COURT OF APPEALS
DECISION
DATED AND FILED

December 28, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2006AP982-CR **Cir. Ct. No. 2005CM72**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STEVEN L. BEECRAFT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Columbia County: JAMES MILLER, Judge. *Affirmed*.

¶1 VERGERONT, J.[1] Steven Beecraft appeals the judgment of conviction and sentence for possession of THC[2] as party to a crime in violation of

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[2] THC stands for tetrahydrocannabinols.

WIS. STAT. §§ 961.41(3g) and 939.05. He contends that the possession of marijuana in the privacy of his own home is protected from interference by the State under various provisions of the United States and Wisconsin Constitutions. For the reasons we explain below, we reject his contentions and affirm the judgment of conviction and sentence.

BACKGROUND

¶2 The background facts relevant to this appeal are not in dispute and were presented by the State at Beecraft's trial.

¶3 A deputy from the Columbia County Sheriff's Department was dispatched to Beecraft's residence, looking for a third party who, the deputy was told, might be there. While speaking with Beecraft in the front hallway of his house, the deputy detected what he thought was the odor of burnt marijuana. In response to questions from the deputy, Beecraft admitted that he had been smoking marijuana; he got it and gave it to the deputy.[3] The material Beecraft gave the deputy, together with the baggie it was in, weighed 4.32 grams. Testing of the material showed the presence of THC. The jury found Beecraft guilty of possession of THC, party to a crime.

¶4 Before the jury returned its verdict, at the close of the State's evidence, Beecraft filed a motion to acquit on the ground that the statute criminalizing the possession of marijuana, when applied to small amounts used in one's home, violates a number of state and federal constitutional provisions. The

[3] Beecraft also gave the deputy the pipe he had been using to smoke the marijuana. He was charged with possession of drug paraphernalia but was acquitted on that charge.

circuit court took up the motion before sentencing and denied the motion. The court imposed a six-month suspension of Beecraft's driver's license and fines and costs of $459.

DISCUSSION

¶5 On appeal, Beecraft renews his argument that prohibiting his possession of marijuana for personal use in his home violates protections afforded him under the Wisconsin and United States Constitutions. We agree with the circuit court that there is no merit to any of his arguments.

¶6 The constitutionality of a statute presents a question of law, which we review de novo. ***Ferdon v. Wisconsin Patients Comp. Fund***, 2005 WI 125, ¶58, 284 Wis. 2d 573, 701 N.W.2d 440. In our review, we presume the legislature acted within its constitutional limits and the challenger bears a heavy burden; we resolve any doubts in favor of the constitutionality of the statute. ***Id.***, ¶68. This "heavy burden" does not refer to evidentiary proof; in this context, it means that we give deference to the legislature, and our degree of certainty regarding unconstitutionality results from the persuasive force of the legal argument. ***Id.***, ¶68 n.71.

¶7 We address first Beecraft's argument that he has a Fifth and Fourteenth Amendment due process right to liberty in his personal conduct, as established in ***Lawrence v. Texas***, 539 U.S. 558 (2003).[4] The Supreme Court

[4] Beecraft's brief at times does not clearly identify and separately discuss the constitutional provisions on which he relies. We have provided our own organization of his arguments. Because he does not distinguish between the federal constitutional provisions and their state constitutional counterparts, we make no distinctions in our discussion, but generally refer to the federal constitutional provisions

there held the personal liberty guaranteed by the due process clauses of the Fifth and Fourteenth Amendments prevented criminalizing the conduct of consenting adults engaging in homosexual sexual acts in private. ***Id.*** at 578. The Court's analysis relied heavily on sexual behavior—"the most private human conduct"—in one's home—"the most private of places." ***Id.*** at 567. Beecraft has provided no legal authority for treating, for purposes of the liberty interest protected by the Fifth and Fourteenth Amendment, marijuana use in one's home the same as adult-consenting sexual conduct in one's home.

¶8 Beecraft also relies on the substantive component of due process that "forbids a government from exercising 'power without any reasonable justification in the service of a legitimate governmental objective.'" ***State v. Radke***, 2003 WI 7, ¶12, 259 Wis. 2d 13, 657 N.W.2d 66. Beecraft argues that there is no rational basis for criminalizing his possession of marijuana for personal use in his home. However, the binding precedent in Wisconsin is to the contrary. In ***State v. Peck***, 143 Wis. 2d 624, 629-30, 422 N.W.2d 160 (Ct. App. 1988), we considered a challenge to the statute prohibiting manufacture of controlled substances brought by a person whose religion dictated use of marijuana as a sacrament. Because the statute substantially burdened the defendant's First Amendment right to practice his religion, the State had to show a compelling interest in regulating the possession and growing of marijuana. ***Id.*** at 632. We concluded that the State's interest, as expressed in the statute, was to preserve the public health and safety,[5]

[5] At the time ***State v. Peck***, 143 Wis. 2d 624, 422 N.W.2d 160 (Ct. App. 1988), was decided, WIS. STAT. § 161.001, now numbered WIS. STAT. § 961.001 provided:

(continued)

and that the State had a compelling interest in regulating marijuana and other controlled substances that overrode the defendant's First Amendment interest in using marijuana as a religious sacrament. ***Id.*** at 633-35.

