

**IN THE MATTER OF THE GRAND JURY
(Jocelyn Elders).**

A-97-3211-T4

Superior Court, Appellate Division

Submitted May 5, 1997 -- Decided May 9, 1997.

Before Judges GRIM, REAPER and MERCY.

Marcia Clark, Attorney for the Appellant (Marcia Clark, of counsel and on the brief).
Johnny Cochran, State Attorney General for the State of Utopia (Johnny Cochran, of counsel and on the brief).

REAPER, J.A.D., joined by GRIM, J.A.D.

This case arises out of the approval last fall of Proposition 215, purporting to legalize the medicinal use of marijuana by patients in the state and the assistance of Utopia's doctors in recommending, prescribing and procuring marijuana for their patients. It presents us with difficult issues of first impression. It comes to us as an emergent appeal from a decision by the Superior Court, Law Division, which has stayed any Grand Jury action pending this further review.

We conclude, first, that an individual who has been notified by letter that she is the target of a Grand Jury investigation has no right to advance judicial review of the legal sufficiency of the evidence against her nor of the legal instructions to be presented to that Grand Jury. Secondly, even if we were to assume that we had jurisdiction to review the Grand Jury's pending actions, we hold that Proposition 215 does not and cannot override federal law outlawing medicinal use of marijuana.

The Laws

Prior to November 5, 1996, Utopia's criminal statutes with respect to the possession, distribution, cultivation and use of marijuana essentially paralleled the provisions of the federal drug laws. Compare 21 U.S.C. §841 with Utop. Stat. 2C:35-10 (see appendix).

On November 5, 1996, by a 65-35% margin, the Utopia electorate approved Proposition 215. The proposition asked: "Shall it be lawful in the State of Utopia for licensed physicians to recommend, prescribe and procure the use of marijuana to patients undergoing treatment for life-threatening diseases and for such patients to obtain, possess and use such quantities of marijuana and the derivatives of marijuana as, in the

judgment of a licensed physician, are medically advisable in such treatment?"

On the same day as the Utopia voters passed on Proposition 215, voters in Arizona and California were also called on to vote on marijuana legalization referenda. The pendency of these three voter issues and the likelihood of others in the future spurred Congress to adopt The Medical Marijuana Act of 1996, codified at 21 U.S.C. § 841AA (see appendix). Passed by Congress one day after Election Day 1996 and signed into law by the President just days after the Utopia, Arizona and California referenda all passed, the statute declares that national policy precludes the medicinal use of marijuana and it requires the states to adopt or retain criminal prohibitions against the possession, distribution or use of marijuana for any purpose.

The Facts

According to the facts alleged by the Attorney General of Utopia, between November 1996 and March 1997, Dr. Jocelyn Elders of New City was involved in the distribution of marijuana to a patient at the Sloan Kettering Cancer Institute in New City. Through an orderly, the doctor arranged for a supply of marijuana to a cancer patient, claiming it alleviated symptoms resulting from chemotherapy.

In early March 1997, a hospital orderly involved in the marijuana distribution scheme was arrested for possession and sale of marijuana. He agreed to plead guilty and to cooperate with state law enforcement officers. He named Dr. Elders as a physician who had used his services to obtain marijuana for at least one of her patients. He, the patient and the patient's father testified before the Grand Jury sitting in New City on March 10, 1997.

Although not required to do so by Utopia law, on March 12, 1997, the Attorney General sent Dr. Elders a target letter. The letter advised her that the Grand Jury was investigating her conduct with respect to the supply of marijuana to the patient between November 1996 and March 1997. It notified her that an indictment would be sought against her for violating Utop. Stat. 2C:35-10 and 2C:2-6. The letter also invited her, at her option, to waive her Fifth Amendment privilege and testify before the Grand Jury.

