Trippet

Adam Spicer

People v. Trippet (1997) 56 Cal.App.4th 1532

Court: Court of Appeal, First District

Date of decision: August 15, 1997

Facts:

- Defendant was charged with possession of more than 28.5 grams (11357(c)) and transportation (11360)
- Cops searched Defendant in a routine traffic stop and found 2 pounds

Procedure:

- At trial Defendant moved for dismissal on several grounds including medical necessity and religious necessity.
- Prosecution moved to keep out medical necessity defense and court had a 402 hearing. The court ruled to keep out all evidence of a medical necessity.
- Jury found Defendant guilty.
- Briefing was complete for this appeal on Nov 4, 1996 and the next day prop 215 was passed by the voters.

Issue(s):

- Was the medical necessity defense properly excluded?
- Was the conviction an infringement on Defendant's free exercise of religion?
- Does Prop 215 provide Defendant a defense in this case?

Holding(s):

- The conviction is proper in light of medical necessity and religious free exercise. (1538 – 1543)
- The case is remanded to determine whether the limited immunity provided by Prop 215 is applicable in this case. (1551)
    - Prop 215 will apply to a 11357 charge when the use has been approved or recommended by a doctor. (1548 – 1549)

- Prop 215 can provide a defense to 11360 transportation when all other criteria of 215 are satisfied. (1550)
- The quantity must be reasonably related to the patient's current medical needs. (1550 – 1551)

Discussion:

- Defendant's arguments for why the convictions should be reversed: (1536)
  - Trial court denied the right to present medical necessity to the jury.
  - Convictions violate free exercise of religion
  - Prop 215 provides a defense.
- Medical necessity
  - The trial court properly concluded that there was insufficient evidence to allow the issue to go to the jury. (1540)
  - Defendant failed to establish that she had no adequate alternatives but to possess and transport marijuana. (1539)
    - Defendant had marinol available (1539)
- Free Exercise of Religion
  - RFRA was declared unconstitutional in City of Boerne v. Flores (1541)
  - Employment Dept of Oregon v. Smith also speaks to this issue. (1541 – 1542)
    - A state may prohibit "religiously inspired" drug use without running afoul of the first amendment. (1541)
    - General criminal drug laws "need not be supported by a compelling state interest" (1541 – 1542)
  - Defendant failed to show that there was a strongly held personal religious belief to trigger any sort of consideration of the free exercise clause. (1542)
    - Defendant did not put forward any evidence of religious use. She did not say what her religion is or say that the religion mandates use of marijuana. (1542)
    - She said one sentence during the whole trial – "I use it for spiritual and meditative needs." (1542)
- Application of Prop 215 to this case

- Prop 215 can apply retroactively (1544 – 1545)
- The court rejects the Defendant's argument that prop 215 gives complete immunity. (1546)
    - The law is not an open invitation to possess or transport marijuana. (1546)
- The court discusses that Defendant was in possession of 2 pounds and that is far over the 28.5 gram line, where the law draws distinctions for other purposes. (1547)
- The court then begins to test 11362.5 against the facts of this case.
    - The court says it is clear that there was no recommendation by a doctor. (1548)
        - But there may have been approval. (1548)
        - This is where the court first talks about the difference b/w a "recommendation" and an "approval"
    - 11357 charge
        - the issue is remanded to consider where the use was "recommended" by the primary doctor or was "recommended or approved" by any other doctor. (1548)
        - Even with the recommendation or approval of a doctor, the patient may not possess an unlimited quantity of marijuana. – The quantity must be reasonably related to the patient's current medical needs. (1549)
            - The only thing that the doctor could testify to is his advice on the frequency and amount of the dosage the patient needs. (1549)
    - 11360 charge
        - 11362.5(d) only names 11357 and 11358 (1550)
        - because of the plain text, as a general matter 11362.5 cannot provide a defense to transportation (1550)

- But, practical realities dictate that there be some leeway in applying 11360 in cases where a prop 215 defense is asserted to companion charges. (1550)
    - The court hints that 215 may not provide a defense b/c the quantity may put this outside of medical use. (1550)
    - "The test should be whether the quantity transported and the method, timing and distance of the transportation are reasonably related to the patient's current medical needs. If so, we conclude there should and can be an implied defense to a section 11360 charge; otherwise, there is not. (1550 – 1551)
    - The trial court must also determine this issue on remand. (1551)

Outcome:

- The convictions are vacated and the case is remanded to consider whether: (1551)
    - The use was recommended or approved by a doctor
    - Prop 215 should provide a defense to transportation in this case. That will depend on whether or not the quantity is reasonably related to the patient's current medical needs.

