

N THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Appellant,
vs.
LEONARD SCHWINGDORF,
Respondent.

No. 60464

FILED

JAN 24 2014

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *T. Malone*
DEPUTY CLERK

THE STATE OF NEVADA,
Appellant,
vs.
NATHAN HAMILTON,
Respondent.

No. 60466

*ORDER DISMISSING APPEAL (60466) AND REVERSING AND
REMANDING (60464)*

These are consolidated appeals from a district court order granting respondents' motions to dismiss indictments. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

In 2000, the voters of Nevada approved an initiative to amend the Nevada Constitution to add Article 4, Section 38, allowing for the possession and use of medical marijuana for the treatment of specified illnesses upon advice of a physician and to authorize the Legislature to provide for appropriate methods of supply. In response, the Legislature provided for a self-grow plan of supply in which qualified patients would be allowed to produce their own medical marijuana. The legislation did not address distribution, adopting a "don't ask, don't tell" policy as to how

the plants were initially obtained.¹ The Legislature subsequently enacted this legislation, which is codified in NRS Chapter 453A.

As enacted, NRS Chapter 453A allows for the possession of marijuana plants by qualified individuals for medical purposes. NRS 453A.200(3)(b)(1-3).² Individuals validly registered by the state are generally exempted from state prosecution for certain marijuana-related crimes. NRS 453A.200. However, “[a] person who holds a registry identification card . . . is not exempt from state prosecution for . . . [d]elivering marijuana for consideration to any person, regardless of whether the recipient lawfully holds a registry identification card.” NRS 453A.300(1)(f).

Nearly a decade after the legalization of medical marijuana, respondents Nathan Hamilton and Leonard Schwingdorf opened a non-profit cooperative medical marijuana dispensary in Las Vegas. The cooperative dispensary provided marijuana to individuals who held valid state-issued medical marijuana cards for a suggested donation. After sending a detective into respondents’ cooperative to obtain medical marijuana on multiple occasions, the State charged respondents by way of indictment with multiple counts of sale of marijuana and trafficking

¹The Legislature has since addressed the failure to provide appropriate methods of supply in its passage of Senate Bill 374. S.B. 374, 77th Leg. (Nev. 2013).

²This section of the statute was amended by the Legislature in Senate Bill 374. S.B. 374, 77th Leg. (Nev. 2013). However, the amendments are not relevant in this context.

marijuana.³ Hamilton and Schwingdorf filed motions to dismiss based on vagueness and overbreadth. The district court granted respondents' motions and dismissed the charges, concluding that NRS Chapter 453A is unconstitutional because it is vague and fails to provide a reasonable method for lawfully obtaining medical marijuana as required by Article 4, Section 38 of the Nevada Constitution. These consolidated appeals followed.⁴

Before reaching the propriety of the district court's decision, we must first address the State's appeal as to Hamilton in Docket No. 60466. After the filing of this appeal, Hamilton passed away. We conclude that his death has rendered that appeal moot. The State cannot prosecute a person who is deceased. See *Schneider v. City of Grand Junction Police Dep't.* 717 F.3d 760, 763 (10th Cir. 2013); *James v. La. Laborers Health & Welfare Fund*, 29 F.3d 1029, 1034 (5th Cir. 1994); *Cf. Brass v. State*, 129 Nev. ___, ___, 306 P.3d 393, 395 (2013) (“[W]hen a criminal defendant dies after a notice of appeal has been filed, a personal representative must be substituted for the decedent within 90 days of his death being suggested on the record; otherwise, this court will dismiss the appeal.”). Given the unique factual situation and the subsequent alteration of the statutory scheme, we decline to review this appeal under the capable-of-repetition-yet-evading-review exception to the mootness

³It is notable that the undercover police detective never attempted to offer an amount other than the suggested donation. Another detective indicated that “in retrospect that would have potentially solved a very pressing problem.”

⁴The American Civil Liberties Union of Nevada filed amicus briefs in this matter.

doctrine. See *Binegar v. Eighth Judicial Dist. Court*, 112 Nev. 544, 548, 915 P.2d 889, 892 (1996). Accordingly, we dismiss the appeal in Docket No. 60466.

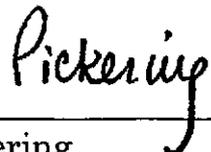
Concerning the appeal in Docket No. 60464 related to Schwingdorf, while the State asks us to address the constitutionality of NRS Chapter 453A, we decline to do so at this time. We have continually held that we will not decide constitutional questions unless absolutely necessary. See *Sheriff, Pershing Cnty. v. Andrews*, 128 Nev. ___, ___, 286 P.3d 262, 263 (2012) (“It is well settled, however, that we should avoid considering the constitutionality of a statute unless it is absolutely necessary to do so.”); see also *State v. Curler*, 26 Nev. 347, 354, 67 P. 1075, 1076 (1902).

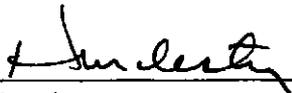
Before the constitutionality issue may be reached here, a jury must first address the factual issue of whether the exchange of medical marijuana for a suggested donation constitutes consideration under NRS 453A.300(1)(f), bringing Schwingdorf’s actions under the purview of that statute. While we do not decide constitutionality at this time, we do so without prejudice to the parties’ right to challenge it later.

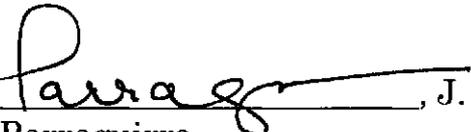
Accordingly, we dismiss the appeal in Docket No. 60466, and in Docket No. 60464, we reverse and remand the district court's judgment for proceedings consistent with this order.

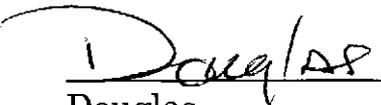
It is so ORDERED.

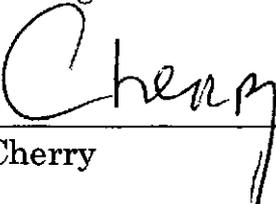

Gibbons, C.J.


Pickering, J.


Hardesty, J.


Parraguirre, J.


Douglas, J.


Cherry, J.


Saitta, J.

cc: Eighth Judicial District Court Dept. 14
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American Civil Liberties Union of Nevada/Las Vegas
Eighth District Court Clerk