

Opinion

Chief Justice:
Robert P. Young, Jr.

Justices:
Michael F. Cavanagh
Marilyn Kelly
Stephen J. Markman
Diane M. Hathaway
Mary Beth Kelly
Brian K. Zahra

FILED MAY 31, 2012

STATE OF MICHIGAN
SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

No. 142695

ALEXANDER EDWARD KOLANEK,

Defendant-Appellant.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

No. 142712

ALEXANDER EDWARD KOLANEK,

Defendant-Appellee.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

No. 142850

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LARRY STEVEN KING,
Defendant-Appellant.

BEFORE THE ENTIRE BENCH

MARY BETH KELLY, J.

We granted leave in these cases to consider substantive and procedural aspects of the affirmative defense of medical use of marijuana under § 8, MCL 333.26428, of the Michigan Medical Marihuana Act (MMMA).¹ Given the plain language of the statute, we hold that a defendant asserting the § 8 affirmative defense is not required to establish the requirements of § 4, MCL 333.26424, which pertains to broader immunity granted by the act. The Court of Appeals erred by reaching the opposite conclusion in *People v King*,² and we therefore reverse the Court of Appeals' judgment in *King*.

Further, to establish the affirmative defense under § 8, we hold that a defendant must show under § 8(a)(1) that the physician's statement was made after enactment of the MMMA but before commission of the offense. The Court of Appeals reached this conclusion in *People v Kolanek*,³ and we affirm the Court of Appeals in this regard. However, the Court of Appeals also held that defendant could reassert the affirmative defense at trial, despite his failure at the evidentiary hearing to establish the existence of a

¹ MCL 333.26421 *et seq.* Although the act uses the spelling "marihuana," we use the more common spelling "marijuana" throughout this opinion.

² *People v King*, 291 Mich App 503; 804 NW2d 911 (2011).

³ *People v Kolanek*, 291 Mich App 227; 804 NW2d 870 (2011).

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timely physician's statement under § 8(a)(1). This was error, and we reverse that portion of the Court of Appeals' holding.

I. FACTUAL BACKGROUND

A. *PEOPLE v KING*

In May 2009, police officers received an anonymous tip that marijuana was growing in the backyard of defendant Larry King's home in Owosso, Michigan. The officers went to the residence and observed, from a neighbor's driveway, marijuana plants growing inside a chain-link dog kennel that was wrapped on three sides with a plastic tarp. The officers then spoke with King, who showed them his "registry identification card" for medical use of marijuana that had been issued April 20, 2009. The officers asked to see the marijuana plants, and King consented. Using a key, he unlocked the padlock on the kennel. Inside the kennel were six marijuana plants. The kennel was six feet tall, was not anchored to the ground, and was open on top.

The officers then obtained a search warrant for King's home. Inside, the officers discovered six marijuana plants in his living-room closet, which did not have a lock on it. The back door to the home also lacked a lock. In addition to the live plants, the officers also found processed marijuana in two prescription bottles; several plastic bags containing marijuana stalks, buds, and leaves; two additional dead marijuana plants; and a food dehydrator.

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The back door to the home also lacked a lock. In addition to the live plants, the officers

also found processed marijuana in two prescription bottles; several plastic bags containing marijuana stalks, buds, and leaves; two additional dead marijuana plants; and

a food dehydrator.

King was arrested and charged with one count of manufacturing marijuana.⁴ At the preliminary examination in the district court, he moved to dismiss the charge under § 8 of the MMMA.⁵ The court denied King's motion and bound him over on the charge.⁶

King renewed his motion to dismiss in the circuit court, again asserting that he had established the elements of the affirmative defense under § 8. The prosecutor responded that because King had failed to comply with § 4(a) by not keeping his marijuana in an "enclosed, locked facility," King could not establish the elements of the affirmative defense under § 8. The circuit court disagreed with the prosecutor that King was not in compliance with § 4(a), ruling instead that King had satisfied the requirements of § 4 because he was a qualifying patient with a valid registry identification card; possessed no more than 12 plants in an enclosed, locked facility; and was entitled to the presumption that he was engaged in the medical use of marijuana. The circuit court further reasoned that King, in accordance with § 8, had obtained a valid physician's statement, possessed a reasonably necessary amount of marijuana consistently with § 4, and was engaged in the use and possession of marijuana to treat a serious medical condition. The circuit court

⁴ MCL 333.7401(2)(d)(iii).

⁵ Although King had a valid registry card, he never asserted that he was entitled to immunity under § 4 of the MMMA.

⁶ The district court did not hold an evidentiary hearing on King's motion to dismiss. Rather, the court denied the motion on the basis that the evidence supported binding King over on the charge.

