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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

HUMBERTO D. NIETO,

Defendant and Appellant.

A131826

(Napa County  
Super. Ct. No. CR150910)

Humberto D. Nieto was placed on probation after pleading guilty to the possession of marijuana for sale. He appeals from the ensuing revocation of his probation based on findings he violated its terms and conditions by possessing marijuana and pepper spray. We affirm the revocation order.

**I. BACKGROUND**

On June 17, 2010, defendant pleaded guilty to one count of possession of marijuana for sale. (Health & Saf. Code, § 11359.) As a condition of his plea, defendant was sentenced to three years of probation and 90 days in jail. The court suspended imposition of sentence and granted formal probation for three years.

On October 15, 2010, the court summarily revoked defendant's probation for possession of marijuana (Health & Saf. Code, § 11357, subd. (b)) and illegal possession of pepper spray. Following a contested hearing, the court found defendant to be in violation of probation, and revoked and reinstated his probation with modifications, including imposition of a 30-day jail sentence. Defendant timely appealed.

## **A. Facts**

### **1. Prosecution Case**

On March 1, 2010, Deputy Sheriff Mark Horvath made contact with defendant as he was sitting in the driver's seat of a white Mercedes automobile parked in a public parking garage. Deputy Horvath searched the vehicle's interior and, in addition to finding marijuana,<sup>1</sup> found an invoice in defendant's name for the purchase of a set of tires for the vehicle from Pueblo Tire Service. Horvath also seized defendant's cell phone which contained six photographs of the Mercedes. Defendant provided Horvath with two expired medical marijuana cards, dated December 11, 2008 and December 15, 2009.

On October 13, 2010 at approximately 9:50 p.m., Officer Aaron Medina stopped defendant while he was walking on a sidewalk in Napa and asked him if he was on probation. After some hesitation, defendant admitted he was. Defendant told Medina he had a container with marijuana in his hand that did not belong to him, and that he was on his way to throw it away. He said the marijuana belonged to his brother. Medina looked into the container, a white Styrofoam cup, and found marijuana. After defendant was detained, Medina contacted defendant's brother and father who denied ownership of the marijuana and did not provide the officer with any information as to who did own it.

Medina conducted a probation search of defendant's residence where he found and seized a digital scale as well as an expired cannabis card from defendant's bedroom. The card expired June 8, 2010. On defendant's cell phone, Medina found several text messages pertaining to the purchase of marijuana.

Medina found a set of keys in defendant's pocket to the same white Mercedes in which Deputy Horvath had found defendant in March. In a search of the Mercedes, parked in defendant's driveway, Medina found a canister of pepper spray in the trunk of the car.

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<sup>1</sup> The marijuana found in the vehicle on March 1 was the basis for the possession-for-sale charge to which defendant pleaded guilty on June 17.

## ***2. Defense Case***

Defendant's father, David Tapia, testified the Mercedes was his car and he was its registered owner and primary driver. He "sometimes" allowed defendant to use his car to fill it up with gas, buy groceries, or go to work, but defendant also drove two other cars belonging to Tapia. When asked about the Pueblo Tire Service receipt found on March 1, Tapia explained he had sent his son to purchase tires for the Mercedes, but he had paid for it.

Defendant testified he was not aware of any pepper spray in the trunk of his father's Mercedes, had not purchased or used pepper spray, and had not opened the car's trunk for nine months. He testified he and his "whole family" use the Mercedes, and he had been ticketed for speeding both in the Mercedes and in his family's other cars. Regarding the Pueblo Tire Service invoice, defendant testified he had gone with his father to get a quote and, since he spoke English, he gave the salesman his name. His father later sent him back with cash to pay for the tires.

Defendant testified he had obtained medical cannabis cards at least three times going back to 2007, primarily for migraines and for back pain stemming from a car accident. Each time he obtained a cannabis card, it was from a new doctor. Defendant testified the medical conditions still existed at the time of the hearing.

Defendant conceded on cross-examination he was still smoking marijuana in August and possibly September 2010, but stopped using the drug before October 2010. That was the reason he tested positive for marijuana at the time of his arrest on October 13, 2010. He was also exposed to second-hand marijuana smoke during this period.

