

STATE OF SOUTH DAKOTA
COUNTY OF DAVISON

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IN CIRCUIT COURT
FIRST JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,
Plaintiff,

vs.

DARREL KYLE BENNET, JR.,
Defendant.

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17CRI23-000169

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This matter was brought on for a hearing on September 19, 2023, on a motion to dismiss pursuant to a medical purpose defense and was combined with that of the co-defendant, Aaron Bradley Cooper, who brought a similar motion. The hearing was held at the Davison County Public Safety Center in Mitchell, South Dakota, with the Honorable Chris S. Giles presiding. The State was represented by James Miskimins, Davison County State's Attorney. Darrel Kyle Bennet, Jr., ("Defendant") was present and represented by Doug Dailey. The Court having considered the Affidavits, motions, testimony, and evidence presented to date, along with the records and files contained herein, and being advised on the premises and good cause appearing therefore, the Court enters the following Findings of Fact and Conclusions of Law and Order.

FINDINGS OF FACT

1. The Court thoroughly reviewed the record herein and finds that there is an adequate record contained in the file to review.
2. Defendant was charged with the following crimes via Indictment on March 17, 2023:
 - a. Possession of More than Two Ounces but less than One-Half Pound of Marijuana;
 - b. Possession of Delta-9 THC (Hash Wax);

- c. Possession with Intent to Distribute More than One Half Ounce but Less Than One-Half Pound of Marijuana;
 - d. Conspiracy to Commit Distribution of Marijuana;
 - e. Conspiracy to Distribute Hash Wax;
 - f. Possession with Intent to Distribute Hash Wax in a Drug Free Zone.
3. The indictment alleges that the offenses were committed on March 1, 2023.
 4. Defendant was certified by the State of South Dakota Medical Cannabis Program to receive a medical marijuana card on April 6, 2023.
 5. This Court has found that Defendant has a valid, state-issued medical cannabis card and is allowed the continued use of medical marijuana.
 6. The State called Detective Andrew Becker to the stand to testify. Detective Becker is assigned to the James Valley Drug Task Force.
 7. After receiving several complaints from individuals in the community, Detective Becker applied for and executed a valid search warrant of Darrel Bennett Junior's residence, who was present at the residence when the warrant was executed.
 8. During the execution of the search warrant, Detective Becker located a marijuana grow enclosure in the basement of the residence containing 28 marijuana plants.
 9. In addition to the plants, 5 jars with a substance suspected to be THC concentrates, paraphernalia, a cup with a THC tincture and isopropyl alcohol, a bag of harvested marijuana plants, and containers of marijuana stems and stalks were found.
 10. A Levo machine was also found in the residence which allows an individual to extract THC from harvested materials.

11. The plants and the 5 jars were submitted to ProVerde Laboratories for testing and the testing was completed on May 10, 2023.
12. The 28 marijuana plants contained .0970% Delta 9 THC. Jar #1 contained .297% Delta 9 THC, Jar #2 contained .0435% Delta 9 THC, Jar #3 contained .0468% Delta 9 THC, Jar #4 contained .312% Delta 9 THC, and Jar #5 contained .284% Delta 9 THC.
13. On June 9, 2023, additional evidence results were received by Detective Becker from ProVerde Laboratories.
14. No drugs were detected in the cup with the THC tincture and isopropyl alcohol.
According to these results, 1.25 ounces of marijuana along with a brownie and gummy worms containing marijuana were found. The marijuana found was allegedly purchased legally through a dispensary.
15. On cross-examination, Detective Becker stated that the bag of leftover plant materials was not submitted for testing.

Based upon the foregoing Findings of Fact, the Court now makes and enters the following Conclusions of Law:

CONCLUSIONS OF LAW

1. All Findings of Fact above are incorporated by reference as if they were fully restated herein. Any findings that are more appropriately conclusions of law shall be treated as such, and vice versa.
2. The Court has jurisdiction over the parties and venue is proper in Davison County, South Dakota.

