UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

RHONDA FIRESTACK-HARVEY, LARRY HARVEY, MICHELLE GREGG, ROLLAND GREGG, and JASON ZUCKER,

Defendants.

No. CR-13-24-FVS

ORDER RE AFFIRMATIVE DEFENSES

THIS MATTER came before the Court by telephone conference call on May 6, 2014. The defendants seek leave to present evidence indicating they were attempting to comply with the Washington State Medical Use of Cannabis Act at all times relevant to this action. The United States objects to the presentation of any such evidence. This order serves to memorialize the Court's oral ruling.

BACKGROUND

On two occasions during August of 2012, law enforcement officers executed warrants authorizing them to search 939 Clugston-Onion Creek Road, Colville, WA. The first search warrant was issued by a state judicial officer on August 8th. The next day, officers drove to 939 Clugston-Onion Creek Road and executed the search warrant. Although one federal agent was present, the search was directed by a state law enforcement officer. The officers observed approximately 70 growing

marijuana plants. They also observed indications the marijuana growers were attempting to comply with the Washington State Medical Use of Cannabis Act ("MUCA"), chapter RCW 69.51A. *See State v. Reis*, No. 69911-3-I, 2014 WL 1284863, at *2 (March 31, 2014) (discussing, among other things, the relationship between the state MUCA and the state Controlled Substances Act). Given indications the marijuana growers were attempting to comply with the state MUCA, the officers seized some marijuana plants, but left a majority of the plants just as they found them. On August 16th, federal agents executed a search warrant that had been issued by a federal judicial officer. The agents seized all of the marijuana plants they observed. On February 6, 2013, a federal grand jury returned a six-count Indictment. The grand jury returned a five-count Superseding Indictment on May 6, 2014.

MISTAKE OF LAW

Count 1 in the Indictment alleges conspiracy in violation of 21 U.S.C. § 846 and 21 U.S.C. § 841(a). The defendants argue the crime of conspiracy is a specific-intent crime. They seem to be arguing the United States must prove, as an element of Count 1, that they knew their actions were illegal. They maintain they had a good-faith -- although, perhaps, mistaken -- belief they were entitled to grow marijuana. According to the defendants, their good-faith belief they were entitled to grow marijuana would negate the *mens rea* that is necessary to convict them.

The defendants candidly acknowledge the continuing validity of

the "'common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally.'" *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 581, 130 S.Ct. 1605, 176 L.Ed.2d 519 (2010) (quoting *Barlow v. United States*, 7 Pet. 404, 411, 8 L.Ed. 728 (1833) (opinion for the Court by Story, J.)). They point out, however, the Supreme Court has carved out exceptions to the traditional rule. *See, e.g., Ratzlaf v. United States*, 510 U.S. 135, 149, 114 S.Ct. 655, 126 L.Ed.2d 615 (1994) (defendant charged with "willfully" structuring financial transactions to avoid federal reporting requirements); *Cheek v. United States*, 498 U.S. 192, 194, 111 S.Ct. 604, 112 L.Ed.2d 617 (1991) (defendant charged with willfully failing to file federal tax returns and willfully attempting to evade federal income tax). The defendants place great weight upon *Cheek*. The statutes that were at issue in that case -- *i.e.*, 26 U.S.C. § 7201 and 26 U.S.C. § 7203 -- required proof of willful behavior. The Supreme Court analyzed the meaning of the word "willfulness." In the criminal tax context, the word "[w]illfulness . . . requires the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty." *Cheek*, 498 U.S. at 201, 111 S.Ct. 604. If the defendant claims he had a good-faith belief he was not violating any of the provisions of the tax laws, the United States must negate the defendant's claim in order to prove willfulness. *Id.* at 202, 111 S.Ct. 604. This may be difficult to do. "If," observed the Supreme Court, "Cheek asserted

that he truly believed that the Internal Revenue Code did not purport to treat wages as income, and the jury believed him, the Government would not have carried its burden to prove willfulness, however unreasonable a court might deem such a belief." *Id.*, 111 S.Ct. 604.

The outcomes in *Cheek* and *Ratzlaf v. United States*, *supra*, were influenced by the highly technical nature of the statutes the defendants were accused of violating. In *Bryan v. United States*, 524 U.S. 184, 194-95, 118 S.Ct. 1939, 141 L.Ed.2d 197 (1998) (internal punctuation and citations omitted), the Supreme Court explained:

> In certain cases involving willful violations of the tax laws, we have concluded that the jury must find that the defendant was aware of the specific provision of the tax code that he was charged with violating. . . . Similarly, in order to satisfy a willful violation in *Ratzlaf*, we concluded that the jury had to find that the defendant knew that his structuring of cash transactions to avoid a reporting requirement was unlawful. . . . Those cases, however, are readily distinguishable. Both the tax cases and *Ratzlaf* involved highly technical statutes that presented the danger of ensnaring individuals engaged in apparently innocent conduct. As a result, we held that these statutes carve out an exception to the traditional rule that ignorance of the law is no excuse and require that the defendant have knowledge of the law.