## **II. DISCUSSION**

Defendant contends the trial court erred in (1) rejecting his defense under the Compassionate Use Act of 1996 (CUA) (Health & Saf. Code, § 11362.5 et seq.); and (2) finding he possessed the pepper spray found in the Mercedes trunk.

### **A. Standard of Review**

Under Penal Code section 1203.2, subdivision (a), “a court is authorized to revoke probation ‘if the interests of justice so require and the court, in its judgment, has reason to believe . . . that the person has violated any of the conditions of his or her probation. . . .’ ” (*People v. Rodriguez* (1990) 51 Cal.3d 437, 440, fn. omitted (*Rodriguez*)). “A grant of probation is not a matter of right; it is an act of clemency designed to allow rehabilitation. [Citations.] It is also, in effect, a bargain . . . with the convicted individual, whereby the latter is in essence told that if he complies with the requirements of probation, he may become reinstated as a law-abiding member of society.” (*People v. Chandler* (1988) 203 Cal.App.3d 782, 788 (*Chandler*)).

The prosecution must establish a violation of probation by a preponderance of evidence and we review the court’s determination on appeal for an abuse of discretion. (*Rodriguez, supra*, 51 Cal.3d at pp. 444–445.) “ ‘[O]nly in a very extreme case should an appellate court interfere with the discretion of the trial court in the matter of denying or revoking probation. . . .’ ” (*Id.* at p. 443.) The trial court’s discretion will not be reversed unless it was exercised in an arbitrary or capricious manner. (*Chandler, supra*, 203 Cal.App.3d at p. 788.) Defendant has the burden of establishing an abuse of discretion. (*People v. Urke* (2011) 197 Cal.App.4th 766, 773.) When the finding of a violation turns on the weighing of conflicting evidence, we apply the substantial evidence rule. (*People v. Kurey* (2001) 88 Cal.App.4th 840, 848.)

### **B. CUA Defense**

Defendant contends he raised a reasonable doubt as to the existence of facts providing him a defense under the CUA. He cites the following evidence in support of that proposition: (1) Officer Medina’s testimony he found an expired cannabis recommendation card among defendant’s possessions; and (2) defendant’s testimony he had been issued medical marijuana recommendations for back pain and migraines since 2007, had never been refused a card for these conditions, and the conditions were ongoing. According to defendant, no more was required to establish his defense as a qualified patient under the CUA.

We agree with defendant that his lack of a valid identification card at the time of his arrest did not in and of itself preclude him from offering a CUA defense. The problem for defendant in this case is three-fold. First, he offered no medical evidence, such as the testimony of a qualified physician who had seen him before his arrest, that a physician recommendation for him to use marijuana for medical purposes—oral or written—*was still operative at the time of his October 2010 detention*. Defendant’s lay testimony that he still had the conditions for which marijuana had been recommended in the past, by itself, does not close the evidentiary gap. Second, defendant failed to offer any evidence he possessed the marijuana found on his person on October 13, 2010 *for* medical purposes, as required by section 11362.5, subdivision (d) of the CUA. To the contrary, he told Officer Medina the marijuana did not belong to him and he intended to dispose of it rather than consume it for any medical purpose. At trial, defendant testified he had stopped using marijuana for any purpose before October 1, 2010. Third, this was a probation revocation proceeding, not a criminal trial. Even assuming for the sake of analysis defendant produced enough evidence to put his CUA defense before a jury, the issue in this case was not his right to assert the defense, but whether substantial evidence supports the trial court’s finding the defense did not apply.

Defendant argues at some length that *People v. Windus* (2008) 165 Cal.App.4th 634 (*Windus*) casts doubt on the trial court’s decision. We do not agree. *Windus* did not hold or imply that an expired cannabis card is the only medical evidence a defendant needs in order to be allowed to present a CUA defense to a jury. The issue in *Windus* was whether the *testimony of the defendant’s doctor*—given at an Evidence Code section 402 hearing on whether the defendant could proceed with a medical marijuana defense—was or was not sufficient to entitle the defendant to proceed with the defense. (*Windus*, at p. 640.) The trial court had accepted that the defendant was a qualified medical marijuana patient with a valid recommendation for the use of marijuana to treat his condition, but found insufficient evidence the quantity of marijuana found in the defendant’s possession was reasonably related to his medical needs. (*Id.* at p. 639.) The specific question decided by the Court of Appeal in *Windus* was whether the post-arrest

