STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v EARL CANTRELL CARRUTHERS, Defendant-Appellant.	FOR PUBLICATION July 11, 2013 9:05 a.m. No. 309987 Oakland Circuit Court LC No. 2011-237303-FH

Before: M. J. KELLY, P.J., and MURRAY and BOONSTRA, JJ.

BOONSTRA, J.

Defendant appeals by right from his conviction of possession of marijuana with intent to deliver, MCL 333.7401(2)(d)(*iii*), following a jury trial. We remand to allow defendant to file a motion to dismiss the charges against him and for an evidentiary hearing to determine whether defendant can present an affirmative defense pursuant to section 8 of the Michigan Medical Marihuana[1] Act (MMMA), MCL 333.26421 *et seq*. We also determine, as an issue of first impression, that under the existing statutory scheme, an edible containing THC extract from marijuana resin is not "usable marihuana" under the MMMA. See MCL 333.26423(k).

I. BASIC FACTS AND PROCEDURAL HISTORY

Following a traffic stop on January 27, 2011, defendant was charged with possession with intent to deliver marijuana and driving with a suspended license. Defendant filed a motion to dismiss the possession of marijuana charge, arguing that the prosecution was improper because he had in his possession at the time of the traffic stop a medical marijuana card for himself, caregiver applications for four patients, and a caregiver certificate. He also argued that the gross weight of the brownies found in his vehicle should not be considered toward the amount limit set forth in section 4 of the MMMA, MCL 333.26424. Rather, only the net weight of the active ingredient of marijuana contained in the brownies should be considered, and section

[1] Although the statutory provisions at issue refer to "marihuana" and "usable marihuana," "by convention this Court uses the more common spelling 'marijuana' in its opinions." *People v Jones*, ___ Mich App ___; ___ NW2d ___ (2013), slip op at 1 n 1. This opinion will thus refer to "marijuana" apart from direct quotation of statutory language and reference to the full title of the MMMA.

4 then would prohibit his prosecution.[2] The trial court denied defendant's motion to dismiss, ruled that the entire weight of the brownies would be considered as a marijuana mixture, and ruled that defendant could not use the medical marijuana defense at trial. Although the trial court gave defendant permission to file an interlocutory appeal, no such appeal was ever filed.

Defendant was charged with possession of marijuana found in various locations within the vehicle, including mason jars, plastic bags, and a binder of plastic pouches, as well as containers of brownies that were individually labeled to indicate the weight of the brownie and content of medical marijuana (e.g., brownie weighing 3.1 ounces and containing two grams of medical marijuana). The labels also said, "For medical use only, keep out of children's reach, medical marijuana, two grams each." There were also some sugar oatmeal cookies, labeled 3.75 grams each.[3] Prices were written on the bags that contained marijuana. Various packaging materials, including Glad zipper bags, labels, price labels, plastic portion cup lids, a vacuum sealer, and a grinder, were found. The police also found a tally sheet, listing people's names, the amount purchased, and the amount paid. For the most part, the prices and quantities matched the prosecution's expert's training and experience regarding the street values of marijuana.

A brownie was tested by a forensic chemist and found to contain Delta 9 tetrahydrocannibinol ("THC"), a schedule I controlled substance. The chemist could not determine how much THC was in the brownie, nor could the chemist detect any plant material in the brownie by examining it microscopically. The chemist testified that the weight of "the total mixture that contains the THC," i.e. one brownie, was 69.08 grams;[4] the other brownies were of similar size. The chemist also testified that THC extraction techniques involve extracting THC from the resin of the marijuana plant. Testimony from a prosecution expert indicated that 9.1 ounces of usable marijuana (separate from the baked goods) was found, as well as 54.9 ounces of the brownies containing THC. At his preliminary examination, defendant acknowledged that THC was extracted from marijuana and infused into the brownies. Defendant's counsel at the preliminary exam also stated that the brownies were "not made from ground up leaves [of marijuana]" but rather were made with a THC extract called "Cannabutter."

The jury returned a guilty verdict to the charge of possession with intent to deliver the controlled substance marijuana. The trial court sentenced defendant to three years' probation with 33 days in jail. This appeal followed.

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[2] Defendant indisputably possessed 9.1 ounces of usable marijuana in the form of raw plant matter. Thus, if the aggregate weight of the brownies (54.9 ounces) were added to that amount, defendant would have been in possession of 64 ounces, considerably more than the 12.5 ounces he arguably was allowed to possess under the MMMA.

[3] The sugar cookies appear not to have been subjected to forensic testing and did not appear to be part of the trial court's weight calculation.

[4] We note that 69.08 grams is roughly 2.44 ounces, slightly less than the per patient allowable quantity of usable marijuana under section 4 of the MMMA.

II. STANDARD OF REVIEW

This case presents issues of statutory interpretation. We review questions of statutory interpretation de novo. *People v Kolanek*, 491 Mich 382, 393; 817 NW2d 528 (2012).