[No. A073484. First Dist., Div. Two. Aug. 15, 1997.]

THE PEOPLE, Plaintiff and Respondent, v.
SUDI PEBBLES TRIPPET, Defendant and Appellant.

SUMMARY

A jury convicted defendant of transporting marijuana (Health & Saf. Code, § 11360, subd. (a)) and possession of more than 28.5 grams of marijuana (Health & Saf. Code, § 11357, subd. (c)), and the trial court sentenced her to probation conditioned on her confinement in the county jail for 180 days, less 51 days of credit. (Superior Court of Contra Costa County, No. 950331-9, Richard Patsey, Judge.)

The Court of Appeal vacated the convictions and remanded to the trial court for further proceedings. The court held that the trial court properly excluded defendant's common law medical necessity defense. The defense was unavailable to defendant, since a legal medication was available and known to both her and her doctor for treating her migraine headaches. A reasonable jury, therefore, could not have found that defendant lacked adequate legal alternatives to possessing and transporting marijuana. Further, the trial court properly excluded defendant's psychiatrist from testifying during the trial with respect to the defense. The court also held that the trial court properly rejected defendant's religious freedom defense on the ground that the statutes prohibiting the possession and transportation of marijuana were constitutional as applied to her. However, the court held that the Compassionate Use Act of 1996 (Health & Saf. Code, § 11362.5) (marijuana for medical purposes), which was enacted while defendant's appeal was pending, could be applied retroactively to provide, if its terms and the applicable facts permitted, a defense to defendant. Finally, the court held that remand for a limited retrial was required for the trial court to determine whether Health & Saf. Code, § 11362.5, provided defendant with a partial defense to either or both of the charges against her. (Opinion by Haerle, J., with Kline, P. J., and Lambden, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1a-1c) **Drugs and Narcotics § 21—Offenses—Possession and Transportation of Marijuana—Common Law Medical Necessity Defense—Availability of Defense.**—In a prosecution for transporting marijuana (Health & Saf. Code, § 11360, subd. (a)) and possession of more than 28.5 grams of marijuana (Health & Saf. Code, § 11357, subd. (c)), the trial court properly excluded defendant's common law medical necessity defense. The defense was unavailable to defendant, since a legal medication was available and known to both her and her doctor for treating her migraine headaches. A reasonable jury, therefore, could not have found that defendant lacked adequate legal alternatives to possessing and transporting marijuana. Further, the trial court properly excluded defendant's psychiatrist from testifying during the trial with respect to that defense. A witness may testify at trial only as to relevant matters. The witness's testimony was relevant only to whether defendant could establish a medical necessity defense. The trial court found defendant's offer of proof insufficient. The defense was excluded because, even accepting all of the witness's testimony as true, defendant failed to establish the required elements of that defense.

(2a, 2b) **Criminal Law § 17.5—Defenses—Necessity—Elements—Standard of Review.**—The common law necessity defense may be available where a defendant is charged with committing any criminal act except the taking of an innocent human life. An individual claiming this defense must establish that (1) the act charged as criminal was done to prevent a significant evil; (2) there was no adequate alternative to the commission of the act; (3) the harm caused by the act was not disproportionate to the harm avoided; (4) he or she entertained a good faith belief that the act was necessary to prevent the greater harm; (5) such belief was objectively reasonable under all of the circumstances; and (6) he or she did not substantially contribute to the creation of the emergency. Further, the standard for evaluating the sufficiency of the evidentiary foundation is whether a reasonable jury, accepting all of the evidence as true, could find the defendant's actions justified by necessity.

[See 1 Witkin & Epstein, Cal. Criminal Law (2d ed. 1988) § 232.]