testimony of the defendant’s doctor at the section 402 hearing about the extent of the defendant’s medical needs was in fact sufficient to allow the defendant to present his CUA defense to the jury. (*Windus*, at p. 640.) Because the physician had seen the defendant twice prior to his arrest and once a year afterward, and had originally recommended marijuana for his back pain, the Court of Appeal found the physician’s testimony as to the defendant’s condition and medical need for marijuana at the time of his arrest was sufficient. (*Id.* at pp. 641–642.) At the same time, *Windus* affirmed prior case law holding mere evidence of post-arrest approval of such use by a physician is *not* sufficient to allow a CUA defense to be presented. (*Windus*, at p. 642, discussing *People v. Rigo* (1999) 69 Cal.App.4th 409.) We find nothing in *Windus* to support the view that a defendant’s *expired* cannabis card is sufficient to warrant jury consideration of such a defense in the absence of any medical testimony establishing a valid oral recommendation was in force on the day of arrest.

Defendant maintains the following passage from *Windus* suggests otherwise: “[W]e see nothing in the [CUA] that requires a patient to periodically renew a doctor’s recommendation regarding medical marijuana use. The statute does not provide . . . that a recommendation ‘expires’ after a certain period of time.” (*Windus, supra*, 165 Cal.App.4th at p. 641.) This passage—responding to the Attorney General’s argument that the defendant’s recommendation “ ‘had clearly expired’ ” because it was more than three years old—merely points out *the CUA itself* imposes no automatic expiration period on a doctor’s recommendation, whether oral or written. (*Windus*, at p. 641.) No such claim was made in this case. Here, defendant’s cannabis cards, all obtained from different doctors, had expired *by their own terms*. No evidence was presented—either through medical testimony or documentation signed by a doctor—that defendant had a valid oral or written medical recommendation for his use of medical marijuana as of the date of his arrest. Nothing in *Windus* suggests evidence of an expired recommendation is sufficient to allow him to proceed with a medical marijuana defense. Equally, nothing in *Windus* suggests a defendant’s own lay testimony suffices to show he

still had a medical need for cannabis after his doctor's recommendation had expired by its own terms.

Another passage in *Windus* states: "Where, as here, the accused possesses marijuana and has a physician's recommendation that he use the drug to treat an ailment set forth in the CUA, he is entitled to present a CUA defense to the jury." (*Windus, supra*, 165 Cal.App.4th at p. 641.) The "physician's recommendation" required by *Windus* and the CUA can only mean a recommendation *in effect on the date of arrest*. Eliminating that requirement would mean a defendant, having once obtained a written medical marijuana recommendation good until a specified date, remains covered by the protections of the statute indefinitely as long as he continues to use marijuana for medicinal purposes. Nothing in *Windus* or the CUA supports so expansive an interpretation of the compassionate use defense.

As discussed earlier, even assuming defendant's expired recommendations were still good on the date of his arrest, he would still not qualify for a CUA defense. Health and Safety Code section 11362.5, subdivision (d) provides in pertinent part: "Section 11357, relating to the possession of marijuana . . . shall 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." (Italics added.) By his own admission, defendant did not possess the marijuana found on him in October 2010 for his personal medical use. According to his testimony, he had stopped using marijuana for any purpose a month or two earlier. He would therefore not come within the protection of the CUA even if his medical recommendation had not expired.

Finally, the issue in this probation proceeding, unlike in *Windus*, was not whether defendant had a right to present a CUA defense to the trier of fact, but whether the trier of fact found the defense supported by a preponderance of evidence. Here, defendant had no valid, unexpired identification card. He offered no physician testimony evidencing an operative recommendation for him to use marijuana for medical purposes. He offered no testimony he was even using marijuana for a personal medical purpose at the time of his

arrest. In these circumstances, the trial court did not abuse its discretion in finding defendant failed to prove his possession of marijuana in October 2010 was lawful.

Because defendant's unlawful possession of marijuana justified the revocation of his probation, it is unnecessary for us to decide whether substantial evidence supported the trial court's pepper spray possession finding.

### **III. DISPOSITION**

The probation revocation order is affirmed.

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Margulies, J.

We concur:

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Marchiano, P.J.

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Banke, J.