

**STATE OF WASHINGTON  
DEPARTMENT OF HEALTH  
OFFICE OF PROFESSIONAL STANDARDS**

In the Matter of the License to Practice )	
Pharmacy of: )	OPS No. 94-11-07-498 P
)	Prog. No. 93-4706
HEIDI LYNN BROWN, R.Ph., )	
)	PREHEARING ORDER NO. 2:
Respondent. )	ORDER ON EVIDENTIARY
_____ )	MOTIONS

This matter came before Health Law Judge Brian D. Peyton, Presiding Officer for the Washington Board of Pharmacy (the Board), on Respondent's Evidentiary Motions. Respondent moves (1) to exclude from evidence statements made by Respondent about events surrounding a search of her residence by police; and (2) to preclude a finding of unprofessional conduct based solely on her statements under the corpus delicti rule. Respondent further contends that exclusion of her statements would require dismissal of the charges for lack of evidence. Having considered the briefs submitted by the parties and the record in this case, the Presiding Officer enters the following:

**I. FACTS RELEVANT TO THE MOTIONS**

1.1 On March 23, 1993, after several weeks of investigation of a possible marijuana grow operation, four police officers went to the house in Cape George Colony, Jefferson County, where Ms. Kane and Shannon Kane resided. Findings of Fact, Conclusions of Law on Order on CR 3.5 and 3.6 Hearing, pp. 2-4, State v. Kane (Jefferson Cty. Sup. Ct. October 6, 1993), attached as Exhibit A to Respondent's Memorandum (the Order.) The police officers did not have a warrant to search the

house. The officers knew that they did not have probable cause to support issuance of a search warrant for the house. Order, p. 4.

1.2 The officers approached the house intending to gain consent to enter. Ms. Kane answered the door at approximately 10:00 A.M. The officers told Ms. Kane that she could let them enter “the easy way,” with her permission, or the “hard way,” with a search warrant they said they would obtain. Order, p. 7. After a discussion, at least two officers entered the house. Ms. Kane told the detectives that there was a marijuana grow operation in the basement, which the officers discovered. Order, p. 4.

1.3 After the officers had entered the house, but before she was advised of her Miranda rights, Ms. Kane signed a “Permission to Search” form. Several minutes later, she signed a “Witness/Suspect Statement” which included Miranda rights and a waiver of her rights. Order, p. 5. Ms. Kane was not arrested. At her request, the officers let Ms. Kane go to work at the pharmacy in Sequim where she was employed as a pharmacist. Order, p. 6

1.4 Ms. Kane’s supervisor at the pharmacy was Brigham Consoliver, a pharmacist. On the morning of March 23, 1993, Ms. Kane called him to inform him she would be late for work. State’s Memorandum Opposing Respondent’s Evidentiary Motions (Opposition), p. 1. When Ms. Kane arrived at work, she asked to speak to Mr. Consoliver. She told him about the events of that morning and the existence of the grow operation. Mr. Consoliver later contacted the Board office. Opposition, p. 2.

1.6 Ms. Brown told Charles James, Board staff member, that she had been growing marijuana. The Board staff initiated an investigation. On May 15, 1993, Ms. Kane, in the presence of her counsel, admitted to a Board investigator to operating

a marijuana grow operation in her residence. However, Respondent disputes the facts regarding her statements to Mr. Consoliver and Board staff that the Department asserts in its Opposition. Respondent's Reply Memorandum, p. 1.

1.7 On October 6, 1993, the Jefferson County Superior Court entered the Order. The court concluded that the officers' warrantless search of Ms. Kane's residence was unlawful, because, due to coercion by the officers, her consent was not freely and voluntarily given. Order, p. 9. The court suppressed all evidence seized at the residence, as well as all statements made by Ms. Brown to the police. Order, p. 11.

## II. LEGAL ANALYSIS

2.1 RCW 34.04.452(1) provides that "The presiding officer shall exclude evidence that is excludable on constitutional or statutory grounds or on the basis of evidentiary privilege recognized in the courts of this state. . . ." Thus, whether Respondent's statements must be excluded depends on whether legal grounds for the the exclusionary and corpus delicti rules apply in this disciplinary proceeding.

### A. The Application of the Exclusionary Rule.

2.2 The "exclusionary rule" requires the exclusion of evidence obtained during an illegal search or seizure, as well as evidence or statements obtained as a result of that illegal search or seizure. U.S. v. Janis, 428 U.S. 433, 446-47; State v. Byers, 88 Wn.2d 1, 559 P.2d 1334 (1977), overruled on other grounds in State v. Williams, 102 Wn.2d 733, 741, 689 P.2d 1065 (1984). The exclusionary rule is a judicially created remedy designed to safeguard Fourth Amendment rights through its deterrent effect. Janis, 428 U.S. at 446-47, quoting U.S v. Calandra, 414 U.S. 338, 348 (1974). Thus,

“the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served.” Id.

