169, 261 P.2d 983, 987-88 (1953).

(State ex rel. Montgomery v. Harris, 237 Ariz. 98, 101, 346 P.3d 984, 987 (2014).

The Harris Court addressed conflicts in the AMMA and other statutes:

> The State's interpretation that "its metabolite" includes any byproduct of a drug listed in § 13-3401 found in a driver's system leads to absurd results. See State v. Estrada, 201 Ariz. 247, 251 ¶ 14, 34 P.3d 356, 360 (2001)(observing that a "result is absurd if it is so irrational, unnatural, or inconvenient that it cannot be supposed to have been within the intention of persons with ordinary intelligence and discretion") (internal quotation marks omitted).
>
> Most notably, this interpretation would create criminal liability regardless of how long the metabolite remains in the driver's system or whether it has any impairing effect. For example, at oral argument the State acknowledged that, under its reading of the statute, if a metabolite could be detected five years after ingesting a proscribed drug, a driver who tested positive for trace elements of a non-impairing substance could be prosecuted.
>
> Additionally, this interpretation would criminalize otherwise legal conduct. In 2010, Arizona voters passed the Arizona Medical Marijuana Act ("AMMA"), legalizing marijuana for medicinal purposes. A.R.S. § 36-2801 et seq.
>
> Despite the legality of such use, and because§ 28-1381(A)(3) does not require the State to prove that the marijuana was illegally ingested, prosecutors can charge legal users under the (A)(3) provision. Because Carboxy-THC can remain in the body for as many as twenty-eight to thirty days after ingestion, the State's position suggests

> that a medical-marijuana user could face prosecution for driving any time nearly a month after they had legally ingested marijuana.

...

> Because § 28-1381(A)(3) does not require the State to prove that a substance discovered in a driver's body is actually metabolized from a proscribed drug, the State's interpretation would permit prosecution if the discovered substance is a metabolite of a proscribed drug even if the proscribed drug was never ingested. These results are absurd and make the State's argument untenable.

(*Id.*)

In this case, the Trial Court erred and abused its discretion when it did not grant the Motion to Dismiss by following the plain language of the AMMA. The Trial Court explained its decision:

> I have read and reread the *Welton* decision; I do understand the analysis that's made there. But what frustrates this Court and is of concern to this Court is that Judge Cooper really does not address the fact that the statute defines Cannabis separately as a narcotic drug.
>
> And so while I understand that her opinion may be that that's no longer the definition or no longer applicable, I struggle with her decision for that reason:
> She didn't specifically address the fact that the statutes do define the extract Cannabis as a narcotic drug, not as marijuana.
>
> I've read the two definitions, and I understand why she believes that the mixtures and preparations may include Cannibis as it's defined in the statute, but I also accept the State's position at this time that – I'm not sure the AMMA was specifically written in a way that addresses that issue, and I'm not as clear on it as Judge Cooper that, in fact, the AMMA does include what the Legislature defines as "Cannabis."

> At this time, based on my review of the statutes and everything that's involved, my ruling is to deny the Motion to Dismiss.

(Evidentiary Hearing Transcript, April 28, 2015, pgs. 20-21).

The Trial Court noted "They're relying on a decision that was made that has not been taken up, *that has not been addressed by a higher court*. (*Id*., pg. 20, lns. 7-9, italics added).

The Yavapai County Trial Court's Ruling is why this Court must resolve the conflicts outlined in this Appeal. First, the statutes, §13-3401 and §36-2801, conflict (*supra*). As stated above, §36-2801 should control for purposes of AMMA cases. Second, the conflicting laws are not being applied uniformly in Arizona: if you are in Maricopa County, possession of an extract of marijuana under the AMMA is legal, but if you enter Yavapai County it is not.

This disparate application of law is a serious Due Process problem.

Finally, the Indictment in this case was insufficient as a matter of law. See: Rule 16.6 (b) of the Arizona Rules of Criminal Procedure. As stated in the Appellant's Motion to Dismiss:

> Mr. Jones contends that the indictment is "insufficient as a matter of law[3]" because the AMMA decriminalized his possession of cannabis.

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[3] The Motion to Dismiss relied in part on Mejak v. Granville, 212 Ariz. 555, 556 (2006), in which the Arizona Supreme Court held: "If a defendant can admit to

The AMMA was passed by Arizona voters on November 2, 2010 and Mr. Jones was issued a valid medical marijuana card on June 9, 2012.

Because the Appellant had a valid Arizona medical marijuana card, the Trial Court erred and/or abused its discretion when it did not dismiss the case because the Indictment was insufficient as a matter of law.

CONCLUSION

For the reasons stated above, the Appellant requests this Court vacate the convictions in the case, and remand the case to the Trial Court for a dismissal.

Finally, it is further requested that this Court search the record for fundamental error. (St. v. Powell, 5 Ariz App. 51, 423 P. 2d 127 (1967)).

Respectfully submitted this March 27, 2017.

By____//S//_____
Craig Williams
Attorney for Appellant

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all the allegations charged in the indictment and still not have committed a crime, then the indictment is insufficient as a matter of law."