

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4052-12T4
A-4477-12T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

EDWARD R. FORCHION,

Defendant-Appellant.

Argued May 27, 2015 – Decided August 7, 2015

Before Judges Messano, Hayden and Summers.

On appeal from the Superior Court of New Jersey, Law Division, Burlington County, Indictment No. 10-08-0866.

John Vincent Saykanic, Designated Counsel, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Mr. Saykanic, on the brief).

Alexis R. Agre, Assistant Prosecutor, argued the cause for respondent (Robert D. Bernardi, Burlington County Prosecutor, attorney; Ms. Agre, on the brief).

Appellant filed a pro se supplemental brief.

PER CURIAM

In these consolidated appeals, defendant Edward R. Forchion appeals from the judgment of conviction and sentence imposed following a jury trial, as well as the judgment of conviction

and sentence that followed his conviction for a violation of probation (VOP). To place defendant's arguments in the proper context, we briefly set forth the procedural history.

The Burlington County grand jury returned an indictment charging defendant with third-degree possession of marijuana with intent to distribute, N.J.S.A. 2C:35-5(a)(1) and 2C:35-5(b)(11) (count 1), and fourth-degree possession of marijuana, N.J.S.A. 2C:35-10(a)(3) (count 2). Defendant was represented by the Office of the Public Defender for purposes of a hearing on his motion to suppress evidence, which was denied. Defendant subsequently sought the court's permission to represent himself. The judge granted defendant's request, as well as his request to have stand-by counsel remain involved. Defendant subsequently moved to dismiss the indictment on a variety of grounds. In a written opinion, the judge denied the motion.

At trial, defendant represented himself with assistance of stand-by counsel. The jury found defendant guilty of count two, but was unable to reach a verdict on the more serious offense of possession with intent to distribute. Defendant was acquitted of that charge after a retrial.¹ On January 16, 2013, the judge

¹ We have not been provided with the transcripts of the second trial.

sentenced defendant to two years' probation and imposed a fine of \$2500 in addition to mandatory penalties.

On March 12, 2013, the judge held a hearing on the VOP that had been lodged against defendant based upon his failure to report to probation, provide a home address, provide a DNA sample and for leaving the state without permission of the court. Represented by counsel, defendant pled guilty and was sentenced to nine months in the Burlington County jail. The judge, however, agreed that upon the filing of a formal motion for reconsideration under Rule 3:21-10, he would reconsider the sentence because defendant needed repetitive medical treatment in California. On September 10, 2013, the judge modified defendant's sentence to permit his intermittent release to attend his medical treatments. Defendant's subsequent motion to withdraw his guilty plea was denied.²

Defendant raises the following points on appeal:

POINT I

N.J.S.A. 2C:35-5A(1)/2C:35-5B(11) . . . AND
N.J.S.A. 2C:35-10A(3) . . . ARE
UNCONSTITUTIONAL ON THE GROUNDS OF "MEDICAL
NECESSITY" OR THE DEFENDANT IS EXEMPT FROM
PROSECUTION DUE TO "MEDICAL NECESSITY"
(EITHER UNDER NEW JERSEY LAW OR COMMON LAW);
THE MARIJUANA CONVICTION MUST BE REVERSED

² Neither the motion for reconsideration, nor the motion to withdraw defendant's guilty plea, are part of the record on appeal.

AND THE INDICTMENT DISMISSED WITH PREJUDICE
. . . .

POINT II

THE DEFENDANT SHOULD HAVE BEEN ALLOWED TO PRESENT EXPERT TESTIMONY ON THE ISSUES OF "MEDICAL NECESSITY" AND RELIGIOUS USE BY RASTAFARIANS; THESE DENIALS BY THE COURT BELOW AND THE OFFICE OF THE PUBLIC DEFENDER PRECLUDED DEFENDANT OF HIS CONSTITUTIONAL RIGHT TO DUE PROCESS, EQUAL PROTECTION, THE RIGHT TO PRESENT A DEFENSE, AND THE RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL MANDATING A REVERSAL OF HIS CONVICTION AND DISMISSAL OF THE INDICTMENT WITH PREJUDICE
. . . .

POINT III

THE DEFENDANT WAS DEPRIVED OF THE FOLLOWING FEDERAL CONSTITUTIONAL RIGHTS: THE RIGHT TO TRAVEL AND THE DUE PROCESS CLAUSE UNDER THE FIFTH AND FOURTEENTH AMENDMENTS, THE COMMERCE CLAUSE, THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT, THE FULL FAITH AND CREDIT CLAUSE (U.S. CONST. ART. IV, SEC. 1), AND THE FOURTH AMENDMENT RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURE, AS HE HAS A VALID CALIFORNIA MEDICAL MARIJUANA CARD AND WAS CONVICTED AND SENTENCED TO 270 DAYS IN JAIL ONLY FOR BRINGING HIS LEGALLY PRESCRIBED MEDICINE INTO THE STATE OF NEW JERSEY.

