COLORADO COURT OF APPEALS, DENVER, COLORADO
2 East 14th Avenue
Denver, CO 80202
(720) 625-5150

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Appellant: JAMES DARDANO

v.

Appellee: THE PEOPLE OF THE STATE OF COLORADO

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GARD & BOND, L.L.C.
Attorneys for Appellant
2541 Spruce Street
Boulder, CO 80302
303-499-3040 (phone)
303-379-6256 (facsimile)
Jeffrey S. Gard, #27294
Anna E.V. Bond, #35501
Michael L. Aaronson, #41551

Case Number: 2012 CA 2025

APPELLANT'S REPLY BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and that all other aspects of the brief such as typeface, font and line spacing comply with the requirements of C.A.R. 32. Specifically, the undersigned certifies that:

1. **The brief complies with C.A.R. 28(g):**

   It contains **5,700** words.

2. **The brief complies with C.A.R. 28(k):**

   It contains under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

3. **The brief complies with C.A.R. 32:**

   The undersigned certifies that this Reply Brief complies with all the requirements to typeface, font and line spacing, pursuant to C.A.R. 32.

Respectfully submitted,

Jeffrey S. Gard

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Defendant, James Dardano, by and through his undersigned counsel, submits the following pursuant to C.A.R. 28(c) and 31(a) as its Reply Brief:

ARGUMENT

I. DARDANO IS IMMUNE FROM CRIMINAL PROSECUTION FOR MARIJUANA CRIMES BECAUSE HE WAS IN LAWFUL POSSESSION OF A PRIMARY CARE-GIVER REGISTRY IDENTIFICATION CARDS.

Standard of Review

Dardano agrees with the State's characterization of the standard of review.

Argument

At all relevant times, Mr. Dardano was in possession of numerous valid primary care-giver cards issued by the Colorado Department of Health in accordance with Colo. Const. Art. XVIII § 14. As such, he was entitled to an "exception from the state's criminal laws" pursuant to Colo. Const. Art. XVIII §14(2)(b).

The State confuses two separate and distinct sections of Art. XVIII §14 of the Colorado Constitution and therefore incorrectly asserts that the trial court correctly denied Dardano's motion to dismiss. Specifically, the State argues that there is no "exemption" [sic] to criminal prosecution and that Mr. Dardano was only afforded an affirmative defense. (*See* AB: 8-9, 11-12.) Further, they argue

that the affirmative defense is only available to individuals meeting certain constitutional requirements. *Id.*

Colo. Const. Art. XVIII §14(2)(a) provides:

> [A] patient or primary care-giver charged with a violation of the state's criminal laws related to the patient's medical use of marijuana will be deemed to have established an affirmative defense to such allegation where: (1) The patient was previously diagnosed by a physician as having a debilitating medical condition; (2) The patient was advised by his or 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 (3) The patient and his or her primary care-giver were collectively in possession of amounts of marijuana only as permitted under this section. This affirmative defense shall not exclude the assertion of any other defense where a patient or primary care-giver is charged with a violation of state law related to the patient's medical use of marijuana.

This section applies to individuals who have not registered with the State as either a patient or primary care-giver. The three subsections that follow section 14(2)(a) detail what a person must show to qualify for the affirmative defense. This makes sense since §14(2)(a) applies to people who do not have patient or primary care-giver registry cards and therefore must demonstrate that they qualify for protection under the Colorado Constitution. The State incorrectly asserts that this affirmative defense section applies to the entire constitutional provision. (*See AB:* 12.) A plain reading demonstrates otherwise. Colo. Const. Art. XVIII§14(2)(b), a separate section from section a, above, states that:

> [I]t shall be an *exception* from the State's criminal laws for any patient or primary care-giver in lawful possession of a registry identification card to engage or assist in the medical use of marijuana, except as otherwise provided in subsections (5) and (8) of this section.[1] (emphasis added)

The text of the Colorado Constitution states that the affirmative defense provision applies only to patients and primary care-givers dealing with criminal laws when they do not possess a state issued medical marijuana card. (*See* Colo. Const. Art. XVIII §14(2)(a)-(b)). The second section, section b, applies to primary care-givers, like Dardano, and patients who possess the registry card. The interpretative canon *expression unius exclusion alterius,* applies here. The drafters of Amendment 20 knew the distinction between an affirmative defense and an exception to criminal law and specifically chose to provide an affirmative defense for patients and caregivers who were arrested without registry cards. The drafters chose to provide an "exception from the State's criminal laws" for patients and primary care-givers who are in lawful possession of the registry card. *Id* at §14(2)(b). The State's Answer Brief incorrectly treats the two different levels of criminal protection them identical.