(3) **Constitutional Law § 53—First Amendment and Other Fundamental Rights of Citizens—Freedom of Religion—As Defense to**

Charges of Possession and Transportation of Marijuana—Necessary Evidentiary Showing: Drugs and Narcotics § 21—Religious Freedom Defense.—In a prosecution for transporting marijuana (Health & Saf. Code, § 11360, subd. (a)) and possession of more than 28.5 grams of marijuana (Health & Saf. Code, § 11357, subd. (c)), the trial court properly rejected defendant's religious freedom defense on the ground that the statutes prohibiting the possession and transportation of marijuana were constitutional as applied to her. Application of religion-neutral, general criminal drug laws need not be supported by a compelling state interest. Thus, a state may enact and enforce generalized criminal sanctions for marijuana possession and transportation without running afoul of the free exercise clause of U.S. Const., 1st Amend. Further, defendant failed to present evidence of her religious beliefs or that her use of marijuana was central to her religious practice to trigger any sort of consideration of the free exercise clause. The only evidence that she presented remotely relevant to this issue consisted of a lengthy policy argument describing the unfairness of prohibiting marijuana use for medical and religious reasons and then the conclusory statement, "I use it for spiritual and meditative needs." At no time did defendant assert, much less establish, that marijuana use was mandated or even substantially motivated by her religion.

(4) **Drugs and Narcotics § 21—Offenses—Possession and Transportation of Marijuana—Defenses—Statute Allowing Marijuana Use for Medical Purposes—Retroactivity: Statutes § 5—Operation and Effect—Retroactivity.**—The Compassionate Use Act of 1996 (Health & Saf. Code, § 11362.5) (marijuana for medical purposes), which was enacted while defendant's appeal from convictions for possessing and transporting marijuana was pending, could be applied retroactively to provide, if its terms and the applicable facts permitted, a defense to defendant. The Legislature is presumed to have extended to defendants whose appeals are pending the benefits of intervening statutory amendments that decriminalize formerly illicit conduct or reduce the punishment for acts that remain unlawful. No different rule applies to an affirmative defense to the crime for which a defendant was convicted, which defense was enacted during the pendency of his or her appeal. Since Health & Saf. Code, § 11362.5, contains no savings clause, it may operate retrospectively to defend against criminal liability, in whole or in part, for some who are appealing convictions for possessing, cultivating, and using marijuana.

(5) **Drugs and Narcotics § 25—Offenses—Possession and Transportation of Marijuana—Remand for Limited Retrial to Determine Applicability of Statute Allowing Marijuana Use for Medical Purposes.**—In a prosecution in which defendant was convicted of transporting

marijuana and possession of more than 28.5 grams of marijuana, remand for a limited retrial was required for the trial court to determine whether the Compassionate Use Act of 1996 (Health & Saf. Code, § 11362.5) (marijuana for medical purposes), which was enacted while defendant's appeal was pending, and which applied retroactively, provided her with a partial defense to either or both of the charges against her. First, Health & Saf. Code, § 11362.5, subd. (d), provides that Health & Saf. Code, § 11357, relating to the possession of marijuana, does not apply to a patient who possesses marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician. Although, defendant could not show that her physician "recommended" marijuana to her to treat her migraine headaches, the record was unclear as to whether or not any physician had "approved" defendant's use of marijuana. It was possible that, on retrial, defendant could show that the quantity of marijuana possessed, and the form and manner in which it was possessed, was reasonably related to her current medical needs. Second, Health & Saf. Code, § 11362.5, does not exempt the transportation of marijuana allegedly used or to be used for medical purposes from prosecution under Health & Saf. Code, § 11360. However, if the quantity transported and the method, timing, and distance of the transportation are reasonably related to the patient's current medical needs, there can be an implied defense to a Health & Saf. Code, § 11360, charge. In this case, there was a remote possibility that defendant could establish that the two pounds of marijuana she was transporting at the time of her arrest met this test.

COUNSEL

Sudi Pebbles Trippet, in pro. per., for Defendant and Appellant.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Ronald A. Bass, Assistant Attorney General, Ronald E. Niver and Clifford K. Thompson, Deputy Attorneys General for Plaintiff and Respondent.

OPINION

HAERLE, J.—

I. INTRODUCTION

Sudi Pebbles Trippet (appellant) was charged with transporting marijuana in violation of Health and Safety Code section 11360, subdivision (a),[1] and possession of more than 28.5 grams of marijuana in violation of section 11357, subdivision (c). A jury found her guilty on both counts on December 1, 1995. On appeal, appellant argues that her convictions should be reversed because (a) the trial court denied her the right to present the defense of medical necessity to the jury, (b) the convictions violate her right to freely exercise her religion, and (c) Proposition 215, enacted after her convictions, provides her with a defense to the prosecution.