3. The Defendant raises four issues which he argues warrants the Court to dismiss the indictment, namely: (1) under SDCL §34-20G-51, the medical purpose defense allows dismissal, (2) the Defendant does not need a valid medical marijuana card to raise this defense pursuant to SDCL § 38-20G-53, (3) the level of THC in the evidence tested was low enough to be considered hemp pursuant to SDCL § 38-35-1(14), and (4) the State lacks evidence to prove the Defendant had intent to distribute or was conspiring to distribute marijuana.
4. The Defendant's Motion to Dismiss correctly states the law in the areas relevant to the medical purpose defense. However, the State presented the relevant statute listing the limited statutory grounds that allowing for the dismissal of an indictment.
5. The language of the statutes presented by the Defendant and the State conflict with one another.
6. The Court notes that SDCL § 23A-8-2 lists exclusive grounds for dismissing an indictment. This is a well-settled principle of South Dakota law.
7. The applicable statute listing grounds for dismissal of an indictment states:

Upon motion of a defendant made pursuant to subdivision 23A-8-3(1), (2), or (3), the court must dismiss an indictment or information in any of the following cases:

(1) When it is not found, endorsed, presented or filed as prescribed by this title;

(2) When the names of the witnesses are not inserted at the foot of the indictment or information or endorsed thereon;

(3) When it does not substantially conform to the requirements of this title;

(4) When more than one offense is charged in a single count;

(5) When it does not describe a public offense;

- (6) When it contains matter which, if true, would constitute a legal justification or excuse of the offense charged, or other bar to the prosecution;
- (7) When the grand jury which filed the indictment had no legal authority to inquire into the offense charged because it was not within the jurisdiction of the grand jury or because the court was without jurisdiction of the offense charged;
- (8) When a person was permitted to be present during the session of the grand jury while the charge embraced in the indictment was under consideration, except as provided in § 23A-5-11; or
- (9) When a defendant charged by information did not have or waive a preliminary hearing before the information was filed. S.D. Codified Law § 23A-8-2.
8. The nine statutory grounds for dismissal of an indictment are exclusive. *State v. Vatne*, 2003 S.D. 31, ¶ 14, 659 N.W.2d 380, 384 (citing *State v. Springer-Ertl*, 1997 S.D. 128, ¶ 8, 570 N.W.2d 39, 40-1).
9. The Supreme Court has held that “the trial court cannot inquire into the legality or sufficiency of the evidence upon which an indictment is based when considering a dismissal under SDCL 23A-8-2.” *State v. Dorhout*, 513 N.W.2d 390, 392 (S.D. 1994) (quoting *State v. Hoekstra*, 286 N.W.2d 127, 128 (S.D. 1979)).
10. “An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits.” *Id.* (citing *Costello v. United States*, 350 U.S. 359, 76 S. Ct. 406, 100 L.Ed 397 (1956)).
11. The statute detailing the medical purpose defense reads as follows:

Except as provided in § 34-20G-18 and this section, a person may assert the medical purpose for using cannabis as a defense to any prosecution involving cannabis, and such defense is presumed valid where the evidence shows that:

(1) A practitioner has stated that, in the practitioner's professional opinion, after having completed a full assessment of the person's medical history and current medical condition in the context of a bona fide practitioner-patient relationship, the patient has a debilitating medical condition and the potential benefits of using cannabis for medical purposes would likely outweigh the health risks for the person;

(2) The person was in possession of no more than three ounces of cannabis, the amount of cannabis products allowed by department rules, two flowering cannabis plants, two cannabis plants that are not flowering, and the cannabis produced by those plants;

(3) The person was engaged in the acquisition, possession use, manufacture, cultivation, or transportation of cannabis, paraphernalia, or both, relating to the administration of cannabis to treat or alleviate the person's debilitating medical condition or symptoms associated with the person's debilitating medical condition; and

(4) Any cultivation of cannabis and storage of more than three ounces of cannabis occurred in a secured location that only the person asserting the defense could access. S.D. Codified Law § 34-20G-51.

12. After a medical purpose defense is raised, the burden then shifts to the prosecution:

An affirmative defense and motion to dismiss shall fail if the prosecution proves that:

- (1) The person had a registry identification card revoked for misconduct; or
- (2) The purpose for the possession or cultivation of cannabis was not solely for palliative or therapeutic use by the person with a debilitating medical condition who raised the defense. S.D. Codified Law § 34-20G-52.

13. The two preceding statutes have yet to be interpreted and analyzed by the South Dakota Supreme Court.
14. The rules of statutory interpretation are well-settled. The purpose of statutory interpretation is to discover legislative intent. *State v. Bryan*, 2002 S.D. 49, ¶ 20, 948 N.W.2d 333, 33.
15. In a case where two statutes touch upon the same subject matter, there is a presumption that the Legislature intended for the two to coexist and that it did not intend an absurd or unreasonable result. *Moss v. Guttormson*, 1996 S.D. 76, ¶ 10, 551 N.W.2d 14, 17.
16. Therefore, the statute with the more specific language “relating to a particular subject will prevail over the general terms of another statute.” *Id.*
17. Even “[w]here statutes appear to conflict, it is our responsibility to give reasonable construction to both, and if possible, to give effect to all provisions under consideration, construing them together to make them harmonious and workable.” *Lewis & Clark Rural Water Sys., Inc. v. Seeba*, 2006 S.D. 7, ¶ 64, 709 N.W.2d 824, 841.
18. The statutes at issue must be read as if they were drafted in harmony, rather than in conflict. When the statutes are read together, they can not be read in harmony with one another because the grounds for dismissal of an indictment are exclusive.