POINT IV

N.J.S.A. 2C:35-10A(3) . . . ALONG WITH . . . N.J.S.A. 2C:35-10A(3)[;] 2C:35-5B(11), ARE UNCONSTITUTIONAL AS THEY VIOLATE PRACTICING RASTAFARIANS' RIGHT TO UTILIZE THEIR RELIGIOUS SACRAMENT GANJA (MARIJUANA) UNDER THE FIRST AMENDMENT FREE EXERCISE CLAUSE, AND RIGHT UNDER ARTICLE 1, PARAGRAPHS 3 AND 4 OF THE NEW JERSEY CONSTITUTION; THE DEFENDANT'S CONVICTION MUST BE REVERSED AND

THE INDICTMENT MUST BE DISMISSED WITH PREJUDICE

POINT V

NEW JERSEY'S CRIMINALIZATION OF MARIJUANA DEPRIVES RASTAFARIANS OF THEIR SACRAMENTAL USE OF CANNABIS IN VIOLATION OF THE RELIGIOUS FREEDOM RESTORATION ACT (RFRA); THE CONVICTION MUST BE REVERSED AND THE INDICTMENT DISMISSED WITH PREJUDICE

POINT VI

N.J.S.A. 2C:35-5A(1)/2C:35-5B(11) AND N.J.S.A. 2C:35-10A(3) ARE UNCONSTITUTIONAL AS THEY VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION SINCE PEYOTE (A SCHEDULE I SUBSTANCE) IS A RECOGNIZED RELIGIOUS EXEMPTION ALONG WITH ANOTHER SCHEDULE I SUBSTANCE (AYAHUASCA TEA); PRACTICING RASTAFARIANS IN NEW JERSEY MUST BE AFFORDED THE SAME PROTECTION.

POINT VII

THE DEFENDANT'S CONVICTION UNDER N.J.S.A. 2C:35-10a(3) (POSSESSION OF MORE THAN 50 GRAMS OF MARIJUANA) MUST BE REVERSED AND THE INDICTMENT DISMISSED WITH PREJUDICE (AND THE MEDICAL MARIJUANA RETURNED TO THE DEFENDANT) SINCE THE CATEGORIZATION OF MARIJUANA AS A SCHEDULE I DRUG VIOLATES THE DEFENDANT'S DUE PROCESS AND EQUAL PROTECTION RIGHTS AS THE STATUTE HAS BEEN PREEMPTED, NULLIFIED, AND RENDERED UNCONSTITUTIONAL BY THE ENACTMENT OF THE NEW JERSEY COMPASSIONATE USE MEDICAL MARIJUANA ACT [(CUMMA), N.J.S.A. 24:6I-1 to -16].

POINT VIII

THE COURT BELOW DEPRIVED DEFENDANT OF HIS DUE PROCESS RIGHT TO A FAIR TRIAL BY PRECLUDING THE DEFENDANT FROM SPEAKING TO THE JURY ABOUT [CUMMA] AND PRECLUDING HIM FROM ARGUING THAT MARIJUANA SHOULD NOT BE A SUBSTANCE PROSCRIBED BY NEW JERSEY LAW AS PART OF HIS DEFENSE AT TRIAL.

In a pro se supplemental brief, defendant raises the following points:

POINT I

THE RECALL STATUTE (N.J.S.A. 43:6A-13(B)) IS UNCONSTITUTIONAL AND VIOLATES NOT ONLY TWO PROVISIONS OF THE NEW JERSEY CONSTITUTION, NAMELY, N.J. CONST. (1947) ARTICLE IV, § 6, ¶ 3 (THE JUDICIAL ARTICLE) AND N.J. CONST. (1947) ARTICLE XI, § 4, ¶ 1 (THE SCHEDULE ARTICLE) BUT ALSO DEFENDANT'S DUE PROCESS RIGHT TO A FAIR TRIAL UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

POINT II

THE EX PARTE ACTION BY THE COURT BELOW VIOLATED RULE 1:2-1 AND DEPRIVED DEFENDANT OF HIS FOURTEENTH AMENDMENT DUE PROCESS RIGHT TO A FAIR TRIAL.

POINT III

DEFENDANT'S COUNSEL'S FAILURE TO CORRECT THAT [THE] JUDGE . . . EITHER RENEGED OR FORGOT (DUE TO HIS AGE) AS TO THE STAY OF SENTENCE PENDING APPEAL DEPRIVED DEFENDANT OF HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE COUNSEL AND TO HIS FOURTEENTH AMENDMENT DUE PROCESS RIGHT TO A FAIR TRIAL.