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[1] Subsections(5) and (8) do not apply here. Subsection 5 deals with patients and their use of medical marijuana in ways that endanger the public or their use of medical marijuana in public. Colo. Const. Art. XVIII §14(5). It also allows for the State to revoke a patients registry card for non-compliance with §14. *Id.* Subsection (8) addresses criminal penalties for lying to a doctor about a medical condition, theft of registry cards, counterfeiting registry cards, and breaches of confidentiality. Colo. Const. Art. XVIII §14(8). Again, none of these issues are present here.

The distinction between the affirmative defense section and the exception section makes sense from a public policy perspective. Colo. Const. Art. XVIII §14(2)(a) provides an opportunity for patients and primary care-givers to present an affirmative defense if they meet the requirements, but only after they have been charged with a crime. The affirmative defense requirements for patients include having been previously diagnosed by a physician as having a debilitating medical condition, being advised by that doctor that marijuana may help in connection with that medical condition and that the patient or primary care-giver possessed no more marijuana or marijuana plants than allowed by this section a.

For primary care-givers, they also have "significant responsibility for managing the well-being of [the] patient." Colo. Const. Art. XVIII §14(2)(b) allows patients and primary care-givers to produce their state issued registry cards to police, so that they are not unnecessarily burdened with criminal charges. Not only does this encourage people to apply for the registry cards, but also allows for the best use of the State's limited judicial resources. If the State's interpretation is followed here, police could arrest any and all patients and primary care-givers with valid medical marijuana cards who possess even the smallest amounts of marijuana and their only remedy would be to present an affirmative defense to the jury at

trial. Under the State's interpretation, there would be no benefit whatsoever to registering as a patient or a primary care-giver with the State.

There are two threshold questions this Court should address when applying Art. XVIII§14 to primary care-givers. First, does the defendant have a registry card. In the case at bar, the parties stipulated that Dardano was a registered primary care-giver at all relevant times. Second, since Dardano was registered with the State, was he within the marijuana and marijuana plant possession limits imposed by the Colorado Constitution. Here, Dardano's plant count was well below that which is allowed by the Colorado Constitution. Evidence was presented at trial, and not refuted by the Prosecution, that Dardano was a caregiver for 50 patients.[2] Under the constitution he was entitled to grow 300 plants. The State admits in its Answer Brief that Dardano had just 128 plants, clearly in compliance with the Constitution. (AB: 3). The parties stipulated that he grew more than 30 plants at trial which is also in clear compliance with the Constitution. Vol. 1 p. 85. Detective Murphy testified at the motion's hearing that there were only 18 plants. Vol. 3 P. 141, L. 21. Under any of the above scenarios: 50 plants, 18 plants, or 128 plants; Dardano is entitled to the exception from the State's marijuana laws under Colo. Const, Art. XVIII § 14(2)(b).

[2] At the time of Dardano's arrest there was no statutory limit on the amount of patients a primary care-giver could care for. On July 1, 2011, C.R.S. §25-1.5-106(8) became effective limiting caregivers to a maximum of five patients.

