

COURT OF APPEAL-4TH DIST DIV 3
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COURT OF APPEAL FOR THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION THREE

THE CITY OF GARDEN GROVE, a municipal corporation

Petitioner

ORANGE COUNTY SUPERIOR COURT

Respondent

FELIX KHA,

Real Party in Interest

Civil No. G036250
Orange County Superior Court
No. GG98995
Superior Court Judge
Honorable Linda S. Marks
Department: W3
Telephone: (714) 896-7142

REPLY TO REAL PARTY IN INTEREST'S INFORMAL
OPPOSITION TO PETITION FOR WRIT OF MANDATE,
PROHIBITION, OR OTHER APPROPRIATE RELIEF

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TABLE OF CONTENTS

1. INTRODUCTION1

2. KHA IS NOT ENTITLED TO THE RETURN OF MARIJUANA WHICH WAS ILLEGALLY OBTAINED OR POSSESSED2

 A. Under State Law It Remains Illegal For Persons Who Are Not Qualified Patients Or Designated Primary Caregivers To Cultivate Or Distribute Marijuana2

 B. Kha Obtained His Marijuana Illegally5

 C. Kha Is Not Entitled To The Return Of Illegal Contraband.....6

3. CONTRABAND MADE UNLAWFUL BY FEDERAL LAW MAY NOT BE RETURNED TO KHA7

4. NEITHER THE CUA NOR ANY OTHER LAW OF THE STATE OF CALIFORNIA CONTEMPLATE THE RETURN OF ILLEGAL CONTRABAND8

5. POSSIBLE IMMUNITY OF LOCAL LAW ENFORCEMENT OFFICERS UNDER 18 U.S.C. SECTION 885(D) DOES NOT MAKE RETURN OF THE MARIJUANA LEGAL.....9

6. TO THE EXTENT STATE LAW FACILITATES POSSESSION OF MARIJUANA, IT IS PREEMPTED BY FEDERAL LAW.....10

7. CONCLUSION11

CERTIFICATE OF WORD COUNT.....12

TABLE OF AUTHORITIES

FEDERAL CASES

Gonzales v. Raich (2005) 125 S. Ct. 2195, 162 L. Ed. 2d 1 2, 7, 10

People v. Urziceanu (3rd Dist. 2005) 132 Cal. App. 4th 747 3, 4

State v. Kama, (Or. Ct. App. 2002) 178 Or. App. 561, 39 P.3d 866 10

STATE CASES

Chavez v. Superior Court (2004) 123 Cal. App.4th 104 8, 9, 10

People v. Mower (2002) 28 Cal. App. 4th 457 1, 9

People v. Tilehkooh, (2003) 113 Cal. App. 4th 1433 7

STATE STATUTES

Health and Safety Code section 11357 1, 3, 7

Health and Safety Code section 11358 1, 3

Health and Safety Code section 11359 3

Health and Safety Code section 11360 3

Health and Safety Code section 11362.7(d)(3) 5

Health and Safety Code section 11362.7(f) 4

Health and Safety Code section 11362.765 3, 4

Health and Safety Code section 11366 3

Health and Safety Code section 11366.5 3

Health and Safety Code section 11473.5 7, 10

Health and Safety Code section 11473.5 (a) 7

Health and Safety Code section 11570 3

Health and Safety section 11362.5 3, 4, 9

Vehicle Code section 23222 1, 6

Vehicle Code section 23222(b) 1

OTHER

Proposition 215 **passim**

1. INTRODUCTION

Neither the State of California nor the Federal Government has legalized marijuana. In the State of California, a person is still subject to arrest and prosecution for use, possession and cultivation of marijuana. In passing Proposition 215, the People of the State of California did nothing more but carve out a limited defense to prosecution under Health and Safety Code sections 11357 (possession) and 11358 (cultivation). (People v. Mower (2002) 28 Cal. App. 4th 457) In 2003, the California Legislature extended the application of this defense to prosecution of related marijuana offenses under five additional sections of the Health and Safety Code.

Real Party In Interest, Felix Kha, ("Kha") was not charged with violation of any section of the Health and Safety Code. Rather, Kha was charged with violation of Vehicle Code section 23222(b) (possession of less than one ounce of marijuana while driving a motor vehicle upon a highway). Neither the People of State of California nor the California Legislature has expressly created a medical marijuana defense to prosecution under Vehicle Code section 23222(b).