We reject arguments (a) and (b) above, but remand the case to the trial court for a limited retrial addressed to the issue of whether and to what extent Proposition 215 provides appellant with a partial defense to either or both of the charges upon which she was convicted.

II. FACTUAL AND PROCEDURAL BACKGROUND

On October 17, 1994, Officer Patrick Sweeney of the Kensington Police Department stopped appellant in her car for lack of a license plate lamp light. Upon approaching the vehicle and requesting identification, Officer Sweeney noted a strong odor of marijuana coming from the vehicle. Officer Sweeney searched the car. He found two bags containing a green leafy substance which he suspected was marijuana. He also found hand-rolled cigarettes, which appeared to contain marijuana. Samples of the contents of the two bags and the cigarettes tested positive for marijuana. Officer Sweeney estimated the total weight of the marijuana recovered from appellant's vehicle at approximately two pounds. At trial, appellant testified that she knew the bags were in her vehicle and that they contained marijuana.

[1]Unless otherwise noted, all subsequent statutory citations are to the Health and Safety Code (Code).

Prior to trial, appellant moved for dismissal of the charges on several grounds including "religious necessity"[2] under the Religious Freedom Restoration Act of 1993 (RFRA). The court denied appellant's motion, finding that the statutes prohibiting the possession and transportation of marijuana were constitutional as applied to appellant.

The People moved *in limine* to exclude appellant's medical necessity defense. During an Evidence Code section 402 hearing, appellant presented a psychiatrist and "drug researcher," Dr. Tod Mikuriya, who testified regarding the medical use of marijuana for conditions such as migraine headaches (of which appellant allegedly suffered). The court found that appellant had not established the required elements of a necessity defense. Thus, the trial court excluded all evidence related to the defense of medical necessity.

On December 1, 1995, a jury found appellant guilty of both possession and transportation of marijuana as charged. The court admitted her to probation conditioned on her confinement in county jail for 180 days, less 51 days of credit. Appellant timely appealed her convictions.

Briefing was complete in this case on November 4, 1996. The very next day, Proposition 215 (the pertinent provisions of which will be noted in pt. III.C., *post*) appeared on the general election ballot and was passed, thereupon becoming section 11362.5 of the Code. Appellant made no mention of Proposition 215 in her briefing to this court; the Attorney General briefly noted it, but did not argue its relevance one way or the other.

At oral argument of this case in April 1997, and in response to questions from the court, appellant's counsel first contended that Proposition 215 did not change the law applicable to her fact situation, but later retreated from this position and conceded it might. After that argument, we delayed submission of the case and requested further briefing on several issues related to Proposition 215 (to be noted and discussed later). Thereafter, on June 26, 1997, appellant filed a petition for a writ of habeas corpus asking to be permitted, on the grounds of ineffective assistance of counsel, to take an entirely new appeal from the trial court's judgment. The disposition we make of the Proposition 215 issue in this case effectively moots that petition and we will, accordingly, deny it (*In re Trippet* (Aug. 18, 1997) A078942 [nonpub. opn.]).

[2]Although appellant uses this term to describe her defense based on her "religious purposes" use of marijuana, it is really more appropriately described as a "religious freedom" defense and we shall use that term hereafter.

III. DISCUSSION

A. *The Common Law Medical Necessity Defense Was Properly Excluded*

(1a) The trial court excluded appellant's common law medical necessity[3] evidence because it concluded she had not established the elements required for that defense. Appellant contends she presented sufficient evidence to invoke the defense and further contends she should have been permitted to present her defense to the jury because her psychiatrist's testimony at the Evidence Code section 402 hearing was uncontradicted. We reject both contentions.

