

COPY

In the Supreme Court of the State of California

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

LEWIS MARCUS DOWL,

Defendant-Appellant.

Case No.S18262\$SUPREME COURT

FILED

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Frank A. McGuire Clerk

Deputy

Appellate District Fifth, Case No. F057384
Kern County Superior Court, Case No. BF125801A
The Honorable Kenneth C. Twisselman, II, Judge

RESPONDENT'S SUPPLEMENTAL BRIEF

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On July 21, 2010, this Court granted Petitioner's petition for review. On June 13, 2011, the case was fully briefed. Then, on July 11, 2012, this Court directed the parties to address the following issues:

1. Whether petitioner's failure to object at trial to Officer Williamson's testimony precludes him from asserting on appeal that, because Officer Williamson was not qualified to opine as to the purpose of petitioner's marijuana possession, his testimony does not constitute substantial evidence to support the verdict.

2. Whether the record, including the preliminary hearing transcript, shows that the trial court did not abuse its discretion in permitting respondent's expert to opine at trial that defendant possessed marijuana for purpose of sales.

In the Argument below, respondent argues that petitioner forfeited his argument concerning Officer Williamson's medical marijuana expertise and that, if not forfeited, the trial court did not abuse its discretion in permitting Officer Williamson to opine that petitioner possessed marijuana for purpose of sales.

ARGUMENT

I. PETITIONER'S ARGUMENT IS FORFEITED BECAUSE A DEFENDANT FORFEITS A CLAIM CONCERNING A PROSECUTION EXPERT'S QUALIFICATIONS WHEN A DEFENDANT FAILS TO CHALLENGE THAT WITNESS'S QUALIFICATIONS AT TRIAL

Petitioner was convicted of transporting and possessing marijuana for sale. (1 CT 160-168.) At petitioner's trial, Officer Williamson opined that, based on his experience and training, petitioner possessed the marijuana for purpose of sales. (1 RT 47.) At trial, petitioner raised (1 RT 155-159), and the jury was instructed on, a medical marijuana defense. (1 CT 138-139; 1 RT 155-159; 224-225.) On appeal, petitioner argued that insufficient evidence existed to support his marijuana related convictions. (Appellant's Opening Brief in Fifth Appellate District case no. F057384, at pp. 15-26

[hereafter AOB].) Petitioner's claim was based on the argument that Officer Williamson's "qualifications were insufficient to permit [him] to render an opinion that [petitioner] possessed the seized marijuana for sale." (AOB 19.)

Petitioner's claim is couched in terms of sufficiency of the evidence. Respondent acknowledges that sufficiency of the evidence claims are, generally, not subject to forfeiture. (See *People v. Butler* (2003) 31 Cal.4th 1119, 1128 [this Court held that a claim of insufficient evidence to support an order for involuntary HIV testing could be raised for the first time on appeal].) Petitioner's claim, however, is not a true sufficiency of the evidence claim.

Petitioner's argues that, without Officer Williamson's expert testimony, insufficient evidence exists to support the judgment. The problem with that argument is that a sufficiency of the evidence claim focuses on the entire record (*People v. Medina* (2009) 46 Cal.4th 913, 919 [substantial evidence test focuses on the whole record of evidence]); and Officer Williamson's testimony, which was admitted without objection, is a part of the record here. Petitioner cannot raise a sufficiency of the evidence claim that ignores a significant portion of the record.

Petitioner's argument is really one of admissibility. Evidence Code section 720, subdivision (a), provides: "A person is qualified to testify if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates. Against the objection of a party, such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert." But "while Evidence Code sections 720, subdivision (a), and 802 provide that the person testifying as an expert must be qualified by special knowledge, skill and experience, these foundational requirements need not be established in the absence of a *specific* objection or unless the court, in

its discretion, requires it.” (*People v. Rodriguez* (1969) 274 Cal.App.2d 770, 776, italics in original.)

People v. Rodriguez corresponds with the rule established by Evidence Code section 353, which provides:

A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless:

(a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion

Petitioner had the opportunity to challenge Officer Williamson’s medical marijuana expertise and exclude evidence of Officer Williamson’s opinion concerning the marijuana found in this case. Under Evidence Code section 720, petitioner could have argued that Officer Williamson was not an expert on the subject matter at issue, and thus, that Officer Williamson’s expert opinion was inadmissible.