This petition presents three basic questions. The first, whether Respondent erred in finding that marijuana was not unlawfully possessed contraband. Second, whether Respondent abused its discretion when it ordered the return of a controlled substance to Kha's possession, when such possession is federally proscribed. Third, whether the Compassionate Use Act ("CUA"), to the extent it compels the return of illegal contraband and condones and facilitates its possession, is preempted by the CSA under the

Supremacy Clause of the United States Constitution.

The basic argument presented by Kha on the issue that marijuana is unlawful contraband is that, under state law, he is a qualified patient absolutely entitled to possess eight grams of marijuana and have it returned to his possession. Kha's argument is unsupported by the facts and the relevant law.

On the issue of whether Respondent abused its discretion by ordering the return of the marijuana, Kha argues, for the first time, that his marijuana was seized without probable cause. The trial court made no finding that Kha's marijuana was confiscated without probable cause and the record does not establish lack of probable cause. Kha also claims that because he is immune from prosecution under the CUA, he was entitled to the return of his marijuana, despite the federal prohibition against possession. Kha's argument is not supported by relevant law.

Kha's basic argument on the issue of federal preemption, is that regulation of drugs is a state concern. Kha's argument is not supported by relevant law, including the United States Supreme Court's recent decision in Gonzales v. Raich (2005) 125 S. Ct. 2195, 162 L. Ed. 2d 1)

2. KHA IS NOT ENTITLED TO THE RETURN OF MARIJUANA WHICH WAS ILLEGALLY OBTAINED OR POSSESSED

A. Under State Law It Remains Illegal For Persons Who Are Not Qualified Patients Or Designated Primary Caregivers To Cultivate Or Distribute Marijuana

"The Compassionate Use Act stated that one of its purposes was to encourage the state and federal government to implement a plan to provide for the safe and affordable distribution of medical

marijuana to those patients who need it. (§ 11362.5, subd.(b)(1)(C).) The Medical Marijuana Program Act is the Legislature's initial response to that directive. (Stats.2003, ch. 875, § 1.)" (People v. Urziceanu (3rd Dist. 2005) 132 Cal. App. 4th 747, 782-783)

The Medical Marijuana Program Act ("Act")¹ provides that a qualified patient is entitled to possess a limited amount of marijuana for personal consumption which was either cultivated by the patient or which was cultivated and distributed to him by his designated primary caregiver. Under these limited circumstances, a qualified patient under the CUA is not subject to prosecution for violating Health and Safety Code sections 11357 and 11358. The Act expanded this protection to other related marijuana offenses, prosecution under sections 11359, 11360, 11366, 11366.5, and 11570 of the Health and Safety Code. (Health and Safety Code section 11362.765)

The Act also extends those exemptions provided by Proposition 215 to those qualifying patients and primary caregivers who collectively and cooperatively cultivate marijuana for medical purposes, exempting them from "criminal sanctions for possession, for sale, transportation or furnishing marijuana, maintaining a location for lawfully selling, giving away or using controlled substance, managing a location for the storage, distribution of a

¹ The Medical Marijuana Program Act became effective January 1, 2004. In enacting this law, the Legislature intended to "clarify the scope of the application of the CUA and facilitate the prompt identification of qualified patients and their designated primary caregivers in order to avoid unnecessary arrests and prosecutions of these individuals and provide needed guidance to law enforcement officers. (Historical and Statutory notes under Health and Safety Code section 11362.7, Legislative Findings and Declarations Relating to Stats. 2003, C. 875 (S.B. 420))

controlled substance for sale and the law declaring the use of property for these purposes of nuisance.” (People v. Urziceanu (3rd Dist. 2005) 132 Cal. App. 4th 747, 785) However, the exemptions only apply to “qualifying patients” and “primary givers as narrowly defined by the Act.”²

The Act defines a qualified patient as “a person who is entitled to the protections of Health and Safety section 11362.5, but does not have an identification card issued pursuant to this article. (Health and Safety Code section 11362.7(f)) By definition, a primary caregiver is the “individual, designated by a qualified patient or person with an identification card, who has consistently assumed responsibility for housing, health, or safety of that patient or person, and may include ...” a licensed clinic, healthcare facility, hospice, or health agency facility, and its owner or operator, “if designated as a primary caregiver by the qualified patient or person with an identification card;” an individual designated as primary caregiver by more than one qualified patient or person with an identification card, if every such person who has “designated that individual as a primary caregiver resides in the same city or county as the primary caregiver;” or an individual who has been designated as a primary caregiver by a qualified patient who resides in a city or county other than that primary caregiver, if the individual has not been designated as a primary caregiver by any other qualified patient or person with an identification card.” (Health and Safety Code section 11362.7(d))