2.3 The exclusionary rule applies to criminal proceedings, as it did in the criminal case against the Respondent. The U.S. and Washington supreme courts have also ruled that the rule is applicable to proceedings for the forfeiture of property used in violation of the criminal law. One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 14 L. Ed. 2d 170, 85 S.Ct 1246 (1965); Deeter v. Smith, 106 Wn.2d 376, 721 P.2d 519 (1986).

2.4 With regard to administrative proceedings, there is no Washington authority for Respondent's assertion that “the exclusionary rules of criminal evidence apply [in Washington administrative proceedings].” As the court noted in Janis , the rule had, to the time of that decision, never been applied in any civil context. 428 U.S. at 447. In Janis, the court held that evidence illegally seized and excluded from a criminal proceeding was admissible in a civil tax proceeding. 428 U.S. at 453-4. The court determined that the improper police conduct had been deterred by exclusion of the evidence from the criminal proceeding, and that any additional deterrent factor was “marginal,” and did not outweigh the cost of extending the rule to the civil proceedings. Id.

2.5 In I.N.S. v. Lopez-Mendoza, 468 U.S. 1032, 82 L. Ed. 2d 778, 104 S. Ct. 3479 (1984), the court determined that illegally obtained evidence was admissible in a civil deportation hearing. The court determined that the deportation hearing was a civil, not criminal, proceeding. It focused prospectively on respondent's right to remain in the country in the future; respondent's past conduct was relevant insofar as it shed light on

his right to remain in the country. 468 U.S. at 1038. The court established a balancing test to be applied in determining the application of the exclusionary rule to civil cases. The social benefits from excluding unlawfully seized evidence and deterring future unlawful police conduct must be weighed against the loss of probative evidence and costs that flow from less accurate or more cumbersome adjudication. Id. at 1041.

2.6 Like the proceeding in Lopez-Mendoza, the disciplinary proceedings against Respondent are civil in nature. The disciplinary proceedings involve her fitness to hold a license and practice as a pharmacist in the future, based on her commission of past acts of unprofessional conduct as defined by RCW 18.64.160(3) and (9). Ms. Brown is not being “punished” for breaking a criminal law. See O’Day v. King County, 109 Wn.2d 796, 749 P.2d 142 (1988) (license revocation proceeding not considered penal when rationally related to an exercise of the police power); In re Discipline of Ritchie, 123 Wn.2d 725, 870 P.2d 967 (1994) (judicial disciplinary proceedings are civil in nature.)

2.7 In this case, the balancing of the factors set forth by the Supreme Court in Lopez-Mendoza weighs in favor of not applying the exclusionary rule in this case. The application of the rule to exclude any statements that may have been illegally obtained would have little or no deterrent effect on the police agency that conducted the illegal search. That deterrent purpose has been served by the exclusion of evidence and statements from the criminal action. The agents or employees of the Board did not conduct or participate in the illegal search, so that it is not their conduct that is to be sanctioned or deterred in the future. On the other hand, the exclusion of the statements would result in the loss of probative evidence, and the potential cost to the public safety

and welfare if the allegations that Respondent was illegally cultivating a Schedule I controlled substance could be proven correct.

B. The Corpus Delicti Rule.

2.8 The corpus delicti rule requires that, to obtain a criminal conviction, the State must present evidence that a crime has been committed independent of the defendant's own statements. City of Bremerton v. Corbett, 106 Wn.2d 569, 723 P.2d 1135 (1986). The purpose of the rule is to prevent criminal convictions based on uncorroborated confessions that may have been coerced, or convictions of crimes that have not even occurred. McCormick on Evidence, section 145 (John Strong ed. 4th edition 1992) The rule of corpus delicti has not been applied in administrative proceedings in any reported Washington case.

2.9 The admissibility of evidence in administrative proceedings is governed by the Administrative Procedures Act, which provides that evidence is admissible if it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs, and is not barred by recognized constitutional or statutory provisions or privilege recognized in the courts of the state. RCW 34.05.452(1). Respondent's statements are admissible under that standard. In addition, her statements would be admissible under the Washington Rules of Evidence. ER 801(d)(2). See RCW 34.05.452(2) (Rules of Evidence shall serve as guidelines for evidentiary rulings.)

2.10 The Presiding Officer concludes that, given the evidentiary standard applicable to administrative proceedings and the lack of any substantial authority applying the corpus delicti rule to administrative proceedings, it does not apply to

preclude a finding of unprofessional conduct by the Board based on Respondent's otherwise admissible statements.

### III. ORDER

For the reasons set forth above, Respondent's evidentiary motions to apply the exclusionary rule in this proceeding to exclude Respondent's statements and to apply the corpus delicti rule in this proceeding are DENIED.

DATED THIS 17TH DAY OF JANUARY, 1995.

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BRIAN D. PEYTON, Health Law Judge  
Presiding Officer