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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. RANDALL HARRIS WOOD, Defendant and Appellant.	A116693 (San Mateo County Super. Ct. No. SC60825)

Defendant Randall Harris Woods appeals a judgment entered upon a jury verdict finding him guilty of transporting marijuana. (Health & Saf. Code,[1] § 11360, subd. (a).) He contends the trial court erroneously instructed the jury on the transportation of marijuana intended for his medical use and that his counsel rendered ineffective assistance. We affirm.

I. BACKGROUND

Gary D'Souza, a South San Francisco police officer, stopped the car defendant was driving on October 19, 2004, because he noticed a loud exhaust noise. While he was speaking with defendant, he noticed the odor of unburnt marijuana. He asked defendant if there was any marijuana in the car. Defendant said there was, and removed from the glove compartment a plastic ziplock bag containing marijuana. D'Souza asked defendant if he had a medicinal marijuana card. Defendant said he did, and gave D'Souza a card, which he said he had because of chronic back and neck pain. D'Souza asked defendant if

[1] All undesignated statutory references are to the Health and Safety Code.

he had any more marijuana in the car, and defendant took two more plastic bags of marijuana from the glove compartment. Additional officers arrived, and one of them asked defendant if there was more marijuana in the car and said he would like to search the car. Defendant said there was no more marijuana in the car, and after some reluctance, agreed that the officers could search the vehicle. He then told the officers that he had "caregiver status," and that he had two pounds of marijuana in the back of his vehicle. In the trunk of the car, the officers found two 5-gallon buckets, each filled with a large plastic bag of marijuana. Defendant told D'Souza he planned to sell or give the marijuana in the trunk of his car to marijuana establishments.

The amount of marijuana in the car (more than two pounds) would be enough for approximately 1,600 "joints," and at a rate of 10 joints per day—an unusually large number—would last about five months.

Hanya Barth, the doctor who recommended the use of marijuana to defendant for treatment of chronic pain, insomnia, and anxiety, testified at trial. She had not recommended any particular amount to use, instead following her usual practice of stating in her recommendation and telling defendant that he should use no more than was required to alleviate his symptoms. She did not have an opinion as to how much marijuana Wood should use, and when asked whether she was required to recommend a particular amount to a patient, she explained that she was not allowed to do so. Barth did not have defendant's chart with her, and could not recall the details of his visits with her. Nor could she give an opinion at trial about whether it would be appropriate for defendant to smoke 10 joints of marijuana a day to treat his conditions.

Defendant testified in his own defense at trial. He acknowledged that he was carrying the marijuana in his car and that the marijuana in the back weighed two pounds. According to defendant, he had grown and harvested the marijuana in Grass Valley and was returning home with it. He intended to keep it for his own use. He smoked five to ten marijuana cigarettes a day, and said the amount in his car would have lasted him about half a year. He grew his own marijuana because he could not afford to buy it, and believed he was legally entitled to "grow a crop for a year."

The jury found defendant not guilty of possession of marijuana for purposes of sale (§ 11359) and guilty of transporting marijuana (§ 11360, subd. (a)).

II. DISCUSSION

A. The Jury Instructions

Defendant contends the trial court erred in instructing the jury on the law applicable to transporting medicinal marijuana. The trial court instructed the jury as follows: "The possession or transportation of marijuana is lawful, one, where its medical use is deemed appropriate and has been recommended or approved, orally or in writing, by a physician; two, the physician has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief; three, the marijuana possessed or transported was for the personal medical use of the patient; and four, the quantity of marijuana possessed and the form in which it was possessed were reasonably related to the patient's then current medical needs, not exceeding eight ounces of dried marijuana per qualified patient unless the qualified patient or primary caregiver has a doctor's recommendation that this quantity does not meet the qualified patient's medical needs, in which case the qualified patient or primary caregiver may possess an amount of marijuana consistent with the patient's needs." Defendant contends that this instruction was erroneous to the extent it imposed a presumptive eight-ounce cap on the amount of marijuana a patient could transport without a doctor's recommendation.

The Compassionate Use Act of 1996 (the CUA) (§ 11362.5), approved by the voters as Proposition 215 in the November 5, 1996, general election, provides that those who obtain and use marijuana for specified medical purposes at a physician's recommendation are not subject to certain criminal sanctions. Although it provides an affirmative defense to the crimes of possessing marijuana (§ 11357) and cultivating marijuana (§ 11358), it does not provide a defense to the crime of transporting marijuana. (§ 11362.5, subd. (d); *People v. Wright* (2006) 40 Cal.4th 81, 84 (*Wright*); *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1543-1544 (*Trippet*).) Nevertheless, the court in

Trippet concluded that the CUA provided an implied defense to a charge of transporting marijuana, subject to the requirement that "the quantity transported and the method, timing and distance of the transportation are reasonably related to the patient's current medical needs." (*Trippet, supra*, 56 Cal.App.4th at pp. 1550-1551.) After a conflict arose as to whether the CUA provided a defense to transportation of marijuana in a vehicle (see *People v. Young* (2001) 92 Cal.App.4th 229, 237), the Supreme Court granted review in *Wright* to resolve the issue. (*Wright, supra*, 40 Cal.4th at pp. 84-85.)