¶9 Because Beecraft has not identified a fundamental interest such as a First Amendment right to the free exercise of religion at issue in ***Peck***, the higher standard of a compelling interest we applied in ***Peck*** is not applicable to Beecraft's challenge. However, our conclusion that the State did have a compelling interest necessarily entails a conclusion that the statute met the lower "rational basis" standard; and, indeed, we specifically stated: "Where, as here, the legislative response has a rational basis, we may not substitute our own judgment for that of the legislature," ***id.*** at 634.

> **Declaration of intent.** The legislature finds that the abuse of controlled substances constitutes a serious problem for society. As a partial solution, these laws regulating controlled substances have been enacted with penalties. The legislature, recognizing a need for differentiation among those who would violate these laws makes this declaration of legislative intent:
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> ….
>
> **(3)** Upon conviction, persons who casually use or experiment with controlled substances should receive special treatment geared toward rehabilitation. The sentencing of casual users and experimenters should be such as will best induce them to shun further contact with controlled substances and to develop acceptable alternatives to drug abuse.

The following subsection, among others, was added by 1995 Wis. Act 448, § 463:

> (1m) The manufacture, distribution, delivery, possession and use of controlled substances for other than legitimate purposes have a substantial and detrimental effect on the health and general welfare of the people of this state.

¶10 Beecraft criticizes our reasoning in ***Peck***, but these arguments must be addressed to the supreme court, as this court does not have the authority to reverse or modify its decisions. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997).

¶11 We next consider Beecraft's argument that his prosecution violates his right to privacy under the several constitutional provisions that create a right to privacy under the Supreme Court's analysis in ***Griswold v. Connecticut***, 318 U.S. 479 (1965). In ***Griswold***, the court invalidated a state law prohibiting the use of contraceptives; in describing the right to privacy there, the Court placed emphasis on "the marriage relation and the protected space of the marital bedroom." ***Lawrence***, 539 U.S. at 564-65, (citing ***Griswold***, 381 U.S. at 485). Subsequently, the Court expanded the right of privacy beyond the marital relationship to include "the right of an *individual*, married or single, to be free from unwarranted intrusion into matters so fundamentally affecting a person as the decision of whether to bear or beget a child." ***Lawrence***, 539 U.S. at 565, (quoting ***Eisenstadt v. Baird***, 405 U.S. 438, 453 (1972)). Beecraft provides no legal authority that supports extending this line of cases under federal constitutional law to marijuana use in one's home.

¶12 Beecraft asks us to follow the reasoning of the Alaska supreme court's decision in ***Ravin v. State***, 537 P.2d 494, 511 (Alaska 1975), which concluded that the possession of marijuana by adults at home for personal use is included in the right to privacy under the Alaska Constitution. However, the right to privacy in that case was based on a specific provision in the Alaska Constitution recognizing the right to privacy. ***Id.*** at 500-501. Beecraft does not explain why the Alaska court's construction of that provision would be relevant in Wisconsin.

¶13 Beecraft also asserts an equal protection violation, arguing that permitting use of alcohol in private while "prohibit[ing] the similar use of marijuana, sets up an invidious discrimination based on personal choice…." In response, the State argues that where there is no suspect class, the analyses under the substantive component of the due process clause and the equal protection clause are essentially the same, citing ***State v. Jorgenson***, 2003 WI 105, ¶32, 264 Wis. 2d 157, 667 N.W.2d 318. Beecraft does not dispute this in his reply brief. We agree with the State that there is no suspect class involved in this case, and we have already resolved the substantive due process claim against Beecraft. Therefore, in the absence of argument to the contrary from Beecraft, we conclude his equal protection claim fails along with his substantive due process claim.

¶14 Beecraft's claim that his prosecution constitutes involuntary servitude under the Thirteenth Amendment to the United States Constitution and article I, section 2 of the Wisconsin Constitution is without legal authority and is wholly lacking in merit. The same is true of his argument that his prosecution violates his right to pursue happiness guaranteed him by the Declaration of Independence.

¶15 Finally, we note that Beecraft's briefs contain a number of policy arguments with references to facts outside the record that, he asserts, show the negative consequences of criminalizing private use of marijuana. We have not addressed these because the legislature is the appropriate forum for policy arguments of this type, not this court.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.