The State repeatedly cites to *People v. Clendenin*, 232 P.3d 210 (Colo. App. 2009) and *People v. Watkins*, 282 P.3d 500 (Colo. App . 2012) as justification that there is no constitutional right to possess marijuana and only an affirmative defense. Neither case speaks to this issue. In *Clendenin*, the defense argued that the defendant should be labeled a "primary care-giver" and entitled to the protections of §14(2)(a), the affirmative defense. *See generally Clendenin*, 232 P.3d 210. *Clendenin* describes the proper analysis for a defendant alleging a primary care-giver status without having registered with the State. §14(2)(b), the section implicated here, is never even mentioned in the ruling. Here, there is no dispute Dardano was a primary care-giver. There is also no dispute he was properly registered with the State and was in possession of less than the permissible amount of marijuana and marijuana plants at the time of his arrest. Therefore, §14(2)(b), the exception, applies, not §14(2)(a), the affirmative defense, as detailed in *Clendenin*.

Watkins is no more instructive on this issue than *Clendenin*. In *Watkins*, the defendant argued that he should be allowed to use marijuana on probation and that he had a constitutional right to use medical marijuana without limitation. *See generally Watkins*, 282 P.3d 500. The *Watkins* Court held that the right was not absolute and, even if it was, probation is a privilege. *Id.* Here, Dardano does not

assert that possession, cultivation or use of medical marijuana is an unrestricted constitutional right, nor was Dardano on probation. Dardano simply argues that under a plain reading of the Colorado Constitution he qualifies for an exception to the state's marijuana laws because he is a registered primary care-giver acting in compliance with the Colorado Constitution.

II. THE TRIAL COUT ERRED IN DENYING DARDANO'S MOTION TO SUPPRESS EVIDENCE.

Standard of Review

Dardano agrees with the State's description of the standard of review for this issue.

Argument

a. The affidavit in support of the search warrant was not supported by probable cause.

The evidence in this matter should have been suppressed for a lack of probable cause. When reviewing a challenge to the validity of a search warrant, the trial court, must determine whether the issuing magistrate had a substantial basis for concluding that probable cause existed. *People v. Leftwich,* 869 P.2d 1260, 1266 (Colo. 1994). Here, the magistrate judge did not have that substantial basis. The State's Answer Brief is correct in that police need not refrain from searching something that is both potentially legal and potentially illegal as long as

there is probable cause of illegal activity. However, the State leaves out crucial facts when discussing the search warrant. Among the facts omitted was that Dardano had numerous legitimate primary care-giver registration cards at the time the search warrant was issued. (AB: 16) As discussed above, this means there could not be any probable illegal activity on site unless Dardano exceeded his constitutionally permissible allowed plant count. Prior to seeking a search warrant, Detective Murphy did not do anything to investigate Mr. Dardano's lawful primary care-giver status. Vol. 3, P.137, L.6 - P.138, L.13. Detective Murphy did not contact the MMED to determine whether Dardano applied for a medical marijuana license. Vol. 3, P.135, L.6-11. He did not investigate whether Dardano had any paperwork showing he was a licensed primary care-giver. Vol. 3, P.137, L.6 - P.138, L.13. Detective Murphy stated he did not believe it was necessary to determine whether Dardano's marijuana cultivation operation was in compliance with state laws prior to seeking the warrant. Vol. 3, P.139, L.12-23. Detective Murphy did not look through Dardano's files to see his paperwork containing copies of numerous patient licenses prior to arresting Dardano. Vol. 4, P.63, L.7-20. Without this basic level of investigation, there was insufficient evidence to make a determination of probable illegal activity. The search warrant is silent on

plant count and Dardano's primary care-giver registration. Therefore, the warrant contained no "substantial basis for concluding probable cause existed."

The evidence in this matter ought to have been suppressed for lack of probable cause. The magistrate who issued it lacked a "substantial basis for concluding that probable cause existed," because the information contained within the affidavit failed to specify evidence of illegal marijuana activity. *Leftwich*, 869 P.2d 1260, 1266. Accordingly, this reviewing Court ought to reverse the trial court's denial of Dardano's motion to suppress evidence.

III. DARDANO WAS IMMUNE FROM CRIMINAL PROSECUTION BECAUSE HE WAS IN COMPLIANCE WITH THE COLORADO MEDICAL MARIJUANA CODE.

Standard of Review

Dardano agrees with the State's standard of review for this issue

Argument

Dardano, at all times relevant to this case, had a pending local application for a medical marijuana center with the City of Federal Heights. (AB: 16). This application was pending at the time Federal Heights passed a moratorium on medical marijuana businesses which prohibited the City from, among other things, processing any medical marijuana applications. *Id.* This meant that Dardano's application was pending and never denied.