In 2003, while *Wright* was pending before the Supreme Court, the Legislature enacted the Medical Marijuana Program (the MMP) (§ 11362.7 et seq.), which was intended in part to address issues not included in the CUA. (Stats. 2003, ch. 875, No. 13, West's Cal. Legis. Service; *Wright, supra*, 40 Cal.4th at p. 85.) Two provisions of the MMP are particularly relevant here. First, the MMP provides that a "qualified patient" or the holder of a medical marijuana identification card shall not be criminally liable for transporting marijuana "for his or her own personal use." (§ 11362.765, subds. (a) & (b)(1).) Second, section 11362.77 provides that: "(a) A qualified patient or primary caregiver may possess no more than eight ounces of dried marijuana per qualified patient. . . . [¶] (b) If a qualified patient or primary caregiver has a doctor's recommendation that this quantity does not meet the qualified patient's medical needs, the qualified patient or primary caregiver may possess an amount of marijuana consistent with the patient's needs."

The issue in *Wright* was whether the defendant was entitled to a CUA instruction on the transportation charge. He had been arrested after being found with slightly more than a pound of marijuana in his car, and charged with possessing marijuana for sale (§ 11359), transporting marijuana (§ 11360, subd. (a)), and driving on a suspended or revoked license (Veh. Code, § 14601.1, subd. (a)). (*Wright, supra*, 40 Cal.4th at p. 86.) Defendant's doctor testified that he had recommended to defendant, approximately three months before his arrest, that defendant use a "self-regulating" dose of marijuana to alleviate his medical problems. (*Id.* at pp. 85-87.) Following defendant's arrest, the doctor saw him again. They discussed the fact that defendant preferred to eat marijuana,

which required a larger amount of marijuana than smoking it to achieve the same effect. The doctor wrote a letter approving the defendant's use of a pound of marijuana every two or three months, and he testified that that amount was consistent with the manner in which the defendant stated he took marijuana. (*Id*. at p. 87.) The Supreme Court concluded that the MMP applied to the case. (*Wright*, at p. 92.) In doing so, it noted that although enactment of the MMP had rendered moot the conflict between *Trippet* and *Young* as to whether the CUA provided a defense to a charge of transportation of marijuana, "*Trippet*'s test for whether the defense applies in a particular case survived the enactment of the MMP and remains a useful analytic tool to the extent it is consistent with the statute." (*Wright*, at p. 92 & fn. 7.)

Among the claims of the Attorney General that the court rejected in *Wright* was the contention that defendant was not entitled to the protections of the MMP because he had more than eight ounces with him. In doing so, the court stated: "[Section 11362.77, subdivision (b)] provides that a qualified patient may, pursuant to a doctor's recommendation that a greater amount is required for the patient's medical needs, 'possess an amount of marijuana consistent with the patient's needs.' [Citation.] Moreover, the sponsors of Senate Bill No. 420 (2003-2004 Reg. Sess.) made clear that, although couched in mandatory terms, the amounts set forth in section 11362.77, subdivision (a) were intended 'to be the threshold, and not a ceiling.' (Historical and Statutory Notes, 40 pt. 1 West's Ann. Health & Saf. Code (2006 supp.) foll. § 11362.7, p. 192); *Gonzales v. Raich* [(2005)] 545 U.S. 1, 31, fn. 41 . . . [noting that 'the quantity limitations [set forth in § 11362.77, subdivision (a)] serve only as a floor'].) In this case, defendant presented testimony at trial by his doctor that the amount of marijuana found in his possession at the time of his arrest was appropriate in light of his medical needs and the manner in which he used the marijuana, e.g., eating it for the most part, rather than smoking it." (*Wright*, *supra*, 40 Cal.4th at p. 97.) The court concluded the jury should have been instructed on the CUA defense to the transportation charge. (*Wright*, at p. 98.)