Because the MMMA resulted from the passage of a citizens' initiative, our interpretation of language of the MMMA is guided by the established principles concerning the interpretation of voter initiatives:

> [B]ecause the MMMA was the result of a voter initiative, our goal is to ascertain and give effect to the intent of the electorate, rather than the Legislature, as reflected in the language of the law itself. We must give the words of the MMMA their ordinary and plain meaning as would have been understood by the electorate. [*Id*. at 397.]

"The words of an initiative law are given their ordinary and customary meaning as would have been understood by the voters." *People v Redden*, 290 Mich App 65, 76; 799 NW2d 184 (2010). Our analysis also is guided by our established canons of statutory interpretation. We presume that the meaning as plainly expressed in the statute is what was intended, and we avoid a construction that would render any part of the statute surplusage or nugatory. *Id*. Statutes that relate to the same subject, that is to say the same person or thing or class of persons or things, should be harmonized. *People v Shakur*, 280 Mich App 203, 209; 760 NW2d 272 (2008).

III. THE MMMA GENERALLY

Although marijuana remains illegal in Michigan, the MMMA allows a limited class of individuals the medical use of marijuana. MCL 333.26421 *et seq*. The history and purpose of the MMMA has been described by our Supreme Court as follows:

> The MMMA was proposed in a citizen's initiative petition, was elector-approved in November 2008, and became effective December 4, 2008. 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] citizens." 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.
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> 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. Rather, the MMMA's protections are limited to individuals suffering from serious or debilitating medical conditions or symptoms, to the extent that the individual's marijuana use "is carried out in accordance with the provisions of [the MMMA]." [*Kolanek*, 491 Mich at 393-394 (internal citations and footnotes omitted).]

This action presents issues arising under two sections of the MMMA. Section 4 of the MMMA, MCL 333.26424, grants broad immunity from criminal prosecution and other penalties

to qualified patients and caregivers who hold registry identification cards and who possess "an amount of marihuana that that does not exceed 2.5 ounces of usable marihuana," or, as to a primary caregiver, "2.5 ounces of usable marihuana for each qualifying patient to whom he is connected through the department's registration process." MCL 333.26424(a), (b)(1).

Section 8 of the Act, MCL 333.26428, provides an affirmative defense to patients generally for "possession of a quantity of marihuana that was not more than was reasonably necessary to ensure the uninterrupted availability of marihuana for the purpose of treating or alleviating the patient's serious and debilitating medical condition or symptoms of the patient's serious or debilitating medical condition." MCL 333.26428(a)(2). Section 8's affirmative defense is thus available regardless of the amount of marijuana possessed. A defendant may assert a section 8 defense by filing a motion to dismiss the criminal charges, in which case an evidentiary hearing shall be held before trial. MCL 333.26428(b); *Kolanek*, 491 Mich at 393-397.

Under the MMMA, "'[m]arihuana' means that term as defined in section 7106 of the public health code, 1978 PA 368, MCL 333.7106." MCL 333.26423(e). MCL 333.7106(3) in turn defines "marihuana" as follows:

> "Marihuana" means all parts of the plant Cannabis sativa L., growing or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant or its seeds or resin. It does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture or preparation of the mature stalks, except the resin extracted therefrom, fiber, oil or cake, or the sterilized seed of the plant which is incapable of germination. [MCL 333.7106(3).]

Additionally, the MMMA separately defines "usable marihuana" as follows:

> "Usable marihuana" means the dried leaves and flowers of the marihuana plant, and any mixture or preparation thereof, but does not include the seeds, stalks, and roots of the plant. [MCL 333.26423(k).]

Thus, the definition of "usable marihuana" under the MMMA is narrower than the definition of "marihuana" that is incorporated into the MMMA through the public health code, as is described with greater particularity below.

IV. THE "MIXTURE" ISSUE, AS PRESENTED

Defendant claims that the trial court erroneously denied him the protection of section 4 of the MMMA, because the trial court's determination that he possessed more than the allowable quantity of marijuana under the act was based upon the aggregate weight of the baked goods in his possession, rather than the net weight of the THC contained therein. We thus are presented with an issue of first impression: in determining whether the quantity limit of section 4 has been exceeded, is it the aggregate weight of an edible that is to be considered, or, alternatively, is it only the net weight of the marijuana (or its active ingredient) contained in the edible that is to be considered?

Defendant maintains that the consideration of the aggregate weight of an edible would "defeat the purpose of the MMMA," as it would effectively deny the medicinal use of marijuana by a delivery system other than smoking. Defendant argues that the proper course of action would be to consider only the amount of marijuana as was reflected on the labels that defendant had affixed to the brownies.

Plaintiff argues, to the contrary, that an edible constitutes a "mixture" or "preparation" within the MMMA's definitions of "marihuana" and "usable marihuana" and, therefore, that the entire weight of the edible should be considered. Plaintiff contends that such a reading would be consistent with prior court decisions holding that the weight of a controlled substance for criminal prosecution purposes includes the aggregate weight of the entire mixture or preparation containing the controlled substance.

For the reasons that follow, we conclude that the issue as presented is not properly before us, and that it is unnecessary for us to decide that issue in the circumstances presented. Rather, we find, also as an issue of first impression, that edibles made with THC extracted from marijuana resin are not "usable marihuana" under the MMMA. Our resolution of that definitional issue compels us to conclude that we should not reach the "mixture" issue, as presented to us, and instead should resolve the issues before us on alternate grounds.