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established the elements of the affirmative defense under § 8. The prosecutor responded

that because King had failed to comply with § 4(a) by not keeping his marijuana in an

"enclosed, locked facility," King could not establish the elements of the affirmative defense under § 8. The circuit court disagreed with the prosecutor that King was not in

compliance with § 4(a), ruling instead that King had satisfied the requirements of § 4

because he was a qualifying patient with a valid registry identification card; possessed no

more than 12 plants in an enclosed, locked facility; and was entitled to the presumption

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therefore ruled that King's use of marijuana was "in accordance with [the MMMA]"⁷ and that King was entitled to dismissal of the charge under § 8.⁸

The Court of Appeals reversed. The Court of Appeals held that the "express reference" in § 8 "to § 7 [MCL 333.26427] and the statement in § 7(a) that medical use of marijuana must be carried out in accordance with the provisions of the MMMA require [King] to comply with the provisions of § 4 concerning growing marijuana."⁹ Applying its interpretation of the statute, the Court of Appeals concluded that because King had failed to keep the plants in an "enclosed, locked facility," he had not complied with § 4(a). As a consequence, the Court held that he also failed to meet the requirements for the affirmative defense in § 8.¹⁰ The Court of Appeals reversed the circuit court and remanded for further proceedings.

We granted leave to consider, in relevant part, "whether the language '[e]xcept as provided in section 7' in § 8(a) required the defendant to fulfill all of the conditions set forth in § 4 in order to have a valid affirmative defense under § 8(a)."¹¹

⁷ See MCL 333.26427(a).

⁸ The circuit court reached this conclusion without holding an evidentiary hearing on King's motion to dismiss under § 8.

⁹ *King*, 291 Mich App at 510.

¹⁰ *Id.* at 514, quoting MCL 333.26424(a).

¹¹ *People v King*, 489 Mich 957 (2011). Our grant order in *King* contained several other issues. However, because resolution of those questions is not necessary to the disposition of King's appeal, we have limited our consideration to the issue stated above.

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B. *PEOPLE v KOLANEK*

On April 6, 2009, police arrested defendant Alexander Kolanek for the possession of eight marijuana cigarettes. Kolanek did not have a registry identification card at the time of his arrest. The next day, the prosecution charged Kolanek with possession of marijuana.¹²

Six days later, on April 12, 2009, Kolanek requested that his physician of nine years, Dr. Ray Breitenbach, authorize his medical use of marijuana to treat chronic severe pain and nausea caused by Lyme disease. Breitenbach complied with this request on the basis of his professional opinion that Kolanek would receive a therapeutic benefit from using marijuana. The same day, Kolanek applied for a registry identification card. The Michigan Department of Community Health issued him a card two weeks later on May 1, 2009.

On June 9, 2009, Kolanek moved to dismiss the criminal charge pending against him, asserting the affirmative defense in § 8 of the MMMA. The district court held an evidentiary hearing on the motion, at which Breitenbach testified that Kolanek would have been eligible for the medical use of marijuana on the date of his arrest. However, despite having discussed Kolanek's potential medical use of marijuana on July 14, 2008, before the enactment of the MMMA, Breitenbach testified that he did not provide Kolanek with authorization to use marijuana until April 12, 2009, six days after the date of Kolanek's arrest.¹³

¹² MCL 333.7403(2)(d).

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The district court rejected the prosecutor's argument that Kolanek must have had a valid registry identification card to assert a § 8 defense, but nonetheless denied Kolanek's motion to dismiss. The court reasoned that the language "has stated" in § 8(a)(1) contemplates a physician's statement made before commission of the offense. Because Kolanek had not obtained such a statement, the court concluded that Kolanek had failed to meet his burden under § 8.

Kolanek appealed in the circuit court, which reversed the district court's ruling. In the circuit court's view, the district court's interpretation of § 8(a)(1) was erroneous. Section 8(a)(1), according to the circuit court, "does not require the physician have stated [sic] this before the defendant's arrest. It merely requires that the physician has stated it. In this case, the physician stated it at the hearing."

The Court of Appeals reversed the circuit court. Like the district court, the panel rejected the prosecution's argument that Kolanek had to meet the registry-card requirement of § 4 in order to assert a valid defense under § 8.¹⁴ The Court of Appeals also concluded that Kolanek had not produced sufficient evidence of the § 8 affirmative defense.¹⁵ The Court of Appeals reasoned, like the district court, that the phrase "has stated" in § 8(a)(1) contemplates a physician's statement made after enactment of the MMMA but before the offense occurs.¹⁶ It reversed the circuit court's decision and

testimony, Breitenbach responded that if it was legalized, he would support Kolanek in using it.

¹⁴ *Kolanek*, 291 Mich App at 233.

¹⁵ *Id.* at 241.

¹⁶ *Id.* at 235, 240-241.

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14 Kolanek, 291 Mich App at 233.