POINT IV

NEW JERSEY MARIJUANA LAWS (N.J.S.A. 2C:35-5 AND 2C:35-10) ARE INHERENTLY DISCRIMINATORY AGAINST AFRICAN-AMERICANS AND ALSO DISCRIMINATORY AS APPLIED BY LAW ENFORCEMENT.

POINT V

[A SECOND JUDGE] RECUSED HERSELF BUT REMAINED INVOLVED IN THE CASE DEPRIVING DEFENDANT OF HIS FOURTEENTH AMENDMENT DUE PROCESS RIGHT TO A FAIR TRIAL.

POINT VI

DEFENDANT WAS DEPRIVED OF HIS RIGHT TO AN IMPARTIAL JURY IN VIOLATION OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, PARAGRAPH 10 OF THE NEW JERSEY CONSTITUTION DUE TO JURORS NUMBER ONE AND NUMBER FOUR POSSIBLY BEING BIASED AGAINST THE DEFENDANT (WHO THEY FOUND GUILTY).

POINT VII

THE PROSECUTOR'S SUMMATION DEPRIVED THE DEFENDANT OF HIS SIXTH AMENDMENT RIGHT TO A FAIR TRIAL AND FOURTEENTH AMENDMENT DUE PROCESS RIGHT AND STATE CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

POINT VIII

THE COURT BELOW IMPROPERLY CURTAILED THE DEFENDANT'S CLOSING ARGUMENTS AND GAVE THE JURY A MISLEADING INSTRUCTION RELATED TO THIS IMPROPRIETY DEPRIVING DEFENDANT OF HIS DUE PROCESS RIGHTS TO A FAIR TRIAL UNDER THE FOURTEENTH AMENDMENT.

POINT IX

THE COURT BELOW DEPRIVED DEFENDANT OF HIS DUE PROCESS RIGHT TO A FAIR TRIAL BY PRECLUDING THE DEFENDANT FROM SPEAKING TO THE JURY ABOUT [CUMMA] AND PRECLUDING HIM FROM ARGUING THAT MARIJUANA SHOULD NOT BE A SUBSTANCE PROSCRIBED BY NEW JERSEY LAW AS PART OF HIS DEFENSE AT TRIAL.

Having now considered these arguments in light of the record and applicable legal standards, we affirm.

I.

Two overarching themes infused the pre-trial motions and trial, those being defendant's claim that criminalizing the possession of marijuana violated his rights under the United States and New Jersey Constitutions, and that defendant's possession of marijuana was necessary to ameliorate his medical symptoms. The issues first surfaced when defendant moved pre-trial to dismiss the indictment based upon grounds of religious freedom and "medical necessity," or, alternatively, that he be permitted to call expert witnesses as to the medical use of marijuana and its religious use as a sacrament by Rastafarians.

In a written decision, the judge noted that when defendant was arrested in April 2010, CUMMA, which had been enacted in January 2010, was not in effect, since the effective date of the legislation was July 1, 2010. He further noted that defendant had not "compl[ie]d with any of the requirements for the medical

use of marijuana under the act[,]" and likely suffered from none "of the debilitating medical conditions allowing the use of medicinal marijuana" in New Jersey. Lastly, the judge noted that defendant possessed a quantity of marijuana that "far exceeded the maximum allowed under CUMMA[.]" The judge concluded, "the law does not contemplate that the illegal use and sale of marijuana should no longer be punished as a criminal act[,]" but rather permits under certain conditions the use for medicinal purposes to be "an affirmative defense." Citing State v. Tate, 102 N.J. 64 (1986), the judge also rejected defendant's argument that the indictment should be dismissed because his use of marijuana was a "medical necessity."

The judge addressed defendant's argument that the indictment infringed upon the free exercise of his religion in violation of the First Amendment to the United States Constitution. Citing United States Supreme Court precedent, he concluded that the criminalization of marijuana did not violate defendant's free exercise rights. The judge also noted that the Religious Freedom Restoration Act, 42 U.S.C.A. § 2000bb to -4

(RFRA), had been held inapplicable to the states. The judge denied the motion to dismiss the indictment.³

At the beginning of trial, defendant and the State stipulated two facts: (1) defendant "was authorized by the state of California to possess marijuana for medical purposes in the state of California"; and (2) the evidence seized by police from the trunk of defendant's car was 454.7 grams of marijuana. Defendant gave an opening and closing statement, but his stand-by lawyer questioned the witnesses at trial.

On April 1, 2010, New Jersey State Trooper Kenneth Rayhon pulled over the car defendant was driving after witnessing it run a red light. Upon approaching the car, Rayhon detected the smell of burnt marijuana and observed a glass pipe behind the driver's seat. Defendant handed the pipe to Rayhon, who observed marijuana residue in it. Rayhon placed defendant under arrest and a search of his person revealed \$2000 in cash. A search warrant was issued for defendant's car. In the trunk, police recovered a duffle bag with "a large vacuum sealed bag of marijuana" and a smaller bag of marijuana located in a laptop bag. Lieutenant Daniel Leon of the Burlington County Prosecutor's Office, testified as an expert in the field of

³ The judge did not specifically address defendant's alternative argument that he be permitted to call expert witnesses on the medical uses of marijuana and its religious use by Rastafarians.

narcotics and opined, based upon a hypothetical question, that the marijuana was intended for distribution.