The Challenges

Dr. Elders declined the invitation to testify before the Grand Jury and, instead, on March 17, 1997, filed motions in the alternative before the Superior Court, Law Division. While it is undisputed that the evidence outlined above would be sufficient for a Grand Jury to return an indictment charging Dr. Elders with violating Utop. Stat. 2C:35-10 due to the accomplice liability provisions of Utop. Stat. 2C:2-6, Dr. Elders argued in her motions that Proposition 215 fundamentally alters the laws of Utopia and provides her with a complete defense to any charge arising out of the patient's acquisition and use of marijuana.

She first sought a writ of prohibition barring the Utopia Attorney General from asking the Grand Jury to return an indictment against her at all. Alternatively, she sought a writ of mandamus compelling the Attorney General to give the Grand Jury legal instructions before the jurors voted on whether or not to return an indictment that would explain the nature and legal effect of Proposition 215. In both situations, she argued that, while the legality of Grand Jury action is normally tested post-indictment, she would be irreparably injured if indicted for actions which no longer constitute an offense.

The State disagreed in all respects. In its responses, filed March 24, 1997, it contended first that there is no established right to pre-indictment review of a Grand Jury's action in Utopia or elsewhere and, second, that the adoption by Congress of 21 U.S.C. §841 AA on November 6th and its signing by the President on November 10th had the effect of rendering Proposition 215 a nullity.

The matter came on for hearing on April 7, 1997 before Judge Solomon of the Law Division. He noted, as do we, that these issues are matters of first impression in Utopia. After canvassing the law, he concluded that federal law provided the most direct guidance to him on the issue of pre-indictment challenge and held that Dr. Elders did not have standing to challenge the grand jury action before an indictment was returned. He further held that were he to reach the issue of the applicable law, he would hold that 21 U.S.C. §841AA preempts Proposition 215 and thus Dr. Elders has no relief under its provisions.

Discussion

We agree with Judge Solomon that Dr. Elders cannot obtain an advance judicial review of the legal sufficiency of the case against her. See *United States v. Williams*, 504 U.S. 36 (1992) (a grand jury requires no authorization from its constituting court to initiate an investigation, nor does the prosecutor require leave to seek a grand jury indictment); *United States v. Chanen*, 549 F.2d 1306 (9th Cir. 1977) (court should be wary of intervening too much in grand jury activities); *In re Grand Jury Proceedings*, 486 F.2d 85, 89-90 (3d Cir. 1973) (grand jury is essentially an arm of the prosecutor). We certainly are not going to bar the prosecutor from doing his job in choosing cases to be presented to the Grand Jury.

We further agree that we have no power to rule in advance that the prosecutor must provide specific legal instructions to the Grand jury. In this we follow the federal rule. See e.g. *In re Grand Jury (Terranova)*, 495 F.Supp. 837 (E.D.Wisc. 1980) (no obligation that the grand jury be charged as to the law). Jury charges in this respect are no different from exculpatory evidence a putative defendant wishes to present to a Grand Jury.

If there is any abuse of the grand jury process, it can be readily cured by a post-indictment motion to dismiss.

Moreover, we agree with Judge Solomon that, even if the judiciary does have jurisdiction to provide Dr. Elders with an advance review of the legal sufficiency of the charges the Attorney General proposes to ask for her indictment on, she would still not be entitled to the relief she seeks. In any case of conflict between state and federal statutes, federal law overrides. The Supremacy Clause of the Constitution provides that "the Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Pursuant to the Supremacy Clause, Congress has the authority to preempt state law, *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368 (1986), and has effectively done so here. The provisions of 21 U.S.C. §841AA must be read as overriding Proposition 215 and returning Utopia law to its pre-proposition status.

AFFIRMED.

MERCY, J.A.D., dissenting:

I can in no way agree with my colleagues of the majority. In my view, the Utopia Constitution requires that we provide greater protection to our citizens from the possibility of the misuse of the grand jury process than federal law may afford. Moreover, I believe Proposition 215 is the law of Utopia and Dr. Elders should be given its protections.