Petitioner, however, did not object to Officer Williamson’s testimony. (1 RT 47.) Officer Williamson testified at petitioner’s preliminary hearing and he described the training he had received in identifying whether marijuana was possessed for personal use or for purpose of sales. (1 CT 25-26.) He also described his experience and training regarding medicinal marijuana. (1 CT 34-36.) At trial, Officer Williamson again described his experience and training regarding marijuana. (1 RT 39-41.) Petitioner did not challenge Officer Williamson’s expertise, and the record does not indicate that the parties or trial court discussed Officer Williamson’s expertise. Apparently, the parties assumed Officer Williamson had expertise in differentiating between marijuana possessed for personal use and marijuana possessed for sales.

Petitioner's failure to object to Officer Williamson's testimony at trial means he has forfeited his opportunity to argue on appeal that Officer's Williamson's qualifications were insufficient to permit him to render an opinion that petitioner possessed the marijuana at issue for sale. When a party fails to object to the admissibility of evidence, the claim is forfeited. (Evid. Code, § 353; *People v. Raley* (1992) 2 Cal.4th 870, 892.)

More specifically, a defendant forfeits a claim that a prosecution expert witness was not qualified to testify to the subject matter at issue when a defendant fails to challenge that witness's qualifications at trial. (*People v. Panah* (2005) 35 Cal.4th 395, 478 [claim regarding forensic serologist's expert qualifications forfeited when defendant failed to challenge the qualifications at trial]; *People v. Farnam* (2002) 28 Cal.4th 107, 162 [defendant failed to "challenge (the criminalist's) qualifications to provide expert opinion on blood spatters"]; *People v. Bolin* (1998) 18 Cal.4th 297, 321 [appellate challenge to criminalist's qualifications waived by failure to make specific trial objections]; *People v. Roberts* (1992) 2 Cal.4th 271, 298 [claim on appeal forfeited where defendant objected on the basis of lack of foundation but "never sought to challenge the witnesses' qualifications as experts"].)

For example, in *People v. Rodriguez*, trial counsel did not challenge a narcotic officer's expertise or make a hearsay objection. (*People v. Rodriguez, supra*, 274 Cal.App.2d at p.775.) Instead, he "merely interposed a general objection" to the officer's testimony. (*Ibid.*) As a consequence, the Court of Appeal found that "the specific objections which appellant now asserts were waived [citations]." (*Id.* at pp. 775-776.) In this case, petitioner failed to interpose even the general objection raised in *Rodriguez*, and certainly failed to challenge Officer Williamson's medical marijuana expertise. Thus, his claim addressing Officer Williamson's qualifications is forfeited.

Petitioner argues that “resolution of this case does not turn on the admissibility of the police officer’s testimony.” (Petitioner’s Supplemental Brief [PSB] 3.) The Court’s question, however, concerns Petitioner’s original argument in the Fifth District Court of Appeal, which was: “Under relevant case law, [Officer Williamson’s] qualifications were insufficient to permit Williamson to render an opinion that [petitioner] possessed the seized marijuana for sale. Accordingly, the evidence on [the marijuana conviction] must be reversed.” (AOB 19.) As discussed above, that argument is really a claim that Officer Williamson’s opinion was inadmissible and that its admission prejudiced petitioner. Since petitioner failed to object to Officer Williamson’s testimony at trial, the claim is forfeited.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING OFFICER WILLIAMSON TO OPINE THAT PETITIONER POSSESSED MARIJUANA FOR PURPOSES OF SALES

Assuming petitioner did not forfeit a claim challenging Officer Williamson’s qualifications, the trial court did not abuse its discretion in allowing Officer Williamson to opine that petitioner possessed the marijuana for purpose of sales.

As noted above, Evidence Code section 720 provides:

(a) A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates. Against the objection of a party, such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert.

(b) A witness’ special knowledge, skill, experience, training, or education may be shown by any otherwise admissible evidence, including his own testimony.

An expert's qualifications "must be related to the particular subject upon which he is giving expert testimony." (*People v. Hogan* (1982) 31 Cal.3d 815, 852, disapproved on another ground in *People v. Cooper* (1991) 53 Cal.3d 771.) "Whether a person qualifies as an expert in a particular case ... depends upon the facts of the case and the witness's qualifications." (*People v. Bloyd* (1987) 43 Cal.3d 333, 357.) "The trial court's determination of whether a witness qualifies as an expert is a matter of discretion and will not be disturbed absent a showing of manifest abuse." (*People v. Bolin, supra*, 18 Cal.4th at pp. 321-322.) "Error regarding a witness's qualifications as an expert will be found only if the evidence shows that the witness clearly lacks qualification as an expert. [Citation.]" (*People v. Farnam, supra*, 28 Cal.4th at p. 162, internal quotation marks omitted.) "Where a witness has disclosed sufficient knowledge of the subject to entitle his opinion to go to the jury, the question of the degree of his knowledge goes more to the weight of the evidence than its admissibility. [Citation.]" (*People v. Bolin, supra*, at p. 322, internal quotation marks omitted.)