V. THE BROWNIES WERE NOT "USABLE MARIHUANA" UNDER THE MMMA.

As noted, the MMMA separately defines "marihuana" and "usable marihuana." Notably, the definition of "marihuana" includes "all parts" of the cannabis plant, as well as "the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant or its seeds or resin." The definition specifically excludes the "mature stalks" of the plant "except the resin extracted therefrom." By virtue of that exception, therefore, resin extracted from mature stalks also is expressly included within the definition of "marihuana." There is no dispute that both the raw marijuana and the brownies found in defendant's possession constitute "marihuana" under the MMMA.

By contrast, however, the definition of "usable marihuana" under the MMMA does not include "all parts" of the cannabis plant. More to the point, it specifically does not include "the resin extracted from" the cannabis plant. Nor does it include "the resin extracted" from mature stalks of the plant. Further, it does not include "every compound, manufacture, salt, derivative, mixture, or preparation of the plant or its seeds or resin." Rather, and in stark contrast to the MMMA's definition of "marihuana," it includes *only* "the dried leaves and flowers of the marihuana plant, and any mixture or preparation *thereof*." [MCL 333.26423(k) (emphasis added).] The word "thereof" as used in this definition refers back to the immediately preceding phrase "the dried leaves and flowers of the marihuana plant." Therefore, to constitute "usable marihuana" under the MMMA, any "mixture or preparation" must be of "the dried leaves or flowers" of the marijuana plant.

Plaintiff argues that the resin from which THC is extracted would itself have been extracted from the leaves and flowers of the marijuana plant. Further, the brownies were a "mixture or preparation" of the THC. Therefore, according to plaintiff, the brownies constitute "usable marihuana." Plaintiff further argues that THC constitutes "marihuana" under the

MMMA, and that THC is "clearly 'useable'" [sic], since it is ingested by virtue of ingesting the edibles in which it is contained.

Plaintiff offered into evidence the testimony of the forensic chemist who analyzed the brownies[5] in this case. The chemist testified that there was no detectable plant-like material in the brownies, but that they contained Delta 9 THC. She defined THC as one of the cannabinoids or active ingredients found in the marijuana plant. The chemist also testified that THC extraction techniques involve extracting THC from the resin of the marijuana plant. THC could be made synthetically as well. The chemist agreed at trial that both marijuana and THC were controlled substances. At defendant's preliminary examination, the chemist offered the opinion (which is supportive of plaintiff's position on appeal) that brownies containing THC constitute "usable marihuana" under the MMMA, because the tested brownie was "the extract from the marijuana plant as added to the—the mixture or the item that is to be consumed."

At his preliminary examination, defendant acknowledged that THC was extracted from marijuana and infused into the brownies. Defendant's counsel also stated that the brownies were "not made from ground up leaves [of marijuana]" but rather were made with "Cannabutter" containing THC extract. Defendant therefore argued at his preliminary examination, unsuccessfully, that the brownies were not "usable marihuana" under the MMMA.

On appeal, defendant does not press this argument; instead, he effectively concedes that point but argues that the proper course of action would have been for the trial court to use the amount of marijuana as set forth on the label, and to count the brownies to see if the active ingredient totaled more than 3.4 ounces (the total amount of usable marijuana that, when added to the 9.1 ounces of raw marijuana found in baggies, defendant arguably would be allowed to possess under section 4). In essence, defendant now seeks to avoid criminal prosecution under our controlled substance possession laws by (a) effectively conceding the brownies to be "usable marihuana" and thereby gaining protection under section 4 of the MMMA; yet, (b) seeking to count only the THC-portion of the brownies toward the statutory quantity allowance, even though our possession laws would count the entire weight of the brownies. See MCL 333.7401(2)(d)(*i*)-(*iii*); *People v Kidd*, 121 Mich App 92, 95; 328 NW2d 394 (1982); see also *People v Prediger*, 110 Mich App 757, 760; 313 NW2d 103 (1981); *People v Lemble*, 103 Mich App 220, 222; 303 NW2d 191 (1981). Further, because the evidence reflects that the amount of THC contained in a brownie cannot be measured, he suggests that the courts accept at face value the quantities listed on the labels he affixed to the brownies.

We disagree with both plaintiff and defendant, based on the plain language of the MMMA itself.[6] Notably, the MMMA's definition of "usable marihuana" excludes much of the

[5] The chemist tested only one brownie seized from defendant; however, defendant does not argue that the other brownies do not contain THC. Therefore, we will sometimes refer to "brownies" in the plural.