Dr. Jocelyn Elders lives in New City, Utopia. She is a licensed surgeon, and is board certified in oncology. Dr. Elders is a noted expert in her field. She has a busy private practice in New City, and has privileges at the Cornell Medical Center, as well as at the Sloan Kettering Cancer Institute in New City. She is a member of the Board of Directors of the National Cancer Society, the AMA Oncology Section and the Utopia Medical Society. Additionally, she is a clinical professor at Cornell Medical School.

In late September 1996 Dr. Elders was contacted by John Johnson. Mr. Johnson explained that he was deeply concerned about his thirteen-year-old son, Magic, whose left leg had become swollen, discolored and painful following a fall at basketball camp during the summer. The injury had not healed in the intervening weeks. An appointment was set up for Dr. Elders to examine Magic.

After an examination of Magic's leg, a series of x-rays and a biopsy, Dr. Elders told the Johnsons that the problem was very serious. Magic had developed osteogenic sarcoma, a malignant bone tumor which was very aggressive. In spite of Magic's otherwise good health, an amputation might be necessary to keep the cancer from spreading. Dr. Elders recommended an initial regimen of chemotherapy, noting that if the tumor responded to this treatment, there was a chance that it could be surgically removed without having to amputate the leg. Mr. Johnson chose to have his son go forward with the chemotherapy. Magic was admitted to Sloan Kettering Cancer Institute as Dr. Elder's patient the next day, September 29th.

In order to counter the many and extreme adverse effects of Magic's treatment, in particular, nausea and vomiting, Dr. Elders first recommended several drugs including Compazine and Thorazine. After a few days, however, it was clear that the drugs were relatively ineffective in Magic's case and were causing severe liver damage.

By late October, Magic's condition due to his reaction to the treatment was obviously severe. He vomited continually. He ate nothing for several days in a row. In the weeks after the first round of chemotherapy, the boy went from 135 pounds to less than 70 pounds. In short, the treatment was killing the boy as surely as the cancer would. A solution had to be found.

On November 6, 1996, John Johnson asked Dr. Elders about using marijuana to reduce the nausea and vomiting caused by chemotherapy. Dr. Elders said that she had read a number studies showing that patients who smoke marijuana before and after each chemotherapy session had had a lessening of some of these symptoms. She recommended that Johnson get marijuana for his son so that the boy could smoke it both before and after treatment. Johnson tried but was unable to find a supplier. On November 9th, Dr. Elders asked some hospital orderlies if they knew anyone selling marijuana. She was able to get two names and telephone numbers and gave them to Johnson. She did not herself ever obtain marijuana nor provide any directly to the Johnsons.

After two rounds of chemotherapy there was no reduction in the size of Magic's tumor, and it was decided that his leg would have to be amputated. On February 23, 1997,

Magic's leg was removed four inches above the knee. Chemotherapy began again when Magic recovered from the surgery. During all of this time, and with the recommendation of Dr. Elders, Magic used marijuana to help alleviate the worst symptoms involved in the treatment.

First of all, my colleagues ignore the enormous damage to Dr. Elders' reputation that will result from being indicted "on drug charges." If in fact her conduct is not criminal at all because of Proposition 215, then it is the obligation of the courts here to ensure that she does not suffer that irreparable injury. The Grand Jury is more than an arm of the prosecution. It is "a protector of citizens against arbitrary and oppressive governmental action." *United States v. Calandra*, 414 U.S. 338, 343 (1974).

In this regard, I would not ignore, as my colleagues have, the fact that the Utopia Attorney General vigorously opposed Proposition 215 during the election campaign nor that he personally embraced the new federal statute as the solution to Proposition 215's mandates. I would not ignore the internal Attorney General Office memorandum that Dr. Elders offered into evidence at the argument before Judge Solomon that quoted the Attorney General saying he had serious doubts as to whether the new law had any effect on Proposition 215 but that he expected his office to take the lead to "find a test case and kill the Proposition in the newspapers even if not in the courts." This to me tends to establish a lack of good faith on the part of Mr. Cochran and I am not willing to wait, as my colleagues are, to see whether the tigers sheds his stripes.