Here, the record shows that the trial court did not abuse its discretion in permitting Officer Williamson to opine that petitioner possessed marijuana for purposes of sales. At the time of Petitioner's trial, Officer Williamson had been a police officer for about 10 years. (1 RT 40.) Officer Williamson related that he had extensive training on marijuana in general. Officer Williamson, however, had not been trained on the validity of medical marijuana cards. (1 RT 37.) At police academy, Officer Williamson received several hours of training in drug recognition, possession of drugs for personal use, and possession of drugs for sales. (1 RT 39-40.) Part of that training addressed marijuana. (*Ibid.*) As a police officer, Officer Williamson encountered marijuana paraphernalia, persons who possessed marijuana for personal use, and persons who possessed

marijuana for purpose of sales. (1 RT 40-41.) He also had training differentiating between marijuana possessed for personal use and marijuana possessed for purpose of sales. (1 RT 41.)

During petitioner's preliminary examination, Officer Williamson described his training regarding marijuana in further detail. Prior to petitioner's trial, Officer Williamson had testified as an expert on possession of marijuana for purpose of sales several times. (1 CT 26.) He had received in-field training on the possession of marijuana for medical use. (1 CT 34.) The training taught Officer Williamson that persons who possess a medical marijuana card are not permitted to possess marijuana for purpose of sales. (1 CT 35.) Officer Williamson stated that he had personally observed marijuana that had been purchased from a medical marijuana dispensary. (1 CT 36.) Officer Williamson explained that such marijuana was packaged in a container with a label that described the package's contents, where the contents originated, and who the contents were for. (*Ibid.*)

As noted above, "Error regarding a witness's qualifications as an expert will be found only if the evidence shows that the witness clearly lacks qualification as an expert. [Citation.]" (*People v. Farnam, supra*, 28 Cal.4th at p. 162, internal quotation marks omitted.) Officer Williamson had significant experience and education differentiating between marijuana possessed for personal use and marijuana possessed for purpose of sales. He also had received "in-field training on people possessing marijuana for medical use." (1 CT 34.) Officer Williamson was familiar with how marijuana purchased from a dispensary was packaged. (1 CT 36.) Given Officer Williamson's substantial experience, training, and education concerning marijuana in general, and his education and experience on the subject of medical marijuana, he possessed the qualifications necessary to testify as a marijuana expert in petitioner's case.

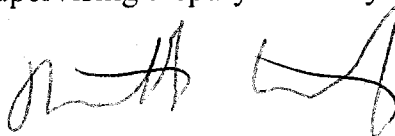
In his supplemental brief, petitioner argues that “Officer Williamson’s knowledge about the patterns of lawful marijuana possession was limited.” (PSB 9.) Petitioner’s statement, however, fails show that the trial court abused its discretion in permitting Officer Williamson to offer his expert opinion because “[w]here a witness has disclosed sufficient knowledge of the subject to entitle his opinion to go to the jury, the question of the degree of his knowledge goes more to the weight of the evidence than its admissibility. [Citation.]” (*People v. Bolin, supra*, 18 Cal.4th at p. 322, internal quotation marks omitted.) The record demonstrates that Officer Williamson possessed specialized knowledge of both illegal and medical marijuana. The degree of Officer Williamson’s medical marijuana expertise went to the weight of his opinion rather than its admissibility. Thus, the trial court did not abuse its discretion in permitting Officer Williamson to offer his opinion on the marijuana at issue in this case.

CONCLUSION

Based on the reasoning above and respondent's Answer Brief on the Merits, respondent respectfully requests that this Court affirm the Court of Appeal's judgment.

Dated: September 19, 2012 Respectfully submitted,

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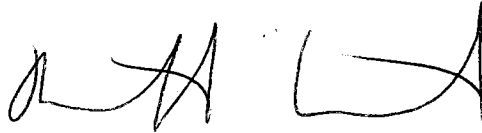
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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S SUPPLEMENTAL BRIEF** uses a 13 point Times New Roman font and contains 2203 words.

Dated: September 19, 2012

KAMALA D. HARRIS
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Handwritten signature of Jeffrey Grant, consisting of stylized initials and a surname.

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: People v. Lewis Marcus Dowl
No.: S182621

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On September 19, 2012, I served the attached **RESPONDENT'S SUPPLEMENTAL BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 19, 2012, at Sacramento, California.

Dawn Stott-Bakarich

Declarant

Signature