[6] We also note briefly that adoption of defendant's position that the trial court should have relied on quantities set forth on the labels that defendant placed upon the brownies would be absurd; we

language found in the definition of "marihuana." It excludes the words "resin extracted from any part of the plant," and "compound, manufacture, salt, derivative . . . of the plant or its seeds or resin." See MCL 333.7106, MCL 333.26423(k). It additionally excludes "the resin extracted" from "the mature stalks of the plant." *Id*. To ignore these exclusions, and to thereby construe "usable marihuana" to include a "mixture or preparation" of an extract (THC) of an extract (resin) from the marijuana plant, would alter the plain meaning of the words that the drafters of the MMMA chose to employ. By excluding resin from the definition of "usable marihuana," as contrasted with the definition of "marihuana," and defining "usable marihuana" to mean only "the dried leaves and flowers of the marihuana plant, and any mixture or preparation *thereof*," MCL 333.26423(k) (emphasis added), the drafters clearly expressed its intent *not* to include resin, or a mixture or preparation of resin, within the definition of "usable marihuana." It therefore expressed its intent not to include a mixture or preparation of an *extract* of resin. Consequently, an edible made with THC extracted from resin is excluded from the definition of "usable marihuana." Rather, under the plain language of the MMMA, the only "mixture or preparation" that falls within the definition of "usable marihuana" is a "mixture or preparation" of "the dried leaves and flowers of the marihuana plant." *Id.*

Provisions not included in a statute should not be included by the courts. *Mich Basic Prop Ins Ass'n v Office of Financial & Ins Regulation*, 288 Mich App 552, 560; 808 NW2d 456 (2010). Further, the use of different terms in a statute suggests different meanings. *US Fidelity Ins & Guaranty Co v Mich Catastrophic Claims Ass'n* (*On Rehearing*), 484 Mich 1, 14; 773 NW2d 243 (2009). Finally, although only an aid to interpretation, we note that the maxim "expressio unius est exclusio alterius" (the expression of one thing suggests the exclusion of all others) means that the express mention of one thing in a statutory provision implies the exclusion of similar things. *Johnson v Recca*, 492 Mich 169, 176 n 4; 821 NW2d 520 (2012).

Nor are we persuaded by plaintiff's argument that "usable marihuana" merely constitutes "marihuana" that is "usable," and that a brownie containing THC extracted from the resin of a marijuana plant is "usable marihuana" because it is "marihuana" that is "usable" simply by virtue of its ingestion. That argument requires a circularity of reasoning that would read into the drafters' definition of "usable marihuana" a component (resin) that the drafters expressly excluded. Moreover, it ignores the fact that "usable marihuana" is not simply a combination of the words "usable" and "marihuana"; rather, it is a term of art specifically defined by the MMMA. We are not at liberty to ignore that definition in favor of our own. See *People v Williams*, 288 Mich App 67, 74; 792 NW2d 384 (2010). The drafters' definition of the term "usable marihuana" clearly was not intended to encompass all "marihuana" that theoretically is "usable," in the colloquial meaning of the term, by virtue of its ability to be ingested. Rather, as a term of art, it is designed to identify a subset of "marihuana" that may be possessed, in allowed quantities, for purposes of an immunity analysis under section 4 of the MMMA.[7]

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find no support in our precedent for the notion that the amount of a controlled substance possessed should be established by a defendant's self-report.

[7] The phrase "usable marihuana" in the MMMA thus refers to marijuana to which the law has granted a qualifying patient the power, right, or privilege to use, rather than merely making reference to marijuana that is *able* to be ingested, smoked, or otherwise consumed in order to

We also are not persuaded by plaintiff's argument that our interpretation of the MMMA's definition of "usable marihuana" is contrary to the ordinary and customary meaning of the term. See *Kolanek*, 491 Mich at 398 ("We must give the words of the MMMA their ordinary and plain meaning as would have been understood by the electorate."). When a statute provides a definition of a term, we are not "left dependent upon dialect, colloquialism, the language of the arts and sciences, or even the common understanding of the man in the street. We have the act itself. We need not, indeed we must not, search afield for meanings where the act supplies its own." *Butterfield Theatres v Dep't of Revenue*, 353 Mich 345, 350; 91 NW2d 269 (1958); see also *Haynes v Neshewat*, 477 Mich 29, 35; 729 NW2d 488 (2007).

In defining the parameters of legal medical-marijuana use, the drafters of the MMMA adopted a definition of "usable marihuana" that we believe comports with the voters' desire to allow limited "medical use" of marijuana, and yet not to allow the unfettered use of marijuana generally. Given the heightened potency of the THC extract, as compared with "the dried leaves and flowers," this definition of "usable marihuana" (for purposes of establishing limited section 4 immunity) strikes us as a sound and reasoned mechanism to promote the "health and welfare of [Michigan] citizens." It also provides an essential mechanism for implementing the voters' desire to continue prosecutions for possession and use of marijuana in excess of that which is permitted for "medical use."

The evidence reflects that the amount of THC contained in an edible cannot be measured, at least not with the testing methods commonly used in police laboratories.[8] Therefore, the inclusion of such edibles within the definition of "usable marihuana," while mandating that only the amount of THC be counted toward the quantity limits of section 4 of the MMMA, as defendant would have us do, would effectively eviscerate the intent of the voters in limiting marijuana to its intended "medical use." Given the unmeasurable nature of the highly potent THC contained in such edibles, the health and welfare of Michigan citizens would be threatened, and prosecutions for possession and use of edibles containing higher-than-allowed quantities of THC would be systematically thwarted.