1. *Appellant failed to present evidence sufficient to establish the required elements of a necessity defense.*

(2a) A "necessity" defense is recognized in California case law; it has not been codified. The defense may be available where a defendant is charged with committing any criminal act except the taking of an innocent human life. (*People* v. *Pena* (1983) 149 Cal.App.3d Supp. 14, 22 [197 Cal.Rptr. 264] (*Pena*); *People* v. *Slack* (1989) 210 Cal.App.3d 937, 940-942 [258 Cal.Rptr. 702] (*Slack*).) The only California case that mentions a defense of *medical* necessity seems to assume the validity of the defense; there is no discussion. (*People* v. *Forster* (1994) 29 Cal.App.4th 1746, 1759 [35 Cal.Rptr.2d 705] ["[T]he jury did not accept Forster's defense of medical necessity, namely, that he drank only to deaden the pain of his ear injury."].) Assuming a medical necessity defense is valid in California (over and above, that is, any provided by Proposition 215), we agree with the trial court's implicit finding that it is composed of the same elements as the general necessity defense.

An individual claiming the defense of necessity must establish six required elements: "1. The act charged as criminal must have been done to prevent a significant evil; [¶] 2. There must have been no adequate alternative to the commission of the act; [¶] 3. The harm caused by the act must not be disproportionate to the harm avoided; [¶] 4. The accused must entertain a good-faith belief that his act was necessary to prevent the greater harm; [¶] 5. Such belief must be objectively reasonable under all the circumstances; and [¶] 6. The accused must not have substantially contributed to the creation of the emergency." (*Pena*, *supra*, 149 Cal.App.3d at pp. Supp. 25-26, fns. omitted; see also CALJIC No. 4.43 (6th ed. 1996).)

(1b) In the present case, the trial court found appellant's offer of proof on the common law medical necessity defense insufficient to permit the

[3]We shall refer to this proffered defense as the "common law medical necessity defense" to distinguish it from a defense based on Proposition 215, which we will discuss *post*.

evidence pertinent to it to go to the jury. **(2b)** The standard for evaluating the sufficiency of the evidentiary foundation is whether a reasonable jury, accepting all the evidence as true, could find the defendant's actions justified by necessity. (*Slack, supra*, 210 Cal.App.3d at p. 941.) The court in *Slack* noted that satisfying the required foundational burden through an offer of proof rather than on the witness stand makes no difference to the standard of review on appeal, which is "whether there is evidence deserving of consideration from which reasonable jurors could conclude the *Pena* elements have been satisfied." (*Id.* at p. 942.)

(1c) To sustain such a defense, appellant was required to establish the following: (1) she possessed and transported marijuana to prevent a significant evil; (2) there was no adequate alternative; (3) the harm resulting from possessing and transporting marijuana was not greater than harm avoided; (4) she believed her actions were necessary to prevent greater harm; (5) her belief was objectively reasonable; and (6) she did not substantially contribute to the creation of the emergency. (See *Slack, supra*, 210 Cal.App.3d at p. 940.) We need not analyze all six elements because we find as a matter of law that appellant failed to establish that she had no adequate alternative but to possess and transport the marijuana.

In discussing the defenses of duress and necessity in the context of a prison escape, the United States Supreme Court stated: "Under any definition of these defenses one principle remains constant: if there was a reasonable, legal alternative to violating the law, 'a chance both to refuse to do the criminal act and also to avoid the threatened harm,' the defenses will fail. [Citation.]" (*United States* v. *Bailey* (1980) 444 U.S. 394, 410 [100 S.Ct. 624, 635, 62 L.Ed.2d 575] (*Bailey*).) The evidence below established that Dr. Mikuriya had prescribed Marinol, a prescription drug containing a synthetic marijuana compound, for appellant's (and other patients') migraine headaches. On cross examination, Dr. Mikuriya acknowledged that marijuana was a relatively unknown treatment, and that thousands of people in California suffering from migraines use "other forms of treatments, other . . . prescription drugs, over the counter drugs, to treat their migraine headaches." Marinol is legally available, having passed Food and Drug Administration scrutiny; its primary application is for nausea. According to Dr. Mikuriya's testimony, the federal drug enforcement administration has acknowledged that Marinol is "useful for any kind of condition that marijuana might be therapeutic for." Appellant cannot claim to have no reasonable alternative to smoking marijuana when a legal medication is available and known to both her and her doctor. (See *Bailey, supra*, 444 U.S. at p. 410 [100 S.Ct. at p. 635]; *People* v. *Patrick* (1981) 126 Cal.App.3d 952, 960 [179