² The Act provides, “nothing in this section shall authorize the individual to smoke or otherwise consume marijuana unless otherwise authorized by this article, nor shall anything in this section authorize any individual or group to cultivate or distribute marijuana for profit.” (Health and Safety Code section 11362.765)

B. Kha Obtained His Marijuana Illegally

Kha ignores the only logical conclusion that can be drawn from the evidence before this court – Kha illegally obtained his marijuana. When questioned, Kha admitted to the officers that his marijuana came from "a lab in Long Beach." (Exhibit E, pg.1) His admission, confirms he neither cultivated it nor acquired it from a designated primary caregiver. At the time the marijuana was confiscated, Kha resided in Westminster, in the County of Orange. (Exhibit D) The lab was admittedly located in a different county, Los Angeles. Under the Act, when a qualified patient resides in a county different from the primary caregiver, the caregiver may only distribute marijuana to him if the qualified patient has designated the individual as his exclusive primary caregiver. (Health and Safety Code section 11362.7(d)(3)) A "lab in Long Beach" does not meet this stringent criteria.

Although Proposition 215 was enacted to ensure qualified patients had access to marijuana and the Act was enacted to clarify what activities were protected under the CUA, it remains illegal for anyone other than a qualified patient or designated primary caregiver to cultivate or distribute marijuana. It follows that it is illegal for a qualified patient to obtain possession of marijuana through illegal means. The fact a qualified patient may possess marijuana legally does not obviate the fact that the possession must have been accomplished legally, i.e. cultivation by the qualified patient or a primary caregiver as those terms are defined the Act. Otherwise, it would have been unnecessary for the Legislature to enact law clarifying who could cultivate and distribute marijuana under the protection of the CUA and the Act.

Kha's illegal activities place him outside the protections of the CUA. Hence, Kha does not have an absolute right to possess 8.1 grams of illegally cultivated and distributed marijuana or to have this property returned to his possession.

C. Kha Is Not Entitled To The Return Of Illegal Contraband

Neither the People of the State of California nor the Legislature has expressly created a medical marijuana defense to Vehicle Code section 23222. As evidenced by enactment of the Act, the Legislature could certainly have extended the medical marijuana immunity to prosecution for possession of marijuana under the Vehicle Code. It did not do so. Nothing in the record supports Kha's contention that the marijuana was seized without probable cause or that Kha even raised this objection in the trial court.³ As discussed above, since it was obtained, illegally, Kha's possession of marijuana was outside the protection of the CUA and the Act.

Cultivation and distribution of marijuana by someone other than a designated primary caretaker is illegal under state law. It is incontrovertible that possession, cultivation and distribution of marijuana under any circumstances, except as part of an FDA pre-approved research study, is illegal under federal law. State law is preempted by federal law when, as here, it is in direct conflict with federal law. Since, Kha was not in lawful possession of the

³ The record does not establish that the referral handed to the officers on the date Kha was cited, was the same physician statement attached as Exhibit B. Regardless, it was reasonable for the officers to seize the marijuana when they could not confirm the authenticity of the referral and Kha was less than candid about where he obtained it.

marijuana, it cannot be returned to Kha. Rather it must be destroyed pursuant to Health and Safety Code section 11473.5 (a).

**3. CONTRABAND MADE UNLAWFUL BY FEDERAL LAW
MAY NOT BE RETURNED TO KHA**

Kha's reliance on People v. Tilehkooh, (2003) 113 Cal. App. 4th 1433, is misplaced. Tilehkooh was decided before the United State Supreme Court rendered its opinion in Gonzales v. Raich (2005) 125 S. Ct. 2195, 162 L. Ed. 2d 1. Raich recognized Congress' expressed intent to occupy the field, leaving no room for states to regulate the distribution and possession of marijuana. Despite California's recognized immunities from prosecution for specified violations of the Health and Safety Code, marijuana remains illegal contraband under federal and state law. No such immunities exist under federal law. Regardless, the CUA and the Act are in direct conflict with Congress' findings that marijuana serves no medicinal purpose and its possession or distribution for personal use is illegal under any circumstance. When state law is in conflict with federal law, federal law prevails.

The voters in passing Proposition 215 and the legislature in passing the Act, limit and regulate who may possess marijuana and where medicinal marijuana can be acquired, i.e., qualified patients only have access to marijuana through limited channels. This appears an attempt by the California legislature, albeit unsuccessful, to avoid colliding with federal law.