Defendant did not testify. Andrew Mastella, a former state trooper, testified as a defense expert. He opined in response to a hypothetical question that the seized marijuana was consistent with personal use. Defendant also sought to call his doctor, Steven Fenichel, as a witness.

Defendant proffered that Dr. Fenichel would testify to treating defendant in the past for benign tumors of his legs which caused "deep bone pain." Additionally, defendant sought to have the doctor testify that marijuana relieved the pain. Concluding that defendant had failed to provide any expert report or notice of Dr. Fenichel as an expert witness, the judge ruled that the doctor could not testify as an expert on medical marijuana, and his testimony would be limited to his diagnosis and the treatment rendered to defendant.

As already noted, the jury found defendant guilty of fourth-degree possession of marijuana, but could not reach a verdict on the more serious charge of possession of marijuana with intent to distribute.

II.

In Point I, defendant argues that the indictment should have been dismissed because the marijuana laws are

"unconstitutional on the grounds of 'medical necessity,'" or alternatively, he was "exempt from prosecution" because of medical necessity. As part of the argument raised in Point II, defendant claims the judge erred in prohibiting expert testimony on the "issues of 'medical necessity.'"⁴

Initially, defendant's facial constitutional challenge to the criminalization of the possession of marijuana lacks sufficient merit to warrant discussion. R. 2:11-3(e)(2). Defendant raises no specific argument in this regard, but rather asserts that the marijuana laws as applied to him are unconstitutional because of medical necessity. We disagree.

The Criminal Code recognizes the affirmative defense of necessity by providing,

Conduct which would otherwise be an offense is justifiable by reason of necessity to the extent permitted by law and as to which neither the code nor other statutory law defining the offense provides exceptions or defenses dealing with the specific situation involved and a legislative purpose to

⁴ Also in Point II, defendant asserts that the Office of the Public Defender provided ineffective assistance of counsel by somehow denying defendant's ability to call these expert witnesses. It suffices to say that there is nothing in the record that supports this claim. Nonetheless, claims of ineffective assistance of counsel are particularly appropriate for resolution in the context of a petition for post-conviction relief, State v. O'Neil, 219 N.J. 598, 610 (2014), and we preserve defendant's ability to do so if he chooses. The same is true with regard to the contention of ineffective assistance of counsel raised in Point III of defendant's pro se brief.

exclude the justification claimed does not otherwise plainly appear.

[N.J.S.A. 2C:3-2(a) (emphasis added).]

The contention that a defendant may invoke medical necessity as a defense in a prosecution for marijuana possession was rejected by the Court in Tate, supra, 102 N.J. at 73. There, the defendant, a quadriplegic charged with possession of marijuana, sought to invoke the defense of medical necessity claiming he used marijuana to "ease[] the effects of spastic contractions regularly suffered by quadriplegics, and that no other prescribable medication [gave] him such relief." Id. at 67. The trial court denied the State's motion to strike the defense, we affirmed in a split decision, and the Court reversed. Ibid.

Interpreting N.J.S.A. 2C:3-2(a), the Court reasoned that the statutory defense was available only "to the extent permitted by law." Tate, supra, 102 N.J. at 70. Thus, the defense was unavailable where statutes already expressly "provide[] exceptions or defenses dealing with the specific situation involved" or "if a legislative purpose to exclude the justification otherwise plainly appears." Ibid. The Court found that because marijuana was a Schedule I drug, and thus by definition had "'no accepted medical use,'" there was "a legislative intent to . . . exclude the defense." Id. at 70-72. (quoting N.J.S.A. 24:21-5(a)). Additionally, the Court relied

on language in the then-existing controlled dangerous substance statute, which prohibited possession unless obtained "pursuant to a valid prescription." Id. at 71. (emphasis removed). The Court reasoned that the Legislature had specifically envisioned the scenario before it and provided the prescription exception. Since the defendant did not have a prescription, the Court barred the medical necessity defense, reasoning it was "without authority to fashion an alternative." Ibid.

The Court also concluded that "even under common law, a 'necessity' defense [was] not . . . available in th[e] case." Id. at 73. The common law defense "[wa]s available . . . only when the legislature ha[d] not foreseen the circumstances encountered by a defendant." Id. at 74. The Court determined that the defendant failed to "show the absence of an available alternative," since it was possible to obtain marijuana for "certain medical uses." Ibid.