Defendant contends that, under *Wright*, the jury instruction should not have included the statement that defendant's lawful possession could not exceed eight ounces

without a doctor's recommendation that this amount did not meet his needs. He points to the comment in *Wright* that the *Trippet* test "remains a useful analytic tool" (*Wright, supra*, 40 Cal.4th at p. 92, fn. 7), and argues that rather than looking to the eight-ounce limitation of section 11362.77, the court should apply the *Trippet* test—whether "the quantity transported and the method, timing and distance of the transportation are reasonably related to the patient's current medical needs." (*Trippet, supra*, 56 Cal.App.4th at pp. 1550-1551.) In effect, defendant asks us to ignore the limitation contained in the MMP. We cannot do so. As our Supreme Court stated in *Wright*, the *Trippet* test remains a useful tool "*to the extent it is consistent with the* [*MMP*]." (*Wright, supra*, 40 Cal.4th at p. 92, fn. 7, italics added.) Reading *Wright*, *Trippet*, and the MMP together, we conclude a patient may possess an amount of marijuana that is reasonably related to his or her current medical needs, but if that amount exceeds eight ounces, a doctor's recommendation to that effect is required. It appears possible from *Wright* that a defense may be established even if the doctor did not make the specific recommendation until *after* the defendant was found in possession of marijuana, but *Wright* does not dispense with the requirement of a recommendation.[2] (*Wright*, at pp. 86-87, 97.)

The question remains, however, whether the MMP limits to eight ounces the amount of marijuana a patient may *transport* without a doctor's recommendation. By its literal terms, the limitation applies to the *possession* of marijuana: Section 11362.77, subdivision (a) provides that a qualified patient may *possess* no more than eight ounces of dried marijuana, and subdivision (b) provides that the patient may *possess* an amount consistent with his or her needs if he or she has a doctor's recommendation that this

[2] We note that the acts in question in *Wright* took place *before* the Legislature had enacted the MMP, and accordingly the defendant would have had no occasion to seek a recommendation that complied with the limitations of section 11362.77. Here, of course, defendant was arrested after the enactment of the MMP. We need not consider whether this would make a difference, however, because here, there is no evidence that a doctor concluded that a two-pound supply of marijuana was necessary to meet defendant's medical needs.

amount would not meet the patient's needs.[3] Section 11362.765, however, which explicitly extends the medical marijuana defense to the crime of transportation of marijuana, states that the defense is available to a patient "who transports or processes marijuana *for his or her own personal medical use*." (*Id.*, subd. (b), italics added.) A construction that would allow a patient to *transport* more marijuana for personal medical use than he or she was allowed to *possess* for such use would be irrational. We conclude that the limitations of section 11362.77 apply to transportation of marijuana. Indeed, our Supreme Court in *Wright* appeared to assume that it did so, explaining that the jury should have been instructed on a CUA defense to the crime of transportation of marijuana where the defendant's doctor had testified that the amount the defendant had in his

[3] Presumably based on this statute, CALJIC No. 12.24.1 (2005 rev.), which the trial court adapted, provides in pertinent part as follows: "The [possession] [or] [cultivation] [or] [transportation] of marijuana is not unlawful when the acts of [defendant] [a primary caregiver] are authorized by law for compassionate use. The [possession] [or] [cultivation] [or] [transportation] of marijuana is lawful (1) where its medical use is deemed appropriate and has been recommended or approved, orally or in writing, by a physician; (2) the physician has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief; [and] (3) the marijuana [possessed] [cultivated] [transported] was for the personal medical use of [the patient] [_____] [; and (4) the quantity of marijuana [[possessed] [or] [cultivated], and the form in which it was possessed were reasonably related to the [patient's] [_____] then current medical needs, not exceeding [(limits)] [eight ounces of dried marijuana per qualified patient] [six mature or twelve immature marijuana plants per qualified patient] unless the [qualified patient] [or] [[primary caregiver] has a doctor's recommendation that this quantity does not meet the qualified patient's medical needs, in which case the [qualified patient] [or] [[primary caregiver] may possess an amount of marijuana consistent with the patient's needs.] [transported, and the method, timing and distance of the transportation were reasonably related to the [patient's] [_____] then current medical needs.]" (This instruction has been quoted exactly as it appears in the current edition of CALJIC, including additional and missing brackets.) Although, as the trial court pointed out, the form of this instruction is confusing, it appears that the instruction is meant to apply the eight-ounce limitation to the possession or cultivation of marijuana, but not to transportation. The instruction, as given, tracked CALJIC No. 12.24.1, but did not include the final clause related to transportation.

vehicle—an amount in excess of the eight-ounce limit—was consistent with his medical needs. (*Wright*, *supra*, 40 Cal.4th at p. 97.)

The instruction as given informed the jury that the possession or transportation of marijuana is lawful where certain conditions are met, including where "the quantity of marijuana *possessed* and the form in which it was *possessed* were reasonably related to the patient's then current medical needs, not exceeding eight ounces of dried marijuana," without a doctor's recommendation that more was necessary to meet the patient's needs. (Italics added.) To the extent the jury understood this instruction to set limitations on the amount of marijuana a patient could *transport*, we conclude the jury was not misled about the applicable law.

