No. 12-35110

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MONTANA CAREGIVERS ASSOCIATION, LLC, *et al.*,

Plaintiffs-Appellants,

vs.

UNITED STATES OF AMERICA, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
For the District of Montana, Missoula Division
Hon. Donald W. Molloy, District Judge
District Court Case No. 9:11-cv-00074-DWM

APPELLANTS' REPLY BRIEF

Counsel for Appellants:

PAUL S. LIVINGSTON
P. O. Box 250
Placitas, NM 87043
(505) 771-4000

Filed: September 13, 2012

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

I. PREFACE 1

II. ARGUMENT 2

A. The Government's Statement of the Issue is Incorrect. 2

B. The District Court's Dismissal of Plaintiffs Claims 3

C. Parallel Criminal Proceedings 4

1. The Government's Attempt to Restrict Testimony 5

2. Criminal Punishment of Montana Cannabis 6

a. Montana Cannabis 6

b. Montana Cannabis: Richard Flor.. 6

c. Montana Cannabis: Chris Williams, Chris Lindsey, Tom Daubert. 7

D. The Government's Commerce Clause Contentions 8

E. The Government's Prohibition of Marijuana is Unconstitutional 12

III. CONCLUSION 13

TABLE OF AUTHORITIES

Federal Cases

Bell Atlantic Corp. v. Twombly, 550 U.S. 544 13

Gonzales v. Raich, 545 U.S. 1 (2005) 9, 10

U. S. v. Lopez, 514 U.S. 549 (1995) 9

U. S. v. Morrison, 529 U.S. 598 (2000). 9

U.S. v. Flor, 9th Cir. No. 12-30148 7

District Court

U.S. v. Flor, No. 6:11-cr-00007 7

U.S. v. Williams, No. 6:12-cr-00008-DLC 5

Other Authorities

Controlled Substances Act 2, 3, 4, 9

Montana Medical Marijuana Act 2, 3

Robert A. Mikos, On the Limits of Supremacy, 62 Vand. L. Rev. 1421 (2009) .. 11

Rule 12(b)(6), Fed. R. Civ. Proc.. . . . . 2, 3

I.

PREFACE

Plaintiffs filed this lawsuit after federal drug raids needlessly destroyed their personal and family lives and businesses and threatened criminal prosecutions. Plaintiffs only "crime," as they saw it, was to advocate and achieve a measure of success in establishing marijuana as a beneficial medical product. More than a year after the raids and after the dismissal of Plaintiffs' civil claims, the Government indicted, arrested, and began prosecuting Plaintiffs and others. Many of the same issues addressed in Plaintiffs' dismissed lawsuit have arisen in the criminal prosecutions.

The central concern of Plaintiffs in filing their civil lawsuit was the abuse of federal power: the classification and prohibition of marijuana in Montana, one of the states where medical use of marijuana was expressly permitted. As Plaintiffs alleged in their Amended Complaint:

> Federal enforcement of the Controlled Substances Act against otherwise legal Montana caregivers and producers unconstitutionally interferes with rights and powers reserved to the states by the Tenth Amendment and to the people by the Ninth Amendment to the U.S. Constitution.

(ER-018).

II.

ARGUMENT

The issue on appeal of this case is whether the federal district court properly dismissed Plaintiffs' claims pursuant to Rule 12(b)(6). Plaintiffs' civil claims resulted from destructive federal police raids on medical marijuana businesses authorized to operate in the State of Montana under the provisions of the Montana Medical Marijuana Act. After the dismissal of Plaintiffs' Amended Complaint for "failure to state a claim," the Government indicted all but one of the Plaintiffs, and has prosecuted Plaintiffs and others, apparently using the same determination and assurance of constitutionality that the Government and the Court used to dismiss Plaintiffs' claims in this case.

A. The Government's Statement of the Issue is Incorrect

In Appellees' Brief, the Government states that the issue on appeal of this case is:

> Whether the district court correctly held that the federal government's enforcement of the Controlled Substances Act in Montana was constitutional, notwithstanding Montana's law permitting medical marijuana use.

Response Brief, at p. 1. Whether this is simply an error, or evidence, the district court could not possibly have made any such determination of constitutionality in dismissing the case. This case was dismissed at the outset; the court did not and

could not have made any determination in this case "that the federal government's enforcement of the Controlled Substances Act in Montana was constitutional."