Contrary to defendant's assertion, the Tate Court's rationale applies in greater force today in light of the passage of CUMMA.⁵ We assume arguendo that CUMMA applied to defendant's

⁵ We briefly address the polemic contained in Point VII of defendant's brief regarding the continued classification of marijuana as a Schedule I drug. Defendant correctly notes that one of the qualifying predicates for placing any drug on Schedule I is that the drug lacks "accepted medical use in treatment." N.J.S.A. 24:21-5(a). CUMMA recognizes potential
(continued)

prosecution, even though his arrest preceded the effective date of the act. Under CUMMA, the Legislature specifically exempted "qualifying patient[s]" from prosecution. N.J.S.A. 24:6I-6(a); N.J.S.A. 2C:35-18. A qualifying patient is "a resident of the State who has been provided with a certification by a physician pursuant to a bona fide physician-patient relationship." N.J.S.A. 24:6I-3. Defendant, of course, could not have been a "qualifying patient" when arrested since CUMMA was not then in effect; but, the record fails to reveal that he became a "qualifying patient" thereafter.⁶

More importantly, CUMMA places other restrictions upon the procurement of medical marijuana and the quantity that may be obtained by prescription. N.J.S.A. 24:6I-10. In any event, as the Court explained in Tate, supra, 102 N.J. at 71, because the Legislature has specifically provided for "an exception set forth in the 'offense' statute itself -- an exception for

(continued)

medical uses of marijuana in the treatment of certain conditions in certain patients. N.J.S.A. 24:6I-2(a). However, defendant's attack on the misclassification of marijuana is not properly before us in this appeal. Rather, the issue should be presented to the Commissioner of Health who, pursuant to N.J.S.A. 24:21-3(a), is charged with categorizing all schedule drugs.

⁶ As noted, it was a stipulated fact that defendant possessed a California medical marijuana card when arrested.

medically-necessary possession of marijuana," defendant was not entitled to advance the necessity defense at trial.

Defendant makes two corollary arguments. He contends that the judge erred in denying his request to have Dr. Fenichel testify as to the medical uses of marijuana in his treatment of defendant and in foreclosing defendant from arguing that possession of marijuana should not be illegal in New Jersey because of its recognized medical uses.

"'[A] trial court's evidentiary rulings are entitled to deference absent a showing of an abuse of discretion, i.e., there has been a clear error of judgment.'" State v. Nantambu, 221 N.J. 390, 402 (2015) (alteration in original) (quoting State v. Harris, 209 N.J. 431, 439 (2012)). Because defendant was not entitled to present a defense of medical necessity to the jury, we cannot conclude that the trial judge erred in refusing to permit the doctor to testify about the palliative benefits defendant received from his or others' use of the drug.

Defendant's reliance on our decision in State v. Granskie, 433 N.J. Super. 44 (App. Div. 2013), is misplaced. There, we permitted the defendant to proffer expert testimony "concerning the potential impact of [his] opiate addiction and withdrawal symptoms on the reliability of his confession." Id. at 46. Subject to certain limitations, we concluded "the defendant's

mental condition may provide an explanation, other than the truth, for the defendant's confession." Id. at 56. In Granskie, the defendant proffered expert opinion to help the jury determine facts that were in contention, i.e., whether his confession was voluntary. Here, defendant sought to have Dr. Fenichel provide expert opinion that was irrelevant to the jury's determination of the facts of the case, and, arguably, only relevant to defendant's asserted, although inadmissible, legal defense, i.e., medical necessity.

We also reject defendant's argument that the judge improperly foreclosed him from advancing certain legal arguments about the medical use of marijuana before the jury. Permitting defendant to have argued that medical necessity or the existence of CUMMA somehow excused his possession of marijuana would have been tantamount to inviting jury nullification. See State v. Ragland, 105 N.J. 189, 211 (1986) ("Jury nullification is an unfortunate but unavoidable power. It should not be advertised, and, to the extent constitutionally permissible, it should be limited. Efforts to protect and expand it are inconsistent with the real values of our system of criminal justice.").

III.

A.

We move on to consider the constitutional claims made by defendant, first addressing those advanced under the general rubric of the free exercise of his religion. Essentially, in Point IV, defendant contends that cannabis is a sacrament used in the practice of his Rastafarian faith, and the criminalization of its possession violates the First Amendment of the United States Constitution's "free exercise clause, and . . . Article 1, paragraphs 3 and 4 of the New Jersey Constitution." Defendant also argues that his prosecution violated RFRA. Lastly, defendant contends that he was denied equal protection under law because possession of other Schedule I drugs is exempt from prosecution because of the religious uses of those substances.

The First Amendment of the federal Constitution, provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. This language protects two concepts: "'freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.'" McKelvey v. Pierce, 173 N.J. 26, 40 (2002) (quoting Cantwell v.