Our interpretation also does not preclude the medical use of marijuana by ingestion of edibles;[9] to the contrary, such use is authorized by the MMMA, within the statutory limitations,

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produce a narcotic effect. See, e.g., Blacks Law Dictionary, 9th ed (2009), p 1682 ("use" may mean "the power, right, or privilege of using something," and "a benefit" granted by operation of law); Random House College Dictionary, 2d ed (2000), p 1440 ("usable" may mean "available … for use").

[8] The chemist testified at the preliminary exam that the chemical testing revealed "whether a cannabinoid was present in the sample" and further stated that the analysis was "qualitative, whether or not the substance is present, not how much." The chemist also agreed that the testing would not reveal the amount of THC present, "just enough that it's detectable."

[9] Defendant advances such an argument with respect to counting the entire weight of an edible toward the quantity limit of section 4 of the MMMA. Although defendant formerly argued (at his preliminary examination) that edibles made from THC extract were not "usable marihuana," we can now envision an argument to the effect that, because our endorsement of that position may result in the subjection of a possessor of such edibles to prosecution under our controlled

provided that the edible is a "mixture or preparation" of "the dried leaves and flowers of the marihuana plant," rather than of the more potent THC that is extracted from marijuana resin. Again, we find that judgment of the drafters of the MMMA, in so defining "usable marihuana," to be an appropriate exercise of its duty to define the parameters of legal medical marijuana use.

"Our courts repeatedly emphasize the importance of construing a statute according to its plain language and refraining from interfering with the Legislature's authority to make policy choices." *People v Adams*, 262 Mich App 89, 97; 683 NW2d 729 (2004). We once again emphasize this importance. Under the plain language of the MMMA, the brownies seized from defendant are not encompassed within its definition of "usable marihuana." Policy-based arguments to the contrary are better made to the Legislature, not the courts.

These principles, and our reading of the MMMA, thus convince us that edibles made with THC extracted from marijuana resin are not "usable marihuana" under the MMMA. Simply put, the evidence before this Court indicates that the brownies were not a "mixture or preparation" of "dried leaves and flowers of the marihuana plant." MCL 333.26423(k). Therefore, the brownies were not "usable marihuana" under the MMMA, and none of the weight of the brownies should have been counted towards the determination of whether defendant possessed over 12.5 ounces of usable marijuana.

VI. APPLICATION

Having concluded that the brownies in defendant's possession were not "usable marihuana" under the MMMA, we must next apply that ruling to the facts of this case and, more specifically, to (a) defendant's claimed immunity under section 4 of the MMMA; and (b) defendant's claimed right to present a defense under section 8 of the MMMA. We discuss each in turn.

A. DEFENDANT IS NOT ENTITLED TO IMMUNITY UNDER SECTION 4 OF THE MMMA

The language of section 4 indicates that a "qualifying patient" who has been issued and possesses a registry identification card is immune from arrest and prosecution "for the medical use of marihuana in accordance with this act," provided that he or she possesses "an amount of *marihuana* that does not exceed 2.5 ounces of *usable marihuana*." MCL 333.26424(a) (emphasis added). A "primary caregiver" who has been issued and possesses a registry identification card also is immune from arrest and prosecution for "assisting a qualifying patient" to whom he or she is connected through the applicable registration process, with the "medical use of marihuana in accordance with this act," again provided that the primary caregiver possesses "an amount of *marihuana* that does not exceed . . . 2.5 ounces of *usable marihuana*" for "each qualifying patient" to whom he or she is connected through the registration process. MCL 333.26424 (b)(1) (emphasis added).

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substance possession statutes, that finding similarly will preclude all medical use of marijuana by ingestion of edibles. We disagree, for the reasons noted.

Notably, neither of these provisions conditions its immunity based on the qualifying patient or primary caregiver possessing "an amount of usable marihuana that does not exceed 2.5 ounces." If they had wished to do so, the drafters of the MMMA easily could have employed such simple and easily understood language. Instead, each of these provisions conditions its immunity based on the qualifying patient or primary caregiver possessing "an amount of *marihuana* that does not exceed . . . 2.5 ounces of *usable marihuana*." MCL 333.26424 (a), (b)(1) (emphasis added).

This distinction is critical to our analysis, because it demonstrates that the drafters of the MMMA chose to provide that, in evaluating a section 4 immunity claim, consideration must be given not only to the amount of "usable marihuana" that is possessed, but additionally to the amount of "marihuana" that is possessed. In other words, consideration must also be given to the possession of "marihuana" that does not fit within the statutory definition of "usable marihuana." This is consistent with the MMMA's use of the "usable marihuana" term of art to define that subset of "marihuana" that may be possessed, in allowed quantities, for purposes of an immunity analysis under section 4 of the MMMA.

In short, the question of whether a possessor of "marihuana" possesses an allowed quantity of "usable marihuana" is only the beginning of the relevant inquiry under section 4. A further pertinent and necessary inquiry, for purposes of a section 4 analysis, is whether a possessor possesses *any* quantity of "marihuana" that does *not* constitute "usable marihuana" under the term of art definition of the MMMA. If so, and without regard to the quantity of "usable marihuana" that is possessed, the possessor then does not possess "an amount of *marihuana* that does not exceed . . . 2.5 ounces of *usable marihuana*." MCL 333.26424 (a), (b)(1) (emphasis added). Instead, he or she then possesses an amount of "marihuana" that is in excess of the permitted amount of "usable marihuana." In other words, the language establishing limited immunity in section 4 of the MMMA expressly conditions that immunity on the possessor possessing *no* amount of "marihuana" that does not qualify as "usable marihuana" under the applicable definitions.