19. The medical purpose defense lists the facts the Defendant must prove to raise the defense.

To find that the medical purpose defense is valid, the Court would have to consider the sufficiency of the evidence presented for it.

20. If it were to do that, this Court would be in direct conflict with SDCL § 23-A-8-2 because the Supreme Court clearly states that the sufficiency of evidence is not to be considered by a Circuit Court when determining whether to dismiss an indictment.

21. This Court finds that the more specific statute for this motion to dismiss is SDCL § 23A-8-2.

22. The nine statutory grounds are exclusive, and the indictment in question does not appear vulnerable to dismissal under any of these grounds.

23. However, this Court does find that the Defendant can raise the medical purpose defense at trial.

24. While it is not sufficient to dismiss an indictment, the medical purpose defense is an affirmative defense that raises a question of fact for the jury to determine.

25. The Defendant may present this defense to the jury and explain the medical purpose behind his marijuana usage.

26. Once this defense is presented, the State has the burden of proving that the Defendant did not have a medical purpose for their use, cultivation, or possession of marijuana.

27. The Defendant contends that the State does not have the evidence to prove their intent to distribute or their conspiracy to distribute.

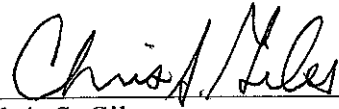
28. The Defendant was indicted on these charges by a grand jury on March 17, 2023.

29. The Court finds that the motion to dismiss the indictment fails as to these charges because the Court would have to inquire into the sufficiency of available evidence which it is not authorized to do.
30. Further, the Supreme Court's analysis of SDCL § 23A-8-2 indicates that a valid grand jury indictment calls for a trial on the merits.
31. According to the Defendant's medical marijuana card, he was not authorized to distribute marijuana.
32. The Defendant is correct in his assertion that he is not prohibited from making THC by-products for personal consumption.
33. However, SDCL § 34-20G-51 clearly states that one may not be in possession of more than two flowering plants and two non-flowering plants.
34. This Court is concerned by the 28 marijuana plants found in Defendant's possession during the execution of the search warrant before the Defendant was issued his medical marijuana card. This is over triple the amount of allowed plants signified by statute.
35. The Court finds that the sufficiency of the evidence to prove intent to distribute or conspiracy to distribute is a question of fact for the jury and not a factor for determining whether the indictment should be dismissed.
36. In support of his motion to dismiss, Defendant contends that the tested samples are not marijuana, rather they are hemp because of the percentage of THC found in the samples. SDCL § 38-5-1(4). The Court finds that this a question of fact for a jury to determine.
37. Defendant states that dates and times of obtaining permits, cards and licenses from the State of South Dakota are irrelevant and immaterial to this prosecution.

38. In accordance with South Dakota law, "a person is not required to possess a registry identification card to raise the affirmative defense set forth in § 34-20G-51. SDCL § 34-20G-53.
39. If the medical purpose defense is raised at trial by the Defendant, a medical marijuana card is not required according to statute.
40. This Court struggles with the application of this statute because one would think possession of a valid medical marijuana card would be necessary in order to raise this defense.
41. However, the Court is required to follow the plain and clear language of the statute which says that possessing the medical marijuana card is not a requirement in order to raise this affirmative defense.
42. The Court finds that a medical purpose defense under SDCL § 34-20G-51 does not present an appropriate basis to dismiss the indictment in this case. SDCL § 23A-8-2 lists the exclusive grounds for the dismissal of an indictment.
43. Therefore, the Defendant's motion to dismiss is denied.
44. However, the Defendant may raise the medical purpose defense at trial.
45. The sufficiency of the evidence for intent to distribute and conspiracy to distribute are questions of fact for the jury to decide, as is the THC level of the items seized.
46. A medical marijuana card is not required pursuant to SDCL § 34-20G-53 in order to raise the medical purpose defense.

Dated this 11th day of December, 2023.

BY THE COURT:

A handwritten signature in cursive script, appearing to read "Chris S. Giles", written over a horizontal line.

Chris S. Giles
First Circuit Judge

ATTEST: _____
Clerk of Courts