Connecticut, 310 U.S. 296, 303-04, 60 S. Ct. 900, 903, 84 L. Ed. 1213, 1218 (1940)). Accordingly, "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion proscribes (or prescribes)." Employment Div. v. Smith, 494 U.S. 872, 879, 110 S. Ct. 1595, 1600, 108 L. Ed. 2d 876, 886 (1990) (internal quotation marks omitted).

In Smith, the plaintiffs were fired from their jobs after using peyote in a religious ceremony and were denied unemployment benefits for having been discharged for misconduct. Id. at 874, 110 S. Ct. at 1597, 108 L. Ed. 2d at 883. Oregon prohibited the possession of peyote unless "prescribed by a medical practitioner." Id. at 874, 110 S. Ct. at 1597, 108 L. Ed. 2d at 882. The Court held the denial of benefits was not a violation of the plaintiffs' free exercise rights:

Respondents urge us to hold, quite simply, that when otherwise prohibitible conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from governmental regulation. We have never held that, and decline to do so now. There being no contention that Oregon's drug law represents an attempt to regulate religious beliefs, the communication of religious beliefs, or the raising of one's children in those beliefs.

[Id. at 882, 110 S. Ct. at 1602, 108 L. Ed. 2d at 887.]

The Court rejected application of the "compelling interest" test in such circumstances. Id. at 885, 110 S. Ct. at 1604, 108 L. Ed. 2d at 890.

However, in cases decided after Smith, the test has become less clear. For example, in Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531-32, 113 S. Ct. 2217, 2236, 124 L. Ed. 2d 472, 489 (1993), the Court said that "[a] law failing to satisfy the[] requirements [of neutrality and general applicability] must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." In that case, the Court struck down a series of ordinances specifically designed to prohibit animal sacrifice that was part of Santeria religious practice, finding the ordinances were not neutral or of general application, and they could not meet strict scrutiny analysis. Id. at 546, 113 S. Ct. at 2233, 124 L. Ed. 2d at 498-99.

After Smith was decided, Congress passed RFRA, which prohibits any law from incidentally burdening religion unless it survives "strict scrutiny," i.e., it is narrowly tailored to serve a compelling state interest. 42 U.S.C.A. § 2000bb(b)(1). Applying RFRA, the Court in Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 431, 126 S. Ct. 1211, 1220, 163 L. Ed. 2d 1017, 1031 (2006), said that in

considering a free exercise claim, a court must "look[] beyond broadly formulated interests justifying the general applicability of government mandates and scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants."

In Gonzalez, the federal government sought to prohibit a small religious sect from drinking a hallucinogenic tea containing a substance, DMT, that was a Schedule I drug under federal law. Id. at 425, 126 S. Ct. at 1217, 163 L. Ed. 2d at 1028. The Court held that the government had failed to present sufficiently compelling reasons to prohibit the sect's use of the tea.

The Court reasoned that DMT's status as a Schedule I drug "simply d[id] not provide a categorical answer that relieve[d] the Government of the obligation to shoulder its burden under RFRA." Id. at 432, 126 S. Ct. at 1221, 163 L. Ed. 2d at 1032. Additionally, since the use of peyote by the Native American Church was specifically exempt from prosecution, the Court found it "difficult to see" a compelling interest that would "preclude any consideration of a similar exception for the 130 or so American members of the [sect] who want to practice" their religion. Id. at 433, 126 S. Ct. at 1222, 163 L. Ed. 2d at 1033. Moreover, the government's argument that the dangers

associated with a Schedule I drug prevented the substance from being used in religious ceremonies was inconsistent with its decision to accord peyote a religious exception. Ibid.

However, the Court has held that application of RFRA to the individual states is unconstitutional. City of Boerne v. Flores, 521 U.S. 507, 511, 117 S. Ct. 2157, 2160, 138 L. Ed. 2d 624, 633 (1997). As a result, defendant's reliance upon Gonzales, which was decided specifically under RFRA's strict scrutiny analysis, is misplaced.

As already noted, in Smith, the Court did not apply a heightened standard of scrutiny to a criminal law of general application providing a prescription exception to otherwise criminal conduct. 494 U.S. at 874, 882, 110 S. Ct. at 1597, 1602, 108 L. Ed. 2d at 883, 887. Like the Oregon statute at issue in Smith, New Jersey's criminal code contains a plainly neutral provision of general applicability that criminalizes the possession of marijuana. Defendant argues, however, that because New Jersey has a medical exemption for marijuana possession, enforcement of the law is no longer general in application, and, therefore, the State may not prohibit a religious exemption for possessing marijuana without demonstrating compelling reasons. We disagree.