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remanded for reinstatement of the charge.¹⁷ In doing so, the Court provided directions on remand:

Because the statute does not provide that the failure to bring, or to win, a pretrial motion to dismiss deprives the defendant of the statutory defense before the factfinder, [Kolanek's] failure to provide sufficient proofs pursuant to his motion to dismiss does not bar him from asserting the § 8 defense at trial or from submitting additional proofs in support of the defense at that time.^[18]

We granted Kolanek's application for leave to appeal to consider "whether, in order to have a valid affirmative defense for the medical use of marijuana under MCL 333.26428(a)(1), a defendant must obtain the required physician's statement after the date of enactment of the [MMMA], but before the date of the defendant's arrest."¹⁹ We also granted the prosecution's application for leave to appeal to consider "whether a defendant may assert the affirmative defense under MCL 333.26428(a) as a defense at trial after a court has denied the defendant's motion to dismiss under MCL 333.26428(b)" and also the issue raised in *King* regarding whether a defendant must satisfy § 4 to have a valid § 8 defense.²⁰

¹⁷ *Id.* at 241.

¹⁸ *Id.* at 241-242.

¹⁹ *People v Kolanek*, 489 Mich 956 (2011) (Docket No. 142695).

²⁰ *People v Kolanek*, 489 Mich 956, 956-957 (2011) (Docket No. 142712). Our grant order also requested the parties to brief "whether a defendant is eligible to assert the affirmative defense of medical use of marijuana under MCL 333.26428(a) without first obtaining a valid "registry identification card[.]" *Id.* at 956. However, because all the parties concede that unregistered patients and persons can assert the affirmative defense under § 8, we do not separately address this issue at length.

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17 Id. at 241.

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II. STANDARD OF REVIEW

These cases present issues of statutory interpretation. We review questions of statutory interpretation de novo.²¹

III. ANALYSIS

A. THE MICHIGAN MEDICAL MARIHUANA ACT

The MMMA was proposed in a citizen's initiative petition, was elector-approved in November 2008, and became effective December 4, 2008.²² The purpose of the MMMA is to allow a limited class of individuals the medical use of marijuana, and the act declares this purpose to be an "effort for the health and welfare of [Michigan]

²¹ *People v Feezel*, 486 Mich 184, 205; 783 NW2d 67 (2010).

²² Const 1963, art 2, § 9 reserves to the people of Michigan the power to enact laws by initiative. The ballot proposal at the November 2008 election, Proposal 08-1, explained to voters that the MMMA would:

- Permit physician approved use of marijuana by registered patients with debilitating medical conditions including cancer, glaucoma, HIV, AIDS, hepatitis C, MS and other conditions as may be approved by the Department of Community Health.
- Permit registered individuals to grow limited amounts of marijuana for qualifying patients in an enclosed, locked facility.
- Require Department of Community Health to establish an identification card system for patients qualified to use marijuana and individuals qualified to grow marijuana.
- Permit registered and unregistered patients and primary caregivers to assert medical reasons for using marijuana as a defense to any prosecution involving marijuana.

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citizens.”²³ To meet this end, the MMMA defines the parameters of legal medical-marijuana use, promulgates a scheme for regulating registered patient use and administering the act, and provides for an affirmative defense, as well as penalties for violating the MMMA.

The MMMA does *not* create a general right for individuals to use and possess marijuana in Michigan. Possession, manufacture, and delivery of marijuana remain punishable offenses under Michigan law.²⁴ Rather, the MMMA’s protections are limited to individuals suffering from serious or debilitating medical conditions or symptoms, to the extent that the individuals’ marijuana use “is carried out in accordance with the provisions of [the MMMA].”²⁵

The cases before us involve two sections of the MMMA that provide separate protections from prosecution for offenses involving marijuana. The first, § 4, MCL 333.26424, grants “qualifying patient[s]”²⁶ who hold “registry identification card[s]”²⁷

²³ MCL 333.26422(c).

²⁴ See MCL 333.7403(2)(d) (making possession of marijuana a misdemeanor); MCL 333.7401(2)(d) (making the manufacture or delivery of marijuana or the possession of marijuana with intent to deliver it a felony). Marijuana remains a schedule 1 substance in Michigan’s Public Health Code, MCL 333.7212(1)(c), and medical use of marijuana is not recognized as a legal activity at the federal level. The MMMA acknowledges that federal law continues to prohibit marijuana use, but justifies allowing limited marijuana use on the grounds that research suggests that marijuana has beneficial medical uses, the majority of marijuana prosecutions are made under state law, and states are not required to enforce federal laws. MCL 333.26422.

²⁵ MCL 333.26427(a).

²⁶ The MMMA defines “qualifying patient” as “a person who has been diagnosed by a physician as having a debilitating medical condition.” MCL 333.26423(h). “Debilitating medical condition” means one or more of the following:

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