It now appears, however, that the federal district court for the district of Montana has established a "house rule" concerning the conflict between the State Medical Marijuana Act and the federal Controlled Substances Act. The district court dismissed Plaintiffs' claims for "failure to state a claim" under Rule 12(b)(6). Plaintiffs appealed, and the subject of this appeal is the wrongful dismissal of Plaintiffs' claims. (ER-002).

B. The District Court's Dismissal of Plaintiffs' Claims

According to the district court, Plaintiffs' Amended Complaint "failed to state a claim" because:

> Even if the plaintiffs' alleged conduct was legal under Montana law, it was still illegal under the federal Controlled Substances Act. . . . So the plaintiffs were still subject to prosecution under the United States Constitution's Supremacy Clause. U.S. Const. Art. VI, cl. 2; *Gonzales v. Raich*, 545 U.S. 1, 28 (2005) ("The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail.")

(ER-005). Significantly, the statement above is contained in the introduction to the court's ruling dismissing Plaintiffs' claims, designated as "Background." (ER-004).

Starting with the premise that Plaintiffs acted illegally and in violation of the Controlled Substances Act and "the federal government's conduct was not unlawful," the court concluded that "(e)ven accepting the plaintiffs' allegations as true and construing them in the light most favorable to the plaintiffs, the plaintiffs have failed (to) state a claim that is plausible on its face." Similarly, according to the district court, with respect to Plaintiffs' Tenth Amendment claim:

> The Supreme Court's and the Ninth Circuit's decisions in *Raich* apply squarely to this case. Even though Montana law permits, in some circumstances, the production and consumption of marijuana for medical purposes, Congress has the power to prohibit that use under the Commerce Clause. Since Congress acted under one of its enumerated powers when it enacted the Controlled Substances Act, the federal government's enforcement of the Act does not violate the Tenth Amendment.

(ER-010). Before hearing any evidence or testimony, probably even before the Complaint was filed, the district court had decided to deny Plaintiffs' claims.

C. Parallel Criminal Proceedings

The dismissal of Plaintiffs' civil claims at the same time the Government was pressing its criminal prosecutions in the district court is only one example of the Government's over-reaching with respect to the Montana medical cannabis businesses. Another example is in the Government's attempt to limit the evidence, testimony and argument that can be presented in criminal trials, precluding any references to medical marijuana.

1. The Government's Attempt to Restrict Testimony

In an unusual pleading, filed near the start of each criminal prosecution, the Government moves to limit the "testimony, evidence, and argument" that Plaintiffs may present in their criminal proceedings:

> Specifically, the government moved the Court to exclude all testimony, evidence, and argument concerning:
>
> (1) the Defendants' contention that their conduct was lawful under Montana law and that they acted to provide a medically necessary product to their customers;
>
> (2) the Defendants' contention that they believed their conduct was lawful under federal law;
>
> (3) the Defendants' contention that they harbored a good faith (but mistaken) belief that their conduct was lawful under federal law,
>
> (4) the Defendants' belief that they relied on the advice of counsel to conclude their conduct was lawful under federal law; and
>
> (5) the defense of entrapment by estoppel.

U.S. v. Williams, et al., 9th Cir. No. 6:12-cr-00008-DLC, Doc. 61, at p. 2-3.

The Government's motives for seeking to limit "evidence, testimony, and argument" in the medical marijuana context are unknown. While the motion is still pending in a few cases, in most the threat that trial testimony will be so limited is a powerful weapon used by the prosecutors to secure plea deals.

2. Criminal Punishment of Montana Cannabis

a. Montana Cannabis

The lead plaintiff in this appeal, Montana Caregivers, doing business as Montana Cannabis, was perhaps the largest and most successful Montana medical marijuana growing enterprise until the federal raids. (ER-052-53). Montana Cannabis was owned and operated by four original partners: Richard Flor was one of the founding partners. Chris Williams, a named Plaintiff in this case, is another. With respect to the business of Montana Cannabis they, and those involved in their collective effort, sincerely believed they were acting responsibly and within the letter and spirit of the law.

