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April 20, 2016

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You are hereby notified that the Court has entered the following opinion and order:

2015AP843-CR State of Wisconsin v. Amy J. Grant (L.C. # 2012CF385)

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

Amy Grant appeals from a judgment convicting her of possessing tetrahydrocannabinols with intent to deliver contrary to WIS. STAT. § 961.41(1m)(h)2. (2011-12)[1] after a trial to the court. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. WIS. STAT. RULE 809.21 (2013-14). We conclude that

[1] All subsequent references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Grant does not have standing to challenge the statutory classification of tetrahydrocannabinols as a Schedule I controlled substance. We affirm.

Officer Dorn testified that the City of Hartford Police Department learned that Grant's vehicle would be returning from Michigan with a large amount of tetrahydrocannabinols. After spotting Grant's vehicle and determining that she was speeding, Dorn executed a traffic stop. During the traffic stop, Grant denied that her vehicle contained controlled substances. Dorn, who is also a K-9 officer, had his K-9 conduct a sniff of Grant's vehicle, and the K-9 signaled the presence of controlled substances in the vehicle. A search of the vehicle revealed 565 grams of tetrahydrocannabinols.

Tetrahydrocannabinols are classified as a WIS. STAT. § 961.14(4)(t) Schedule I controlled substance. Grant moved to dismiss the criminal complaint on the grounds that the Schedule I controlled substance statute is unconstitutional as applied to her because classifying tetrahydrocannabinols as a Schedule I substance was irrational and arbitrary. Grant argued that because tetrahydrocannabinols have therapeutic value for certain medical conditions, they should be classified as a WIS. STAT. § 961.17(1m) Schedule III controlled substance (a substance with a "currently accepted medical use"). The circuit court denied Grant's motion to dismiss. After a court trial, the circuit court convicted Grant and sentenced her to two years of probation.

On appeal, Grant argues that as applied to her, the Schedule I classification of tetrahydrocannabinols is unconstitutional on equal protection and due process grounds. The

State counters that Grant lacks standing to challenge the statutory classification. We agree with the State.[2]

Grant concedes that her classification challenge is at odds with ***State v. Olson***, 127 Wis. 2d 412, 380 N.W.2d 375 (Ct. App. 1985), but she argues that ***Olson*** should be overruled. ***Olson*** makes clear that the classification of tetrahydrocannabinols is a matter for the legislature. ***Id.*** at 426-27. We have no authority to overrule ***Olson***. ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997).

Grant was charged with and convicted of possessing tetrahydrocannabinols with intent to deliver contrary to WIS. STAT. § 961.41(1m)(h)2., a Class H felony. Section 961.41(1m) states that "[i]ntent … may be demonstrated by … evidence of the quantity and monetary value of the substances possessed, the possession of manufacturing implements or paraphernalia, and the activities or statements of the person in possession of the controlled substance … prior to and after the alleged violation." The circuit court was the finder of fact in Grant's trial, and Grant does not challenge the sufficiency of the evidence to convict her of possessing tetrahydrocannabinols with intent to deliver.[3]

[2] In denying Grant's motion to dismiss, the circuit court assumed without deciding that Grant had standing to raise her constitutional challenge.

[3] In her reply brief, Grant concedes that she was convicted of possessing an amount of tetrahydrocannabinols the law presumptively treats as much larger than she would have needed for her own use, i.e., a quantity consistent with an intent to deliver. Grant argues that she possessed a large quantity of tetrahydrocannabinols because she was "stocking up" for her own use over a long period of time. This contention is unsupported by a citation to the record; the record does not contain a transcript of Grant's testimony. Therefore, we decline to consider this assertion. ***Allstate Ins. Co. v. Konicki***, 186 Wis. 2d 140, 158, 519 N.W.2d 723 (Ct. App. 1994). We assume that the record supports the circuit court's findings and supports Grant's conviction. ***State v. Moederndorfer***, 141 Wis. 2d 823, 831, 416 N.W.2d 627 (Ct. App. 1987).

We turn to the standing question. A party must have standing to raise a constitutional claim. ***Racine Steel Castings v. Hardy***, 144 Wis. 2d 553, 563, 426 N.W.2d 33 (1988). "A person does not have standing to challenge a statute on constitutional grounds upon a point not affecting his [or her] rights." ***Id.*** (citation omitted).

Grant premises her equal protection and due process challenges on her contention that tetrahydrocannabinols are erroneously classified as a Schedule I controlled substance. We conclude that Grant lacks standing to bring this challenge because her rights are unaffected by the scheduling of tetrahydrocannabinols. Grant was convicted of possessing tetrahydrocannabinols with intent to deliver, a Class H felony. The penalty provisions for possessing with intent to deliver either a Schedule I controlled substance or a Schedule III controlled substance are the same. WIS. STAT. § 961.41(1m)(b). Regardless of the classification of tetrahydrocannabinols, Grant faced the same penalty for possessing between 200 and 1000 grams of tetrahydrocannabinols. Therefore, Grant's rights were not affected by the statutory classification of tetrahydrocannabinols, and she lacks standing to challenge that classification.[4]

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals

[4] In her reply brief, Grant argues that tetrahydrocannabinols should not be scheduled as a controlled substance for any reason. There is no indication that Grant made this argument to the circuit court, and we will not address it for the first time on appeal. ***Segall v. Hurwitz***, 114 Wis. 2d 471, 489, 339 N.W.2d 333 (Ct. App. 1983).