As a result, we also reject defendant's contention that the trial court erred in not instructing the jury pursuant to CALCRIM No. 2361, an instruction to be given when a defendant is charged with transporting or giving away more than 28.5 grams of marijuana. (§ 11360, subd. (a)).[4] CALCRIM No. 2361 states in pertinent part: "[Possession or transportation of marijuana is not *unlawful* if authorized by the Compassionate Use Act. The Compassionate Use Act allows a person to possess or transport marijuana for personal medical purposes [or as the primary caregiver of a patient with a medical need] when a physician has recommended [or approved] such use. The amount of marijuana possessed or transported must be reasonably related to the patient's current medical needs. In deciding if marijuana was transported for medical purposes, also consider whether the method, timing, and distance of the transportation were reasonably related to the patient's current medical needs. . . ." This instruction does not mention the eight-ounce limitation found in the MMP. Similarly, CALCRIM No. 2375, the compassionate use defense to a charge of simple possession of marijuana, does not mention the limitation. Indeed, the bench notes to both instructions rely on the CUA, and do not refer to the MMP. This apparent oversight on the part of the drafters of

[4] Section 11360, subdivision (a) treats transportation or sale of marijuana as a felony. Subdivision (b) provides that transportation or sale of less than 28.5 grams of marijuana is a misdemeanor.

the CALCRIM instructions does not change our conclusion that the limitation we have discussed applies not only to simple possession of marijuana but also to transportation of marijuana for the patient's own personal medical use.

B. Ineffective Assistance of Counsel

Defendant contends his counsel rendered ineffective assistance by failing to investigate the facts of his case in order to support the "reasonable relation" prong of the compassionate use defense. He contends that under the *Trippet* test, the relevant standard for determining whether he was within the protection of the CUA was whether the quantity transported and the method, time and distance of the transportation were reasonably related to his current medical needs, and that his counsel presented inadequate evidence that the amount of marijuana he was transporting satisfied that test. In particular, he contends, his counsel failed to prepare Barth adequately to testify and did not ask her whether the amount of marijuana he possessed was reasonably related to his needs.[5]

The standard for evaluating a claim of ineffective assistance of counsel is well established. First, the defendant must show that counsel's performance was deficient. " 'This requires a showing that "counsel's representation fell below an objective standard of reasonableness." . . . In evaluating a defendant's showing of incompetence, we accord great deference to the tactical decisions of trial counsel.' " (*In re Jackson* (1992) 3 Cal.4th 578, 601, disapproved on another ground in *In re Sassounian* (1995) 9 Cal.4th 535, 545, fn. 6.) Second, the defendant must show prejudice as a result of counsel's alleged incompetence. " ' "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. . . . [¶] The defendant must

[5] The district attorney argued at the outset of trial that defendant's medical marijuana card and Barth's written recommendation would be inadmissible hearsay unless Barth authenticated them. The trial court indicated that it was "inclined to agree with the People's position." Defendant's counsel told the court at the outset of trial that he had "dropped the ball" in failing to subpoena Barth to authenticate the records because he had not believed there would be an evidentiary issue. Although he had not previously subpoenaed Barth, he succeeded in having her testify at trial. However, Barth had not reviewed defendant's chart before testifying.

show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ' " (*Jackson, supra*, 3 Cal.4th at p. 601.)

This burden is difficult to carry on direct appeal, because the record often contains no indication of why counsel acted in a particular way, or failed to do so. (*People v. Lucas* (1995) 12 Cal.4th 415, 437.) If " ' "the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation," the claim on appeal must be rejected.' " (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.) In such a case, the claim of ineffective assistance is more appropriately decided in a habeas corpus proceeding. (*Id*. at pp. 266-267.)

The record does not make clear why defendant's counsel failed to ask Barth whether the amount of marijuana defendant had in the car was reasonably related to his medical needs, and—not being privy to any conversation they had before she testified—we cannot conclude there could be no satisfactory explanation for not doing so. In any case, defendant has not met his burden to show that he suffered prejudice. As we have already discussed, under the MMP, defendant could transport only eight ounces of marijuana without a doctor's recommendation that he needed more to meet his medical needs. He concededly had more than four times that amount. Nothing in the record indicates that he had any special need for a greater amount, unlike the defendant in *Wright*, or that Barth would have testified that eight ounces did not meet his medical needs. In the absence of any such evidence, we will not speculate about what her testimony might have been.

III. DISPOSITION

The judgment is affirmed.

_____
RIVERA, J.

We concur:

_____
RUVOLO, P.J.

_____
SEPULVEDA, J.