STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant, v TONY ALLEN GREEN, Defendant-Appellee.	FOR PUBLICATION January 29, 2013 9:05 a.m. No. 308133 Barry Circuit Court LC No. 11-100232-FH

Before: CAVANAGH, P.J., and HOEKSTRA and SHAPIRO, JJ.

PER CURIAM.

In this medical marijuana case, the prosecution appeals as of right the circuit court's order finding defendant, Tony Allen Green, a registered medical marijuana patient, immune from prosecution under MCL 333.26424(a) of the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq.*, for his transfer of marijuana to another registered medical marijuana patient.[1] Because we conclude that the uncompensated transfer of marijuana between patients constitutes medical use of marijuana as permitted by the MMMA, we affirm.

The facts in this case are undisputed. On September 7, 2011, defendant gave Al Thornton marijuana. The transfer of marijuana occurred in Nashville, Michigan. On the date of the transfer, defendant possessed a patient registry card, and Thornton had submitted a valid application for a registry identification card more than 20 days before the transfer, thus, under MCL 333.26429(b), his application was the equivalent of a registry identification card. The amount of marijuana transferred was less than the 2.5 ounces that a registered qualifying patient is permitted to possess under § 4(a) of the MMMA. Authorities did not arrest Thornton in connection with his receipt of marijuana from defendant; however, defendant was arrested after authorities learned that he gave Thornton marijuana.

At his preliminary examination in district court, defendant argued that bind over was not appropriate because a transfer of marijuana between two patients constituted protected medical use under the MMMA. The district court declined to consider defendant's argument and bound

[1] Although the statutory provisions at issue refer to "marihuana," by convention this Court uses the more common spelling "marijuana" in its opinions.

him over to the circuit court on the charge of delivery of marijuana in contravention of MCL 333.7401(2)(d)(*iii*). On November 28, 2011, defendant moved the circuit court to dismiss the charges on the basis of § 4(a) of the MMMA. Defendant argued that, because under MCL 333.26423(3)(e) "medical use" includes "delivery" and "transfer," he was immune from prosecution under § 4(a). The prosecution opposed defendant's motion and argued that delivery of marijuana was only authorized under § 4(b), the provision governing primary caregivers, and was thus not applicable to defendant because defendant was not Thornton's primary caregiver.

Following the parties' arguments, the circuit court concluded that the plain language of § 4(a) entitled defendant to a presumption of medical use, a presumption which the prosecution failed to rebut. The circuit court noted that the statutory definition of "medical use" included "transfer" of marijuana, and in this case, defendant transferred marijuana to Thornton. The circuit court opined that the transfer could be inferred to have occurred for the purpose of assisting in the use or administration of marijuana to alleviate the patient's pain. The circuit court rejected the prosecution's argument that transfers could only occur in the context of a patient-caregiver relationship. In making this determination, the circuit court noted that patients were not required to select a primary caregiver, a conclusion underscored by the fact that children are required, under § 6 of the MMMA, to have a primary caregiver. As such, there did not need to be a patient-caregiver relationship to justify the transfer of marijuana under the MMMA. Having found defendant was engaged in the "medical use" of marijuana, the circuit court granted defendant's motion to dismiss, and on December 22, 2011, the circuit court entered a conforming order. The prosecution now appeals as of right.

On appeal, the prosecution argues that the circuit court erred by dismissing the charges against defendant because the MMMA does not grant immunity for patient-to-patient transfers of marijuana. Thus, the issue before us is whether the immunity granted by § 4(a) of the MMMA extends to uncompensated patient-to-patient transfers of marijuana.

We review a trial court's decision on a motion to dismiss charges against a defendant for an abuse of discretion. *People v Campbell*, 289 Mich App 533, 535; 798 NW2d 514 (2010). "A trial court may be said to have abused its discretion only when its decision falls outside the principled range of outcomes." *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008).

We review de novo a trial court's interpretation of the MMMA. *Michigan v McQueen*, 293 Mich App 644, 653; 811 NW2d 513 (2011). "The MMMA was enacted as a result of an initiative adopted by the voters in the November 2008 election." *Id.* This Court explained the rules of construction that apply to the interpretation of an initiative law in *People v Redden*, 290 Mich App 65, 76-77; 799 NW2d 184 (2010):

> "The words of an initiative law are given their ordinary and customary meaning as would have been understood by the voters." *Welch Foods, Inc v Attorney General*, 213 Mich App 459, 461, 540 NW2d 693 (1995). We presume that the meaning as plainly expressed in the statute is what was intended. *Id.* This Court must avoid a construction that would render any part of a statute surplusage or nugatory, and "[w]e must consider both the plain meaning of the critical words or phrases as well as their placement and purpose in the statutory scheme." *People v Williams*, 268 Mich App 416, 425, 707 NW2d 624 (2005).