Tilehkooh is distinguishable on its facts because that case involved prosecution under the Health and Safety Code, specifically section 11357 – expressly addressed in the CUA and the Act. Here, Kha was prosecuted under a different code, the California Vehicle

Code. Kha admittedly obtained the marijuana illegally, from a source other than a primary caregiver. Neither state nor the federal law permit illegal distribution of marijuana. A qualified patient does not change the illegal status of the drug by his possession. To prevent illegal drug trafficking, the legislature provided the only means by which a qualified patient may possess marijuana. Acquisition and possession by any other means falls outside of the protections of the CUA and the Act.

Here the trial court is asked to recognize the unlawful nature of the contraband under federal and state law. To the extent that state law and federal conflict or Congress has expressed the intent to occupy the field, the trial court has no authority to enforce federally preempted state laws.

4. **NEITHER THE CUA NOR ANY OTHER LAW OF THE STATE OF CALIFORNIA CONTEMPLATE THE RETURN OF ILLEGAL CONTRABAND**

The issue addressed in Chavez v. Superior Court (2004) 123 Cal. App.4th 104, is not dissimilar to the issue at hand, "whether the trial court has authority to return the controlled substance, which was not lawfully possessed . . ." (Id. at 111) The Chavez court concluded that the CUA did not contemplate the return of illegally possessed drugs. Similarly, it does not contemplate the return of illegally cultivated and distributed marijuana possessed by a qualified patient. To do so would only promote illegal trafficking of marijuana which is proscribed by both state and federal law and would render superfluous many provisions of the Act.

Despite its intent to ensure seriously ill patients have the right to use and obtain marijuana, neither the CUA nor the Act require or

authorize the court to return confiscated marijuana. The CUA and the Act fail to provide for the return of confiscated marijuana, notwithstanding the fact that qualifying patients and primary care givers are not immune from arrest.⁴ "As the People have observed, courts 'have no power to rewrite the statute to make it conform to a presumed intention that is not expressed. (Citation omitted) (Chavez, 123 Cal. App. 4th at 111)

5. POSSIBLE IMMUNITY OF LOCAL LAW ENFORCEMENT OFFICERS UNDER 18 U.S.C. SECTION 885(D) DOES NOT MAKE RETURN OF THE MARIJUANA LEGAL

Kha asserts that, because Garden Grove police officers may be immune from liability under the federal CSA if they return his marijuana, the court's order does not violate federal law. This is an attempt to deflect the court's attention away from the real issue.

⁴ The court in People v. Mower found that section 11362.5(d) cannot reasonably be read to grant immunity from arrest by implication stating "As the proponents of Proposition 215 declared in their rebuttal to the argument of the measure's opponents: "Police officers can still arrest anyone for marijuana offenses." (Ballot Pamp., Gen. Elec. (Nov. 5, 1996) rebuttal to argument against Prop. 215, p. 61.) Even when law enforcement officers believe that a person who "possesses or cultivates marijuana" is a "patient" or "primary caregiver" acting on the "recommendation or approval of a physician," they may-as in this case-have reason to believe that that person does not possess or cultivate the substance "for the personal medical purposes of the patient" (§ 11362.5(d)).

Thus, we conclude that section 11362.5(d) does not grant any immunity from arrest, and certainly no immunity that would require reversal of a conviction because of any alleged failure on the part of law enforcement officers to conduct an adequate investigation prior to arrest." (People v. Mower (2002) 28 Cal. 4th 457, 469)

The crux of Petitioner's argument is that Kha is not entitled to the return of the marijuana because it is illegal contraband under federal law, that California law does not require its return, that, rather, Health and Safety Code section 11473.5 requires its destruction, and that, even if a provision of California law could be interpreted to authorize or require return of the marijuana, such state law provision is preempted by federal law.

The 2002 Oregon state appellate case cited by Kha in support of his argument, State v. Kama, (Or. Ct. App. 2002) 178 Or. App. 561, 39 P.3d 866, is irrelevant and clearly distinguishable. The Oregon Medical Marijuana Act, which the Kama court was interpreting, specifically requires the return of medical marijuana. As pointed out by the court in Chavez, the CUA, on the other hand, does not contain any provision which requires, or authorizes, the court to return confiscated marijuana. Chavez, 123 Cal. App. 4th at 111. Therefore, even assuming arguendo that the provision of Oregon's law requiring return of medical marijuana is not preempted by federal law, under California law, lawfully seized medical marijuana is a controlled substance, the destruction of which is authorized and required by State law.