Clearly, judicial supervision is required. If Proposition 215 is valid and the law of Utopia, then it appears to me under these facts that there has been no crime committed. However, because I am aware that more evidence may have been received by the Grand Jury than by this Court, I am reluctant to hold that this court, or indeed any court, should sit as a super-Grand Jury to determine whether or not a crime has been committed. Prohibition thus does not lie. However, the Grand Jury itself cannot determine whether a crime has been committed unless its members are accurately charged as to the law.

Since this is an issue of first impression, and since our Constitution and statutory law gives us flexibility, I would choose to follow the lead of New York, rather than the federal system. I would require accurate grand jury instructions as a prerequisite to the public return of an indictment, see *People v. Valles*, 62 N.Y.2d 36 (1984); *In re Grand Jury Reports*, 100 A.D.2d 692 (1984). At a minimum, I would follow the lead of West Virginia and permit Dr. Elders to appear before the grand jury to present her argument and not just testify. See *West Virginia v. Smith*, 168 W.Va 745 (1981) (by analogy). Our Constitution, like West Virginia's, requires that much.

Moreover, I regard it as disingenuous to say simply that state law is preempted any time a federal law in the same area is passed. Not every state enactment can be preempted and not every federal enactment that ostensibly preempts state law is lawful. See e.g. *New York v. United States*, 505 U.S. 144 (1992); *Gregory v. Ashcroft*, 501 U.S. 451 (1991). The federal government may not legislate for the states. The federal government may prosecute Dr. Elders; it cannot compel Utopia to do so. The structure of this federal law tells me it is not intended to preempt state laws, and I would so hold.

I would reverse and issue the mandamus writ directing the Attorney General to charge the Grand Jury that Proposition 215 was the law of Utopia at the time of Dr. Elders' actions and that the grand jurors may indict her if and only if they find that her conduct was not intended by the voters to fall within the protections of the Proposition.

APPENDIX

FEDERAL LAW:

21 U.S.C. §841AA: National Marijuana Act of 1996

(1): It is the policy of the United States that there is no medically acceptable use of marijuana.

(2): In accordance with the policy of section 841AA(1), each State is to ensure that no physician is licensed to practice within his or her jurisdiction unless the physician provides a statement under penalties of perjury as part of the state licensing process that he or she has not, does not and will not recommend the use of marijuana to patients for any purpose whatsoever. The prosecuting authorities within each state are to ensure aggressive prosecution of every physician who is found to be in violation of the state's drug laws.

(3): In accordance with the policy of section 841AA(1), each state shall adopt or retain criminal prohibitions against the cultivation, sale or use of marijuana paralleling those set out in 21 U.S.C. §841-848.

(4): Any state not in compliance with the provisions of 21 U.S.C. §841AA(1)-(3) shall not be eligible to participate in any program providing federal funds for medical insurance including but not limited to Medicare and Medicaid.

UTOPIA LAW:

UTOP. STAT. 2:19-1: Grand Jury: Duties of Trial Court and State Attorney.

a. At the time of empanelment, the trial court shall instruct the grand jury fully as to their duties, rights and obligations.

b. The attorney for the State is authorized to:

(1) Appear before the grand jury and inform them of offenses liable to indictment;

(2) Examine witnesses before the grand jury; and

(c) Advise the grand jury at their request upon any matter of law or upon any question arising respecting the proper discharge of their duties.