It is illegal for a person to possess, use, manufacture, create, or deliver marijuana under the Public Health Code (PHC). *McQueen*, 293 Mich App at 658; see also MCL 333.7401(2)(d); MCL 333.7403(2)(d); MCL 333.7404(2)(d). The MMMA permits the medical use of marijuana "to the extent that it is carried out in accordance with the provisions" of the MMMA. MCL 333.26427(a). The MMMA "sets forth very limited circumstances" under which those involved with the use of marijuana may avoid criminal liability; the MMMA did not repeal any drug laws. *McQueen*, 293 Mich App at 659.

In this case, defendant moved for dismissal of his marijuana charge based on the immunity provided in § 4(a) of the MMMA. In relevant part, § 4(a) provides:

> (a) A qualifying patient who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for the medical use of marihuana in accordance with this act, provided that the qualifying patient possesses an amount of marihuana that does not exceed 2.5 ounces of usable marihuana, and, if the qualifying patient has not specified that a primary caregiver will be allowed under state law to cultivate marihuana for the qualifying patient, 12 marihuana plants kept in an enclosed, locked facility. Any incidental amount of seeds, stalks, and unusable roots shall also be allowed under state law and shall not be included in this amount. [MCL 333.26424(a).]

As explained in *People v Nicholson*, 297 Mich App 191, 198; 822 NW2d 284 (2012), "a defendant is immune from arrest, prosecution, or penalty pursuant to § 4(a) if he or she (1) is a qualifying patient; (2) who has been issued and possesses a registry identification card; and (3) possesses less than 2.5 ounces of usable marijuana." Additionally, medical use in accordance with the MMMA is required for § 4(a) immunity to apply. *Id.*; MCL 333.26424(a).

In this case, it is not disputed that defendant was a qualifying patient who was issued and possessed a registry identification card. Also not disputed is the fact that the amount of marijuana involved was less than the 2.5 ounces permitted by the MMMA, and that defendant received no compensation. Thus, the only issue is whether the medical use requirement for § 4(a) immunity is satisfied. "Medical use" is defined by the MMMA to mean "the acquisition, possession, cultivation, manufacture, use, internal possession, delivery, transfer, or transportation of marihuana or paraphernalia relating to the administration of marihuana to treat or alleviate a registered qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition." MCL 333.26423(e).

On the basis of the MMMA's definition of "medical use," this Court in *McQueen* concluded that the MMMA did not authorize patient-to-patient sales of marijuana. *McQueen*,

293 Mich App at 670.[2] Specifically, this Court concluded that the patient-to-patient sale of marijuana was not protected by the immunity granted in the MMMA because the term "sale" was not included in the statutory definition of "medical use." *Id.* at 668. This Court explained:

> The delivery or transfer of marijuana is only one component of the sale of marijuana—the sale of marijuana consists of the delivery or transfer *plus* the receipt of compensation. The "medical use" of marijuana, as defined by the MMMA, allows for the "delivery" and "transfer" of marijuana, but not the "sale" of marijuana. MCL 333.26423(e). We may not ignore, or view as inadvertent, the omission of the term "sale" from the definition of the "medical use" of marijuana. [*Id.*]

Unlike the sale of medical marijuana, the delivery or transfer of marijuana, absent the exchange of compensation, is specifically included in the MMMA's definition of "medical use." Thus, the circumstances present in this case are distinguishable from the circumstances in *McQueen*. Nevertheless, the prosecution argues that the statute's inclusion of "transfer" in the definition of "medical use" only refers to the transfer of marijuana between caregivers and patients, and that the transfer of marijuana between patients is not medical use. The prosecution supports this argument by reading § 4 as limiting patients to only two options: either grow their own marijuana or name a primary caregiver to provide them with marijuana. However, adoption of the prosecution's position would require us to read limitations into the MMMA that the plain language of the statute does not express because the MMMA does not explicitly limit patients in the fashion the prosecution urges. Further, the MMMA does not place any restrictions on the transfer or delivery of marijuana between adult patients, and we decline to read any such restriction into the act. See *People v Burton*, 252 Mich App 130, 135; 651 NW2d 143 (2002) ("It is not the job of the judiciary to write into a statute a provision not included in its clear language."). Consequently, we hold that the circuit court did not err by granting defendant's motion to dismiss the charged crime because the transfer and delivery of marijuana between registered patients constitutes "medical use" that is protected by § 4(a) of the MMMA.

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[2] In *McQueen*, 293 Mich App at 670 n 19, this Court expressly declined to consider whether uncompensated patient-to-patient transfers of marijuana were protected by the MMMA, stating:

> Plaintiff and the Attorney General, as amicus curiae, ask us to hold that patient-to-patient conveyances of marijuana that are without compensation are not permitted by the MMMA. Their position is that the only conveyance of marijuana permitted by the MMMA is the conveyance of marijuana from a primary caregiver to his or her patients. Because defendants' operation of [a medical marijuana dispensary] involves the selling of marijuana, and because the selling of marijuana is not permitted by the MMMA, we need not, and do not, reach the issue whether the MMMA permits uncompensated patient-to-patient conveyances of marijuana.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra
/s/ Douglas B. Shapiro