6. TO THE EXTENT STATE LAW FACILITATES POSSESSION OF MARIJUANA, IT IS PREEMPTED BY FEDERAL LAW

The Supreme Court's ruling in the Gonzalez v. Raich 125 S. Ct. 2195, 162 L. Ed. 2d 1 (2005), is controlling on the issue of preemption. In Raich, the high court held that Congress' regulation of marijuana production for interstate medicinal purposes is


"squarely within Congress' power because production of the commodity meant for home consumption ... has a substantial effect on supply and demand in the national market for that commodity." (Id. 125 S. Ct. at 2207) It is immaterial that California has accepted some medical use for marijuana, "Congress expressly found that the drug has no acceptable medical uses," (Raich, 125 S. Ct. at 2211) and further found that "use [] for medicinal purposes cannot possibly serve to distinguish it from the core activities regulated by the CSA." (Id. 125 S. Ct. at 2212) Congress has expressed an intent to occupy the field of marijuana regulation. To the extent California has made findings that there is some medicinal use for marijuana, it is in direct conflict with Congress' findings and state law is preempted. To the extent state law facilitates possession of federal contraband by requiring the return of contraband, it directly conflicts with federal law. "The supremacy clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail." (Id. 125 S. Ct. at 2212; U.S. Const., article VI)

7. CONCLUSION

For those reasons discussed above, Petitioner respectfully submits that a peremptory writ may issue in the first instance directing Respondent to rescind its September 1, 2005 order, and to enter a new order commanding Petitioner to destroy the marijuana.

Dated: January 19, 2006

WOODRUFF, SPRADLIN & SMART
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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, Rule 14(c)(1).)

The text of this brief consists of 2,631 words as counted by the Microsoft Word 2002 word processing program used to generate the brief.

Dated: January 19, 2006

WOODRUFF, SPRADLIN & SMART
A Professional Corporation

By: 
MAGDALENA LONA-WIANT
Attorneys for Petitioner
CITY OF GARDEN GROVE

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am over the age of 18 and not a party to the within action; I am employed by WOODRUFF, SPRADLIN & SMART in the County of Orange at 701 South Parker Street, Suite 8000, Orange, California 92868-4760.

On January 19, 2006, I served the foregoing document(s) described as REPLY TO REAL PARTY IN INTEREST'S INFORMAL OPPOSITION TO PETITION FOR WRIT OF MANDATE, PROHIBITION, OR OTHER APPROPRIATE RELIEF by placing true copies thereof enclosed in sealed envelope(s), as follows:

(BY MAIL) I placed said envelope(s) for collection and mailing, following ordinary business practices, at the business offices of WOODRUFF, SPRADLIN & SMART, and addressed as shown on the attached service list, for deposit in the United States Postal Service. I am readily familiar with the practice of WOODRUFF, SPRADLIN & SMART for collection and processing correspondence for mailing with the United States Postal Service, and said envelope(s) will be deposited with the United States Postal Service on said date in the ordinary course of business.

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(STATE) I declare that I am employed in the office of a member of the Bar of this Court at whose direction the service was made. I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on January 19, 2006 at Orange, California.



LOUISE A. MISHLER

PEOPLE OF THE STATE OF CALIFORNIA V. FELIX KHA
OCSC, WEST JUSTICE CENTER
CASE NO.: GG98995

THE CITY OF GARDEN GROVE v. ORANGE COUNTY SUPERIOR
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**PROOF OF SERVICE
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STATE OF CALIFORNIA, COUNTY OF ORANGE

I am over the age of 18 and I am not a party to the within action. I am employed by First Legal Support Services, 301 Civic Center Drive West, Santa Ana, CA 92701.

On November 3, 2005 I served the foregoing document(s) described as REPLY TO REAL PARTY IN INTEREST'S INFORMAL OPPOSITION TO PETITION FOR WRIT OF MANDATE, PROHIBITION, OR OTHER APPROPRIATE RELIEF by personally delivering true copies thereof to the following:

Honorable Linda S. Marks
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County of Orange, West Justice Center
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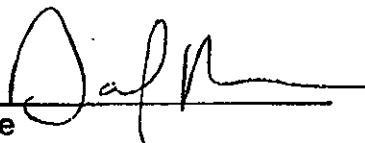
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Executed on January 19, 2006, at Orange, California.

FIRST LEGAL SUPPORT SERVICES

Daniel Reynolds
Print Name of Signator


Signature