To the partners and employees of Montana Cannabis, the enterprise was in all respects a legitimate business, selling a highly-developed medical-herbal product to people who were authorized by physicians and the State of Montana to use it. Montana Cannabis documented its transactions, paid its bills and taxes, kept its employees employed, and served its patients' needs.

b. Montana Cannabis: Richard Flor

Richard Flor was the first of the Montana Cannabis partners to face federal prosecution for his work with Montana Cannabis. He pled guilty and although he was very ill, the Court sentenced him to serve five years in prison. Although

ordered to a medical facility, his transfer was delayed for about two months. Flor was not transported until late August, 2012, whereupon he suffered two heart attacks and died, reportedly still shackled to his bed.

On July 12, 2012, Richard Flor's attorney had filed a Brief in Support of Release Pending Appeal, stating that Mr. Flor could not live much longer under the harsh conditions at the private prison in which he had been placed. The court refused to release Mr. Flor pending appeal. U.S. v. Flor, No. 6:11-cr-00007-CCL, Doc. 223.

An appeal of Richard Flor's wrongful imprisonment and sentencing was filed in this Court by his attorney. 9th Circuit Case No. 12-30148. The issues stated in his Opening Brief, filed July 30, 2012, were:

> 1) Whether the court abused its discretion by incarcerating a man in need of nursing home care? and
>
> 2) Whether the government breached the plea agreement by recommending prison for a man in need of nursing home care?

The Government requested and secured an extension to file its Response Brief by September 28, 2012. Sadly, Richard Flor died on August 30, 2012.

c. Montana Cannabis: Chris Williams, Chris Lindsey, and Tom Daubert

Richard Flor's partner, Chris Williams, was an active participant in this civil litigation, and at the same time he is represented by counsel in his criminal case.

Williams is, at least to this date, the only one of the more than twenty Montana raid victims to not enter a "guilty" plea to reduced charges. His trial is currently scheduled for September 24, 2012.

Chris Lindsey, another partner, is an attorney charged with the same "drug trafficking" crimes as the others. On September 6, 2012, Lindsey changed his plea to "guilty." Tom Daubert, the fourth Montana Cannabis partner, pled guilty and was sentenced to a term of probation, with no prison time.

D. The Government's Commerce Clause Contentions

While the federal government continues to contend that its enforcement of the Controlled Substances Act against medical cannabis providers and caregivers "is squarely within Congress' commerce powers," its effort is doomed to fail. Particularly with respect to marijuana, neither "Congress' commerce powers" nor the DEA's enforcement efforts can overpower the will of people determined to secure and enjoy life, liberty, and the pursuit of happiness.

The Supreme Court has stressed that it is important, in considering its authority under the Commerce Clause, to maintain "the Constitution's distinction between national and local authority." A second broad requirement for constitutional Commerce Clause litigation is that courts may not interpret the Clause in a way that would grant to Congress a general police power, "which the Founders

denied the National Government and reposed in the States." *United States v. Morrison*, 529 U.S. 598, 618 (2000); *United States v. Lopez*, 514 U.S. 549, 584 (1995).

Because "production of the commodity has a substantial effect on supply and demand in the national market" the DEA's prohibition of medical uses fails to address the growing recognition that marijuana has beneficial medical *and* recreational uses, *Gonzales v. Raich*, 545 U.S. 1, 19 (2005). Considering the difficulty "distinguishing between marijuana cultivated locally and marijuana grown elsewhere" and "concerns about diversion into illicit channels," the Court concluded

> that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA.

Concerns over a "gaping hole in the CSA" have little relevance today, especially with reference to marijuana prohibition. Nonetheless, the Government concludes that "(t)he CSA is therefore a legitimate exercise of Congress' Commerce Clause authority." Answer Brief at p. 11. With respect to *actually* affecting supply and demand for medical marijuana nationwide, the Controlled Substances Act would seem to be of little use or value.

The Government insists that "Congress" may properly prohibit marijuana under its enumerated Commerce Clause authority. And while it is true that *Gonzales v. Raich* held that growing a small amount of marijuana for personal medical use had enough of a significant effect on interstate commerce to warrant application of the CSA against the medical marijuana growers, nothing in *Raich* or any other case concerned a large commercial growing operation like that maintained by Montana Cannabis.

With respect to medical marijuana use approved by the state, there are two Commerce Clause distinctions (perhaps not exactly "exceptions") to the "federal" coverage that may be applicable. The first refers to the "enumerated" or historically assigned powers, as distinct from those retained by the people (9th Amendment) and the states (10th Amendment).