The Colorado Medical Marijuana Code, specifically C.R.S. §§12-43.3-103(a)-(b), allows marijuana business which had submitted an application prior to 7/1/10 to a local government and had submitted an application to the State by 8/1/10 to continue to operate while the decisions on the applications were made. Dardano submitted an application to the City of Federal Heights prior to 7/1/10. Vol.3, P.38, L.2-4; Vol. 13, Motions Hearing Defense Exhibit A. Dardano submitted an application to the State prior to 8/1/10. Vol. 3, P.158, L.2-14; Vol. 13, Motions Hearing Defense Exhibits E and F.

The State focuses on the term "subsequently granted" to support its argument that Dardano was entitled to no protection from the Colorado Medical Marijuana Code. (AB:19-23). However, the plain reading of that section implies that a local government will eventually arrive at a decision for each application before 12-43.3-101 et al takes effect, i.e. 7/1/11. A medical marijuana business may continue to operate until such time in which it is denied. It is undisputed that Federal Heights never denied Dardano's application. Until Dardano's application was denied by Federal Heights, his business was in compliance with the Colorado Medical Marijuana Code. This argument was bolstered when the State issued Dardano written confirmation that his business was in compliance with the

Colorado Medical Marijuana Code. Vol. 4, P.4, L.14-20; Vol. 13 Motions Hearings Defense Exhibits E and F.

IV. THE TRIAL COURT ERRED WHEN IT DENIED DARDANO'S MOTION FOR JUDGMENT OF ACQUITTAL.

Standard of Review

Dardano agrees with the State's description of the standard of review for this issue.

Argument

Dardano rests on the arguments made in his opening brief that the trial court erred when it failed to grant Dardano's Motion for Judgment of Acquittal based on the fact Dardano was operating in compliance with the Constitution and the Prosecution presented no evidence to the contrary.

V. CONCLUSION

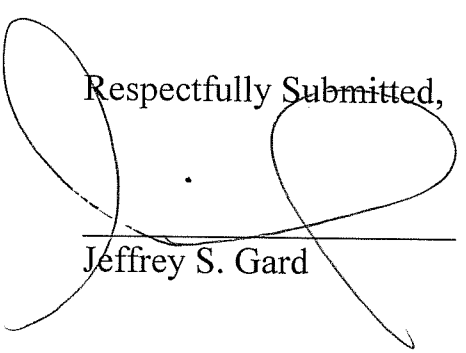
The trial court committed four reversible errors in Dardano's case: 1) the trial court erred when it denied Dardano's motion to dismiss based upon the fact that the Colorado Constitution conveys upon him an exception from the criminal prosecution; 2) the trial court erred when it denied Dardano's motion to suppress evidence due to the insufficiency of the affidavit to establish probable cause necessary for issuance of a search warrant; 3) the trial court erred when it denied

Dardano's motion to dismiss based upon the fact that he was operating in compliance with the Colorado Medical Marijuana Code and therefore was entitled to its protection; and 3) the trial court erred when it denied Dardano's motion for judgment of acquittal with respect to both the cultivation and conspiracy charges because the prosecution failed to produce sufficient evidence upon which a reasonable jury could base a conviction and because the trial court allowed the jury to decide a matter of law in its deliberations. Specifically, the trial court allowed the jury to determine the meaning of C.R.S. 12-43.3-103(1)(a) and whether Dardano fit that meaning.

Wherefore, Dardano respectfully prays this reviewing Court for relief from the above-referenced errors of the trial court.

Dated: January 16, 2014

Respectfully Submitted,



Jeffrey S. Gard

CERTIFICATE OF SERVICE

I hereby certify that on 1/16/14, I duly served by ICCES a copy of the foregoing Appellant's Reply Brief to:

Colorado Attorney General's Office
1525 Sherman St., 7th floor
Denver, CO 80203
Facsimile: (303) 866-5691