Here, defendant was in possession of 9.1 ounces of usable marijuana. Arguably, under the circumstances presented, defendant was entitled to possession of 12.5 ounces of usable marijuana. Therefore, he possessed an amount of usable marijuana that, assuming that all other requirements of section 4 were met, would have qualified him for section 4 immunity. However, defendant also was in possession of brownies containing THC extracted from marijuana resin. For the reasons stated, those brownies did not constitute "usable marihuana" under the statutory definition. The parties agree, however, as do we, that the brownies did constitute "marihuana" under its statutory definition. Possession of THC extracted from marijuana is possession of marijuana. See *People v Campbell*, 72 Mich App 411, 412; 249 NW2d 870 (1976); see also MCL 333.7106(3). Therefore, defendant was in possession of an "amount of marihuana" that exceeded the permitted amount of usable marijuana he may have been allowed to possess. By possessing edibles that were not "usable marihuana" under the MMMA, but that indisputably were "marihuana," he failed to meet the requirements for section 4 immunity.

We therefore determine that the trial court reached the right result in denying defendant immunity from prosecution pursuant to section 4 of the MMMA. We do not disturb that result. *People v Mayhew*, 236 Mich App 112, 118 n 2; 600 NW2d 370 (1999) ("[W]e will not reverse the trial court's decision where it reached the right result for a wrong reason.").

B. DEFENDANT IS ENTITLED TO ASSERT A SECTION 8 AFFIRMATIVE DEFENSE

Defendant argues that he was precluded from offering an affirmative defense pursuant to section 8 of the MMMA, MCL 333.26428, by this Court's decision in *People v Anderson*, 293 Mich App 33; 809 NW2d 176 (2011), rev'd 492 Mich 851 (2012). Because *Anderson* is no longer good law, defendant argues, his case should be remanded to allow him to pursue an affirmative defense according to the procedure outlined in *Kolanek*, 491 Mich at 393-397, and *People v Bylsma*, 493 Mich 17, 35-37; 825 NW2d 543 (2012). As this issue was not raised before the trial court (since *Kolanek* and *Bylsma* had not yet been decided by our Supreme Court), we review it for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Section 8 of the MMMA, MCL 333.26428, provides an affirmative defense to patients and primary caregivers where it is demonstrated, *inter alia*, that the quantity of marijuana collectively possessed was "not more than was reasonably necessary to ensure the uninterrupted availability of marihuana for the purpose of treating or alleviating the patient's serious or debilitating medical condition or symptoms [thereof]." MCL 333.26428(2). The procedure for asserting such a defense is for a defendant to file a motion to dismiss criminal charges and for an evidentiary hearing to be held before trial. MCL 333.26428(3)(b). A section 8 defense therefore "cannot be asserted for the first time at trial, but must be raised in a pretrial motion for an evidentiary hearing." *Kolanek*, 491 Mich at 411.

Section 8's affirmative defense is available regardless of the amount of marijuana possessed.[10] That is, section 8 (unlike section 4) specifies no particular quantity limit, but instead requires that the amount possessed be "not more than was reasonably necessary" for the statutorily recognized purposes. MCL 333.26428(2). Additionally, Section 8 does not refer to "usable marihuana," but instead states that a patient and/or primary caregiver "may assert the medical purpose for using marihuana as a defense to any prosecution involving marihuana . . . ." MCL 333.26428.

[10] Our Supreme Court has noted that "§ 4 [of the MMMA] does not permit defendants to operate a business that facilitates patient-to-patient sales of marijuana." *State v McQueen*, 493 Mich 135, 158; 828 NW2d 644 (2013). However, in *McQueen*, our Supreme Court did not specifically state that the section 8 affirmative defense was unavailable for a defendant engaged in patient-to-patient sales of marijuana, because the proceeding in that case was a public nuisance action, not a criminal proceeding. *Id*. at 158-159. The rationale of *McQueen* may indeed compel a determination that a defendant cannot establish the "medical purpose for using marihuana" required by section 8(a) if that defendant possesses marijuana for the purpose of patient-to-patient sales, especially in light of *People v Green*, ___ Mich ___; ___ NW 2d ___ (2013), slip op at 1, where our Supreme Court quoted *McQueen* with approval in reversing this Court's affirmance of the trial court's dismissal of charges (presumably under section 4 of the MMMA) against the defendant for delivery of marijuana. However, the question of whether the section 8 defense is similarly unavailable for a defendant engaged in patient-to-patient sales is not currently before this Court.