UTOP. STAT.2C:2-6: Liability for Conduct of Another; Complicity.

a. A person is guilty of an offense if it is committed by his own conduct or by the conduct of another person for which he is legally accountable, or both.

b. A person is legally accountable for the conduct of another person when:

(1) Acting with the kind of culpability that is sufficient for the commission of the offense,

he causes an innocent or irresponsible person to engage in such conduct;

(2) He is made accountable for the conduct of such other person by the code or by the law defining the offense;

(3) He is an accomplice of such other person in the commission of an offense; or

(4) He is engaged in a conspiracy with such other person.

c. A person is an accomplice of another person in the commission of an offense if:

(1) With the purpose of promoting or facilitating the commission of the offense; he

(a) Solicits such other person to commit it;

(b) Aids or agrees or attempts to aid such other person in planning or committing it; or

(c) Having a legal duty to prevent the commission of the offense, fails to make proper effort so to do; or

(2) His conduct is expressly declared by law to establish his complicity.

d. An accomplice may be convicted on proof of the commission of the offense and of his complicity therein, though the person claimed to have committed the offense has not been prosecuted or convicted or has been convicted of a different offense or degree of offense or has an immunity to prosecution or conviction or has been acquitted.

UTOP. STAT.2C:35-10: Marijuana or Hashish: Possession, Use or Being Under the Influence, or Failure to Make Lawful Disposition.

a. It is unlawful for any person, knowingly or purposely, to obtain, or to possess, actually or constructively, any amount of marijuana or hashish. Any person who violates this section with respect to:

(1) Possession of more than 50 grams of marijuana, including any adulterants or dilutants, or more than 10 grams of hashish is guilty of a crime of the second degree, punishable by a term of imprisonment between five and 10 years and a fine of up to \$50,000.00;

(2) Possession of 15 or more but less than 50 grams of marijuana, including any adulterants or dilutants, or more than five but less than 10 grams of hashish is guilty of a crime of the third degree, punishable by a term of imprisonment between three and five years and a fine of up to \$25,000.00;

(3) Possession of more than five but less than 15 grams of marijuana, including any adulterants or dilutants, or more than two but less than five grams of hashish is guilty of a crime of the fourth degree, punishable by a term of imprisonment not to exceed 18 months and a fine of up to \$15,000.00; or

(4) Possession of five grams or less of marijuana, including any adulterants or dilutants, or two grams or less of hashish is a disorderly person.

Any person who commits any offense defined in this section while on any property used for school purposes which is owned by or leased to any elementary or secondary school or school board, or within 1,000 feet of any such school property or a school bus, or while on any school bus, and who is not sentenced to a term of imprisonment, shall, in addition to any other sentence which the court may impose, be required to perform not less than 100 hours of community service.

b. Any person who uses or who is under the influence of any controlled dangerous substance, or its analog, for a purpose other than the treatment of sickness or injury as lawfully prescribed or administered by a physician is a disorderly person.

c. Any person who knowingly obtains or possesses marijuana in violation of subsection a. of this section and who fails to voluntarily deliver the substance to the nearest law enforcement officer is guilty of a disorderly persons offense. Nothing in this subsection shall be construed to preclude a prosecution or conviction for any other offense defined in this title or any other statute.

RELEVANT UTOPIA CONSTITUTIONAL PROVISIONS:

ART. I, Sec 1: All persons are by nature free and independent, and have certain natural and inalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property and reputation, and of pursuing and obtaining safety and happiness.

ART. I, Sec. 8: No person shall be held to answer for a criminal offense, unless on the presentment or indictment of a grand jury, the processes and procedures of which shall be consistent with the principles of all sections of this Constitution.

ART. 3, Sec. 5: The courts of this State shall be open, and every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law; and justice shall be administered without sale, denial or delay.

**IN THE SUPREME COURT
OF THE STATE OF UTOPIA**

A-97-522

IN THE MATTER OF :
THE GRAND JURY :
(Jocelyn Elders) :

ORDER

The appeal of this matter by Jocelyn Elders is on this 24th day of May, 1997, docketed as to all issues. Simultaneous briefing is directed and both appellant and respondent are to file briefs with this Court on or before July 7, 1997. Grand Jury action remains stayed during the pendency of this appeal

STEPHEN W. TOWNSEND, Clerk
For the Court