The defendants argue the same issue is present here. Given the conflict between state and federal regulation of marijuana, say the defendants, a reasonable person might be ensnared in a violation of federal law despite engaging in conduct that is apparently innocent under state law.

There are two problems with the defendants' argument. To begin with, they have filed to cite, and independent research has failed to uncover, a federal appellate decision that has ruled the federal Controlled Substances Act ("CSA"), 21 U.S.C. § 801 *et seq*., is comparable in technicality with the Internal Revenue Code. In addition, and perhaps more importantly, the statutes that were at issue in *Cheek* differ materially from the statutes that are issue in this case. Unlike the crimes charged in *Cheek*, § 846 does not require the United States to prove willfulness. To the contrary, § 846 states:

> Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Section 846 does not contain a *mens rea* of its own. As the Fourth Circuit explained in *United States v. Ali*, 735 F.3d 176, 186 (4th Cir.2013), "the *mens rea* of § 846 is derived from that of the underlying offense[.]" In this case, as in *Ali*, the underlying offense is § 841(a)(1), which makes it "unlawful for any person knowingly or intentionally . . . to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance[.]" The key word is "knowingly." As a general rule, when a statute requires proof a person acted "knowingly," the United States merely must prove the person knew the facts that constitute the offense. *See Bryan*, 524 U.S. at 193, 118

S.Ct. 1939. The United States is not required to prove the person knew his actions were illegal. *See id.*, 118 S.Ct. 1939. *Bryan* did not involve a violation of § 841(a)(1). This case does. How has the Ninth Circuit interpreted the word "knowingly" as used in § 841(a)(1)? The law of this circuit is clear. While the United States must prove the accused knew he possessed some controlled substance, the United States need not prove he knew possession of the substance was illegal. *United States v. Delgado*, 357 F.3d 1061, 1067 (9th Cir.2004); *United States v. Cain*, 130 F.3d 381, 384 (9th Cir.1997). This well established rule defeats the defendants' request for permission to present a mistake-of-law defense. Since the United States need not prove they knew it was illegal either to manufacture marijuana, or to distribute marijuana, or to possess with intent to distribute marijuana, evidence they had a good-faith belief it was lawful under state law to engage in any of those activities does not negate the *mens rea* that is required by § 841(a). *United States v. Rosenthal*, 334 Fed. Appx. 841, 842 (9th Cir.2012) (unpublished disposition) ("Rosenthal's contention that a reasonable, good faith belief that one is acting lawfully negates the *mens rea* elements of his crimes of conviction is without merit because none of the offenses at issue require knowledge of the law or intent to violate the law to sustain a conviction"). *See Delgado*, 357 F.3d at 1067; *Cain*, 130 F.3d at 384.

MEDICAL BENEFITS

The defendants are not explicitly seeking permission to assert a defense of medical necessity. This is unsurprising. In *United States*

v. Oakland Cannabis Buyers' Cooperative, 532 U.S. 483, 494, 121 S.Ct. 1711, 149 L.Ed.2d 722 (2001), the Supreme Court held, "[M]edical necessity is not a defense to manufacturing and distributing marijuana." The Ninth Circuit has repeatedly quoted the Supreme Court's holding. *See, e.g., United States v. Halbert*, 472 Fed. Appx. 461, 463 (9th Cir.2012); *United States v. Montes*, 421 Fed. Appx. 670, 672-73 (9th Cir.2011); *United States v. Schafer*, 625 F.3d 629, 638 (9th Cir.2010); *United States v. Rosenthal*, 454 F.3d 943, 946 n.3 (9th Cir.2006). It follows the defendants are not entitled to assert the defense of medical necessity. That being so, the Court will exclude evidence concerning the alleged medical benefits of marijuana. *Schafer*, 625 F.3d at 637 ("district court may preclude a defense if the defendant fails to make a prima facie showing that he is eligible for the defense").

ENTRAPMENT BY ESTOPPEL

The first search of 939 Clugston-Onion Creek Road occurred on August 9, 2012. The search was directed by a state officer and, with one exception, performed by state officers. The officers allegedly observed approximately 70 growing marijuana plants. One of the state officers allegedly consulted a state deputy prosecuting attorney during the August 9th search. The deputy prosecuting attorney allegedly advised the officer to leave 45 of the 70 marijuana plants in place. The officers followed the deputy prosecuting attorney's advice. Furthermore, according to the defendants, the state officers allegedly made statements on August 9th suggesting the marijuana grow

partially complied with state law. Finally, the local prosecuting attorney did not file charges in state court under the state Controlled Substances Act, chapter 69.50 RCW. Citing the preceding circumstances, the defendants allege they were misled by the actions and statements of state law enforcement officers and prosecutors. They argue they should be allowed to present the defense of entrapment by estoppel. *See, e.g., United States v. Batterjee*, 361 F.3d 1210, 1216 (9th Cir.2004). The Court addressed this defense in its "Order Denying Motions to Dismiss on Equal Protection or Due Process Grounds" (ECF No. 283). None of the circumstances cited by the defendants warrant reconsideration of the Court's order.