Our Supreme Court has stressed that "[s]ections 4 and 8 provide separate and distinct protections and require different showings," and that "the requirements of § 4 cannot logically be imported into the requirements of § 8 . . . ." *Kolanek*, 491 Mich at 401-402. Rather, "we must examine these provisions independently." *Bylsma*, 493 Mich at 28. Therefore, our decision with regard to defendant's claim of denial of a section 8 defense does not depend on our analysis under section 4, our conclusion above that the brownies possessed by defendant were not "usable marihuana" under the MMMA, or our conclusion that defendant was not entitled to section 4 immunity.

Defendant unsuccessfully argued, both during his preliminary exam and in a pre-trial motion to dismiss, that he was entitled to dismissal of charges under section 4 of the MMMA, as discussed in Sections IV, V, and VI, *supra*. Defendant did not raise a section 8 argument at any time before trial. When the prosecution specifically requested clarification of whether defendant was requesting a section 8 affirmative defense, defense counsel stated: "Your Honor, actually, the prosecution may be correct in regards to allowing the particular defense; however, I think there's still a question of fact for the trier of fact of whether he was in compliance with the rules." Defendant never raised, or reserved, a section 8 affirmative defense, and plaintiff argues that defendant specifically disclaimed any desire to assert one and, therefore, waived any right to assert a defense under section 8.

However, Defendant argues that he that he did not raise this defense before trial because the law at that time provided that a defendant must fulfill the requirements of section 4 before he could raise a section 8 defense. See *People v King*, 291 Mich App 503; 804 NW2d 911 (2011), rev'd *Kolanek*, 491 Mich 382 (2012). In *King*, this Court interpreted the MMMA as requiring a defendant to comply with the requirements of section 4 before asserting an affirmative defense under section 8. *Id*. at 510. Our Supreme Court reversed this decision in *Kolanek*, holding that "the plain language of § 8 does not require compliance with the requirements of § 4." 491 Mich at 401. The Court further held that:

> Any defendant, regardless of registration status, who possesses more than 2.5 ounces of usable marijuana or 12 plants not kept in an enclosed, locked facility may satisfy the affirmative defense under § 8. As long as the defendant can establish the elements of the § 8 defense and none of the circumstances in § 7(b) exists, that defendant is entitled to the dismissal of criminal charges. [*Id*. at 403.]

In *Kolanek*, the Court stated that a defendant must raise a section 8 defense in a pretrial motion to dismiss. *Id*. at 410-411. However, the Court clarified in *Bylsma*, 493 Mich at 35-37, that a defendant who moves for dismissal under section 4 could still raise a section 8 defense before trial by filing a motion and showing a prima facie case regarding the elements of section 8. Thus, a defendant who moves to dismiss under section 4 is not precluded from raising a section 8 defense in a separate pretrial motion to dismiss. *Id*.

Defendant did not reserve the right to raise a section 8 defense or otherwise preserve this issue for appeal. No evidentiary hearing was held and no evidence concerning the requirements of section 8 was presented. Defendant had a trial, was not permitted to present any medical marijuana defense, and was convicted. The question for this Court is whether this result is plain error affecting substantial rights. *Carines*, 460 Mich at 763-764. Defendant argues that he did not raise a section 8 defense because the law at that time required that the requirements of

section 4 first be fulfilled. At the time of defendant's trial in February 2012, the Michigan Supreme Court had already granted leave to appeal in *King*, specifically to consider whether the requirements of section 4 must be met to raise a section 8 defense. *People v King*, 489 Mich 957; 798 NW2d 510 (2011).

"[A] Supreme Court order granting leave to appeal does not diminish the precedential effect of a published opinion of the Court of Appeals." MCR 7.215(C)(2). However, changes to criminal law are generally given retrospective application to cases pending on appeal as of the date of the filing of the opinion containing the new rule. See *People v Hampton*, 384 Mich 669, 673, 678; 187 NW2d 404 (1971). Here, defendant filed his claim of appeal on April 30, 2012. *Kolanek* was decided on May 31, 2012. *Kolanek*, 491 Mich at 382. We therefore conclude that defendant is entitled to the retrospective application of *Kolanek*.

The *Kolanek* Court noted that this Court's interpretation of the MMMA in *King* rendered section 8 a nullity. *Kolanek*, 491 Mich at 403. Thus, because the state of the law at the time this case was pending rendered section 8 a nullity, and the state of the law changed during the pendency of defendant's appeal, we conclude that defendant was deprived of a substantial defense and has demonstrated plain error. As stated above, the language of the MMMA allows defendant to assert "the medical purpose for using marihuana as a defense to any prosecution involving marihuana," MCL 333.26428; thus defendant may attempt to assert this defense to his prosecution for possession with intent to deliver as to both the raw marijuana and the edibles containing THC that were found in his possession.[11]

In that regard, we note that, unlike with respect to section 4 immunity, the MMMA does not condition the availability of a section 8 affirmative defense on the possession of *only* a limited quantity of "*usable marihuana*." Rather, a section 8 defense may be available without regard to whether the "marihuana" possessed was "usable marihuana," and without regard to the quantity possessed. Further, the considerations that caused the drafters of the MMMA to so condition the broader immunities afforded under section 4 may not exist in a particular individual circumstance giving rise to the assertion of a section 8 affirmative defense. For example, if in an individual circumstance a particular qualifying patient suffers from a serious or debilitating medical condition (or symptoms thereof) such that treatment or alleviation requires the medical use of marijuana, even in a form comprised of a mixture or preparation of THC