We acknowledge that the Court in Lukumi Babalu, supra, said: "[I]n circumstances in which individualized exemptions from a general requirement are available, the government 'may not refuse to extend that system to cases of "religious hardship" without compelling reason.'" 508 U.S. at 537, 113 S. Ct. at 2229, 124 L. Ed. 2d at 493 (quoting Smith, supra, 494 U.S. at 884, 110 S. Ct. at 1603, 108 L. Ed. 2d at 889). In our opinion, the Court's use of this quoted language from Smith is entirely out of context. The Court in Smith specifically recognized the limited application of those cases that applied strict scrutiny analysis where exemptions were permitted, noting explicitly, "Whether or not the decisions are that limited, they at least have nothing to do with an across-the-board criminal prohibition on a particular form of conduct." Id. at 884, 110 S. Ct. at 1603, 108 L. Ed. 2d at 889.

Defendant also relies upon the Third Circuit's decision in Fraternal Order of Police, Newark Lodge No. 12 v. City of Newark, 170 F.3d 359 (3d Cir.), cert. denied, 528 U.S. 817, 120 S. Ct. 56, 145 L. Ed. 2d 49 (1999). In that case, the plaintiffs, two practicing Muslims who believed they were obligated in accordance with their faith to grow beards, argued that the police department's ban on beards violated their free exercise rights. Id. at 361. The department justified the ban

on the basis of imposing uniformity in its ranks, but permitted exceptions for undercover officers and those who, for medical reasons, were unable to shave. Id. at 366.

Justice Alito, then Judge Alito, writing for the Third Circuit, applied "heightened scrutiny" to the prohibition. Ibid. The court did so because "the Department's decision to provide medical exemptions while refusing religious exemptions [wa]s sufficiently suggestive of discriminatory intent." Id. at 365. The Court concluded that the City of Newark failed to present "any interest in defense of its policy that is able to withstand any form of heightened scrutiny." Id. at 366.

In opposition, the Department argued "since the prescription exception did not prompt the Smith Court to apply heightened scrutiny to the Oregon law, [the court] should not apply heightened scrutiny in [a] . . . case based on the Department's allowance of medical exemptions." Ibid. The Third Circuit disagreed, reasoning:

The Department's decision to allow officers to wear beards for medical reasons undoubtedly undermines the Department's interest in fostering a uniform appearance through its "no-beard" policy. By contrast, the prescription exception to Oregon's drug law does not necessarily undermine Oregon's interest in curbing the unregulated use of dangerous drugs. Rather, the prescription exception is more akin to the Department's undercover exception, which does not undermine the Department's interest in

uniformity because undercover officers 'obviously are not held out to the public as law enforcement personnel.' The prescription exception and the undercover exception do not trigger heightened scrutiny because the Free Exercise Clause does not require the government to apply its laws to activities that it does not have an interest in preventing. However, the medical exemption raises concern because it indicates that the Department has made a value judgment that secular (i.e., medical) motivations for wearing a beard are important enough to overcome its general interest in uniformity but that religious motivations are not. . . . [W]hen the government makes a value judgment in favor of secular motivations, but not religious motivations, the government's actions must survive heightened scrutiny.

[Ibid. (citations omitted).]

Subsequently, Judge Alito harmonized these apparent disparate strains of analysis by summarizing,

The Free Exercise Clause forbids any regulation of beliefs as such. On the other hand, . . . a "neutral" and "generally applicable" law that burdens conduct regardless of whether it is motivated by religious or secular concerns is not subject to strict scrutiny. A law is "neutral" if it does not target religiously motivated conduct either on its face or as applied in practice. A law fails the general applicability requirement if it burdens a category of religiously motivated conduct but exempts or does not reach a substantial category of conduct that is not religiously motivated and that undermines the purposes of the law to at least the same degree as the covered conduct that is religiously motivated. If a law burdening religiously motivated conduct is not neutral and

generally applicable it must satisfy strict scrutiny. Accordingly, it must serve a compelling government interest and must be narrowly tailored to serve that interest. Similarly, a law must satisfy strict scrutiny if it permits individualized, discretionary exemptions because such a regime creates the opportunity for a facially neutral and generally applicable standard to be applied in practice in a way that discriminates against religiously motivated conduct.

[Blackhawk v. Pennsylvania, 381 F.3d 202, 209 (3d Cir. 2004) (emphasis added) (citations omitted).]

The court reiterated that the prescription exception in Smith did not trigger strict scrutiny analysis because "when a doctor prescribes a drug, the doctor presumably does so to serve the patient's health and in the belief that the overall public welfare will be served. Therefore, the prescription exception in Smith did not undermine the purpose of the state's drug laws." Id. at 211.

In this case, the fact that marijuana may be medically prescribed for some New Jersey citizens does not create a secular exemption that triggers strict scrutiny analysis. First, unlike the municipal ordinances at issue in Lukumi Babalu, supra, our criminal code is "'neutral,'" i.e., it "does not target religiously motivated conduct either on its face or as applied in practice." Blackhawk, supra, 381 F.3d at 209. Under CUMMA, only certain qualified patients may obtain

marijuana and be exempt from criminal prosecution for its possession; the amount of marijuana a qualified patient may obtain is very small. Thus, the limited, precisely drawn exception simply "does not reach a substantial category of conduct that is not religiously motivated and that undermines the purposes of the [criminal code]." Ibid.