ALLEGED COMPLIANCE WITH MEDICAL USE OF CANNABIS ACT

The defendants argue they need to present evidence concerning their respective efforts to comply with the state MUCA in order to mount defenses to the charges that are set forth in the now-superseded Indictment. Jason Zucker's argument is illustrative. At this juncture, he is unsure whether he will testify at his trial. If he chooses to do so, he may say he possessed marijuana for personal use rather than to distribute for financial gain. In order to enhance the credibility of his testimony, he would like to tell the jury he obtained a medical marijuana authorization card and he attempted to comply the requirements of the state MUCA. According to Mr. Zucker, the state MUCA limits the number of plants an authorized person may possess. He says the limit is well below 100 plants, which is the number of plants alleged in Count 1 of the Superseding Indictment. To

his way of thinking, if the jury decides he was trying to comply with the state MUCA, the jury would be less likely to find beyond a reasonable doubt he conspired to manufacture 100 or more marijuana plants. As a result, Mr. Zucker argues evidence of MUCA compliance would help him defend himself against the allegations that are set forth in the Superseding Indictment.

The Court will assume, for purposes of argument, Mr. Zucker's proposed testimony is potentially relevant for the limited purpose he indicates. Fed.R.Evid. 401. However, the relevance of the proposed testimony depends upon the existence of facts that are disputed by the parties. Yes, Mr. Zucker may have obtained a medical marijuana authorization card; but unless he can demonstrate he was complying with state law, of what significance is the card? Put somewhat differently, the fact he possessed a medical marijuana authorization card has little or no probative value if he was violating state law. But what did state law require in 2011 and 2012? And who is to decide whether Mr. Zucker was in compliance? Would the Court need to make a preliminary decision? Fed.R.Evid. 104(b). Would there be a trial within a trial?

There is another problem. As a practical matter, the Court would be allowing Mr. Zucker to suggest to the jury that compliance with the state MUCA should preclude a conviction under federal law. Such a suggestion would be plainly improper. It is contrary to well established law. Allowing Mr. Zucker to make such a suggestion would be unfairly prejudicial to the United States and confusing to jurors.

Cf. United States v. Thomas, 116 F.3d 606, 614 (2d Cir.1997) ("Nullification is, by definition, a violation of a juror's oath to apply the law as instructed by the court -- in the words of the standard oath administered to jurors in the federal courts, to 'render a true verdict according to the law and the evidence.'" (quoting Federal Judicial Center, Benchbook for U.S. District Court Judges 225 (4th ed. 1996))) (emphasis in *Thomas* omitted)).

Otherwise relevant evidence should be excluded if its probative value "is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, [or] misleading the jury . . . ." Fed.R.Evid. 403. As explained above, the disputed evidence could compromise the trial in at least two ways. For one thing, the evidence could confuse the jury with respect to whether compliance with the state MUCA is a defense to the charges in the Superseding Indictment. For another thing, the evidence could tempt the jury to disregard federal law. Those are clear risks. They weigh heavily against admission. Having balanced those risks against the probative value of the disputed evidence (which, at this juncture, is uncertain at best), the Court concludes the disputed evidence should be excluded under Rule 403.

IT IS HEREBY ORDERED:

1. Rolland M. Gregg's "Motion to Present Affirmative Defenses" (**ECF No. 217**) is **denied**.

2. With respect to "Defendant Zucker's in Limine Motions" (**ECF No. 280**), the Court:

(a) **reserves** ruling with respect to the requests that are set forth in paragraph 1 (exclude prior convictions) and paragraph 4 (exclude incriminating, out-of-court statements of co-defendants pursuant to *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968));

(b) **denies** the requests that are set forth in paragraph 2 (admit evidence of alleged compliance with the Washington State Medical Use of Cannabis Act) and paragraph 5 (present expert testimony re entrapment by estoppel); and

(c) **grants** the request that is set forth in paragraph 3 (ruling re MUCA evidence applies to all parties).

5. The United States' "Motion in Limine Regarding Medical Marijuana" (**ECF No. 295**) is **granted**.

6. Larry Harvey's "Motion to Seal" (**ECF No. 312**) is **denied as moot**.

IT IS SO ORDERED. The District Court Executive is hereby directed to enter this order and furnish copies to counsel.

DATED this 7th day of May, 2014.

s/ Fred Van Sickle
Fred Van Sickle
Senior United States District Judge