[11] Plaintiff argues that defendant explicitly waived his right to a section 8 defense. Defendant did make statements at his preliminary examination to the effect that he was not seeking a section 8 defense. However, waiver is "the intentional relinquishment or abandonment of a *known* right." *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (quotation marks and citations omitted) (emphasis added). Given the law at the time, we will not fault defendant for pursuing a section 4 defense prior to any section 8 defense; as noted above, a defendant is not precluded from raising a section 8 defense in a separate pretrial motion. *Bylsma*, 493 Mich at 35-37. Once his section 4 motion was denied, as the law existed at the time, defendant would have had no reason to pursue a section 8 defense. Thus we conclude his failure to do so was not "waiver" of that defense, nor were his statements made at the beginning of proceedings against him.

extracted from the resin of a marijuana plant (and that thus would not qualify a patient or primary caregiver for section 4 immunity), then the patient and/or his or her primary caregiver may be entitled to assert a section 8 affirmative defense, provided that it is demonstrated that the amount of such marijuana possessed was "not more than was reasonably necessary" for the statutorily recognized purposes (and provided that the other conditions of section 8 are met). This is not to say that establishing a section 8 defense under such circumstances would be an easy task; to the contrary, we suspect that the bar to establishing such a defense under those circumstances indeed would be a high one, and one that would become increasingly higher as the amount and/or potency of the marijuana possessed increases. That said, however, section 8 affords a qualifying patient and/or primary caregiver an opportunity to demonstrate the satisfaction of the statutory conditions for asserting such a defense, even under those circumstances.

However, we conclude that the appropriate remedy is not to simply grant defendant a new trial. Rather, defendant is entitled to an evidentiary hearing to establish whether he is entitled to assert a section 8 defense. If, following an evidentiary hearing, no reasonable juror could conclude that a defendant has satisfied the elements of a section 8 defense, then the defendant is precluded from asserting the defense at trial. *Kolanek*, 491 Mich at 412. Before vacating defendant's conviction and ordering a new trial, it would thus behoove this Court to know whether defendant would in fact be able to assert the defense at trial (or indeed is entitled to dismissal of the charges against him). We therefore remand this matter so that defendant may file a motion to dismiss the charges against him, and for an evidentiary hearing to be held as to the prima facie existence of the elements of a section 8 defense. If defendant cannot meet this burden, his conviction will stand. *Id*. If defendant meets this burden without any question of fact, he will be entitled to dismissal of the marijuana possession charge. *Id*. If defendant establishes evidence of each element listed in section 8 but there are still material questions of fact, then he will be entitled to a new trial and the submission of this defense to the jury. *Id*.

VII. CONCLUSION

In light of the plain language of the MMMA, we conclude that the brownies possessed by defendant were not "usable marihuana" under the MMMA. Therefore, we further conclude (although under a different rationale than that of the trial court or that advanced on appeal) that the trial court did not err in denying defendant immunity from prosecution under section 4 of the MMMA. However, because the state of the law changed during the pendency of defendant's appeal, he is entitled to move the trial court for dismissal and an evidentiary hearing on his ability to assert an affirmative defense under section 8 of the MMMA.

Vacated and remanded for further proceedings consistent with this opinion. We retain jurisdiction.

/s/ Mark T. Boonstra
/s/ Michael J. Kelly
/s/ Christopher M. Murray

Court of Appeals, State of Michigan

ORDER

People of the State of Michigan v Earl Cantrell Carruthers

Docket No. 309987

LC No. 2011-237303-FH

Michael J. Kelly
Presiding Judge

Christopher M. Murray

Mark T. Boonstra
Judges

Pursuant to the opinion issued concurrently with this order, this case is REMANDED for further proceedings consistent with the opinion of this Court. We retain jurisdiction.

Proceedings on remand in this matter shall commence within 56 days of the Clerk's certification of this order, and they shall be given priority on remand until after they are concluded. As stated in the accompanying opinion, we remand this case to the trial court to allow defendant to file a motion to dismiss the charges against him pursuant to MCL 333.26428, and for an evidentiary hearing to be held on that issue. Should defendant make out a prima facie case of all of the elements of an affirmative defense under Section 8 of the Michigan Medical Marihuana Act, his conviction shall be vacated and the charges against him dismissed. Should defendant not meet this burden, his conviction stands. If the defendant establishes evidence of each element listed in § 8 but there are still material questions of fact, then he is entitled to a new trial and the submission of this defense to the jury.

The parties shall promptly file with this Court a copy of all papers filed on remand. Within seven days after entry, appellant shall file with this Court copies of all orders entered on remand.

The transcript of all proceedings on remand shall be prepared and filed within 21 days after completion of the proceedings. Upon remand, this Court will enter an order either affirming defendant's conviction, vacating defendant's conviction, or granting defendant a new trial.

A true copy entered and certified by Angela P. DiSessa, Acting Chief Clerk, on

JUL 11 2013
Date

Angela P. DiSessa
Acting Chief Clerk