The second is the distinction between non-economic activities and economic or commercial activities, giving Congress authority over economic and commercial activities. While the "economic-non-economic" argument was applicable to the *Raich* case, nothing like that makes sense here, where the interests are undeniably economic, and a rapidly expanding national industry, many thousands of jobs, and vast amounts of money and human lives are threatened to the core by the kind of armed, military-style raids carried out against the Montana Plaintiffs.

The Government apparently fails to understand or appreciate that it does not any longer have the ability to effectively prohibit the use of marijuana. Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Over-looked Power to Legalize Federal Crime*, 62 Vand. L. Rev. 1421 (2009). A better and more functional approach to the Commerce Clause is to apply it "to empower Congress to solve multi-state collective action problems. One such "multi-state collective action problem" became a matter of great interest and concern earlier this year. The debate over Obamacare and the individual mandate fizzled, however, when the Court decided the case on tax, rather than Commerce Clause grounds.

As long as the federal government continues to insist that its enforcement of the Controlled Substances Act against medical cannabis providers and caregivers "is squarely within Congress' commerce powers," its effort is doomed to fail, both legally and socially, because neither "Congress' commerce powers" nor the DEA's enforcement efforts can overpower the will of the people. It is because, rather than in spite of, the fact that the production and distribution of marijuana "has a substantial effect on supply and demand in the national market" that the Government's efforts to prohibit marijuana use and possession will surely fail.

E. The Government's Prohibition of Marijuana is Unconstitutional

The federal government's definition of marijuana as a "controlled substance" prohibits absolutely the cultivation, possession, transportation, or use of marijuana in any form. Nonetheless, Montana and sixteen other states and the District of Columbia have legislatively or popularly acknowledged medical uses of marijuana.

The use of the Controlled Substances Act to enforce the Government's marijuana prohibition is unconstitutional for a variety of reasons, not the least of which is the patently false basis used by the legalistic prohibitionists: that marijuana has no medical use and is a drug with a high potential for abuse. The federal Government's prohibition of marijuana obviously has a moral aspect, but it lacks a reasonable factual and scientific basis.

Another very serious basis of unconstitutionality is the essential nature of the dispute between states that authorize medical uses of marijuana and the federal government's prohibition of any and all uses of marijuana. Plaintiffs' contentions that the Government's actions in this case violate the Tenth Amendment and the other applicable constitutional provisions at least warrant consideration by a court that has not already decided the case in favor of the Government .

The Government's raids on medical marijuana businesses are wrong on all counts. The Montana Cannabis caregivers provided a regulated, documented, controlled system for growing and distributing marijuana to patients who were authorized by the State to use it. The United States government, pretty much in one day, wiped out all the work, the hopes, and for some the dreams of a better and more pain-free quality of life, replacing them with threats and fears of prison and unwarranted punishment. Alternatively, a warning letter or even civil litigation would have been preferable to armed raids, seizures, destruction of property, prosecutions and imprisonment, and would have produced greater results at much less cost.

III.

CONCLUSION

In order to survive a dismissal motion, "factual allegations must be enough to raise a right to relief above the speculative level, assuming the allegations in the complaint are true." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The Supreme Court has prescribed the standard to use in reviewing a dismissal: "whether the complaint contains 'enough facts to state a claim to relief that is plausible on its face.'" *Bell Atlantic*, 550 U.S. at 570. Plaintiffs' Amended Complaint contained more than enough facts to state a plausible claim.

The “truth” with respect to the medical use of marijuana is directly contrary to the federal law: marijuana has many beneficial uses and is not particularly dangerous. The Government’s insistence on maintaining cannabis as a Schedule I drug is factually, scientifically, and constitutionally offensive. The Montana raids were an extreme example of the unreasonable use of government power. The Constitution protects the people from the abuse of governmental authority, the Government may not “commandeer” State legislative processes, and the federal government may act only within the limits of its enumerated powers.

For the reasons stated above, the Court should reverse the Order of the Montana district court dismissing Plaintiff’s claims, remand the case, and award such other and further relief as the court deems just.

Respectfully submitted,

s/ Paul Livingston

Paul Livingston
Attorney for Appellants
P.O. Box 250
Placitas, NM 87043
(505) 771-4000

I hereby certify that I filed the foregoing electronically, and the Court's CM/ECF system will send copies to opposing counsel.

s/ Paul Livingston

____

Paul Livingston

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief uses a 14-point font and includes 2,783 words as counted by my WordPerfect X5 word processor.

s/ Paul Livingston

____

Paul Livingston