We therefore conclude that strict scrutiny analysis does not apply to defendant's claims that his criminal prosecution violated his religious freedom. We also reject defendant's argument that since religious exemptions for some Schedule I drugs have been recognized by the Court, his constitutional rights under the free exercise clause require the same result for marijuana. First, the cases cited above were decided under RFRA's strict scrutiny analysis where the government was obligated to demonstrate a narrowly-tailored compelling purpose in criminalizing the possession of certain drugs but exempting others on religious grounds. Second, in Smith, supra, the Court said that to acknowledge "a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts." 494 U.S. at 890, 110 S. Ct. at 1606, 108 L. Ed. 2d at 893.

Lastly, we reject defendant's corollary contention that the trial judge committed error by denying defendant the opportunity to call expert witnesses regarding his Rastafarian faith and the use of cannabis by the religion. It is true that the judge voir dired the prospective jurors regarding their knowledge of the religion, but since defendant's religious practice was not a defense to his possession of marijuana, any expert testimony on the issue was irrelevant.

B.

We briefly address the balance of defendant's arguments that his arrest and prosecution violated "the following federal constitutional rights: the right to travel and the due process clause, . . . the equal protection clause . . . , the full faith and credit clause . . . , and the fourth amendment." In Point IV of his pro se supplemental brief, defendant contends New Jersey's "marijuana laws . . . are inherently discriminatory against African-Americans and also discriminatory as applied by law enforcement."

Although defendant is permitted to possess marijuana in California, it does not follow that his criminal prosecution in New Jersey violates the full faith and credit clause of the federal Constitution. A similar challenge was rejected by the Oregon appellate court in State v. Berringer, 229 P.3d 615 (Or.

Ct. App.), rev. denied, 237 P.3d 824 (Or. 2010), a case we find persuasive.

There, the defendant was permitted to possess medical marijuana in California. Id. at 667. In Oregon, defendant was convicted for unlawful possession of marijuana. Id. at 668. Defendant argued "the recommendation from his California physician was due full faith and credit in Oregon." Ibid. The Court of Appeals of Oregon disagreed, finding that California's medical marijuana statute only accorded the defendant a defense against unlawful possession of marijuana under California law. Id. at 671; see also Franchise Tax Bd. v. Hyatt, 538 U.S. 488, 494, 123 S. Ct. 1683, 1687, 155 L. Ed. 2d 702, 710 (2003) ("[T]he Full Faith and Credit Clause does not compel a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate." (internal quotation marks omitted)).

Defendant's due process rights were not violated by his criminal prosecution in New Jersey. "Insofar as most rights are concerned, a state statute does not violate substantive due process if the statute reasonably relates to a legitimate legislative purpose and is not arbitrary or discriminatory." Greenberg v. Kimmelman, 99 N.J. 552, 563 (1985). Lastly, as the trial judge noted, defendant's claim that New Jersey's criminal

laws regarding marijuana are per se discriminatory, or discriminatory as applied to African-Americans lacked any support in the record. We agree.

To the extent we have not otherwise specifically addressed defendant's other constitutional arguments, they lack sufficient merit to warrant discussion in this opinion. R. 2:11-3(e)(2).

IV.

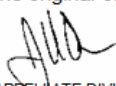
In his supplemental pro se brief, defendant argues that his constitutional rights were violated because the trial judge was more than seventy years old and serving on recall. Defendant never raised the issue below, and we refuse to consider it for the first time on appeal. State v. P.S., 202 N.J. 232, 252 (2010).

He also contends that the judge engaged in ex parte "action." In support of this point, defendant cites to an unexplained entry in "Promis/Gavel," and the transcript of defendant's motion to dismiss the first count of the indictment prior to his retrial. That motion was filed and argued by defendant's stand-by counsel, although defendant was not present and had apparently called the judge's chambers the day before requesting to be permitted to participate by phone. Defendant has never explained his reason for not attending. In any event, the judge did not act ex parte.

Defendant also asserts that he was denied an impartial jury because a juror admitted dating a Rastafarian, and another juror was seen on an elevator with the prosecutor. He also claims that a second judge, who had recused herself, deprived him of his due process rights by executing an order that permitted defendant's release to receive his medical treatments. He asserts that that the prosecutor's summation comments require reversal, and the judge improperly curtailed defendant's right to comment on the law and thereafter provided instructions to the jury that were prejudicial. It suffices to say that these arguments lack sufficient merit to warrant discussion. R. 2:11-3(e)(2).

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION