IN THE SUPREME COURT

APPEAL FROM THE OAKLAND COUNTY CIRCUIT COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff/Appellee,

v

RICHARD LEE HARTWICK,

Defendant/Appellant.
_____/

SC: 148444
COA: 312308
Oakland CC: 12-240981-FH

JESSICA R. COOPER (P23242)
Prosecuting Attorney
1200 N. Telegraph Road
Pontiac, MI 48341
(248) 858-0656

FREDERICK J. MILLER (P41207)
NANCY E. MILLER (P47860)
837 S. Lapeer Road, Suite 102
Oxford, MI 48371
(248) 628-0180

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3. The factual disputes regarding § 4 immunity made by the trial 7
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Statement of the Basis of Jurisdiction

The Michigan Supreme Court has jurisdiction over this appeal pursuant to MCR 7.301(A)(2), which allows the Court to review a decision made by the Court of Appeals.

This appeal was timely filed. The Oakland County Circuit Court Register of Actions and Court of Appeals Docket Sheet are attached as **Appendix 1a-3a and 4a-7a**. The trial court's Order is dated July 18, 2012. **Appendix 34a-**35a. Application for Leave to Appeal to the Court of Appeals was filed on September 6, 2012. Appellate counsel was appointed on September 19, 2012. The Court of Appeals declined leave on October 11, 2012. **Appendix p. 49a.** The Supreme Court remanded to the Court of Appeals as leave granted. **Appendix p. 50a.** The Court of appeals issued an Opinion on November 19, 2013. **Appendix p. 51a-63a.** An application for leave to appeal was filed on January 7, 2014 and was granted by the Supreme Court on June 11, 2014. **Appendix p. 64a.**

Statement of Issues

1. Is a Defendant's entitlement to immunity under § 4 of the Michigan Medical Marihuana Act (MMMA), MCL 333.26421, *et. seq.*, a question of law for the trial court to decide?

   Appellant believes all parties and courts would say "yes."

2. Are factual disputes regarding § 4 immunity to be resolved by the trial court?

   Appellant believes all parties and courts would say "yes."

3. If factual disputes regarding § 4 immunity are to be resolved by the trial court, are the trial court's findings of fact established facts that cannot be appealed?

   Appellant believes the answer is "no," and is unsure of the other parties' and courts' positions.

4. Does a Defendant's possession of a valid registry identification card establish any presumption for purposes of § 4 or § 8?

   Appellant believes the answer is "yes," and is unsure of the other parties' and courts' positions.

5. If a Defendant's possession of a valid registry identification card does not establish Any presumptions for purposes of § 4 or § 8, what is a Defendant's evidentiary burden to establish immunity under § 4 or an affirmative defense under § 8?

6. What role, if any, do the verification and confidentiality provisions of § 6 of the Act play in establishing entitlement to immunity under § 4 or an affirmative defense under § 8?

7. Did the Court of Appeals err in characterizing a qualifying patient's physician as issuing a prescription for, or prescribing marijuana?

   The Court of Appeals would say "no."
   Appellant would say "yes," but is unclear as to Appellee's position.

8. Did the trial court and Court of Appeals err in holding that Appellant was not entitled to § 4 immunity or to raise an affirmative defense under § 8 when Appellant met his burden of proof at the evidentiary hearing?

The trial court, Court of Appeals and Appellee would say "no."
Appellant would say "yes."

Statement of Facts

Appellant is charged with the manufacture of 20-200 marijuana plants and possession with intent to deliver marijuana, in violation of MCL 333.7401(2)(d)(ii) and (iii), respectively.

The trial court conducted an evidentiary hearing on July 18, 2012 to determine if the case should be dismissed pursuant to § 4 of the Michigan Medical Marihuana Act ("MMMA" or "the Act") or if Appellant was entitled to raise the affirmative defense set forth in § 8 of the Act.

At the evidentiary hearing, Appellant testified that on September 22, 2011, a police officer came to his home and asked him if he grew marijuana. Appellant responded in the affirmative, indicating that he was a medical marijuana caregiver. He showed the officer medical marijuana cards for five patients and a physician statement for himself. **Appendix p. 37a.** Copies of the cards and physician's statement were introduced into evidence **Appendix pp. 30a-32a.** The parties stipulated that Appellant had been issued a medical marijuana card. **Appendix p. 39a.**

Appellant also testified that he allowed the officer to search his home. He unlocked the door leading to the area in which he kept the marijuana plants. **Appendix p. 38a.** He estimated that he had about 5 ounces of usable marijuana. **Appendix p. 38a.** The parties stipulated that pursuant to the lab report, 104.6 grams of marijuana were taken from Defendant's home. **Appendix 39a.** Appellant testified there were 71 small Styrofoam cups in which he started seeds. **Appendix p. 38a.** Appellant indicated that he provided each patient with whatever marijuana that patient's plants produced each month. **Appendix p. 39a**. (Tr., p. 15)

Appellant further testified that his doctor gave him a physician's statement for medical marijuana due to deteriorated discs in his lower back. **Appendix p. 37a.** He did not know the medical term for his condition. **Appendix p. 37a-38a.** Appellant testified that he had started

treating with his doctor in 2005 or 2006 and she had taken x-rays and performed other tests on his back during her course of treatment. She did not tell him how much marijuana to use, only that he should not ingest it by smoking it. **Appendix p. 41a.**

Appellant was unsure of the medical conditions for which the five other people for whom he was a caregiver were given medical marijuana cards, nor did he know what amount of marijuana their doctors said they should use. **Appendix pp. 41a-43a.**

On cross-examination, Appellant was questioned as to discrepancies between his testimony and the testimony that had been given by the police officer at the preliminary examination as to the number of plants in his home and whether the room in which the plants were found had been locked. Appellant explained that if the police officer had counted 77 pots of marijuana, it was because the officer had included six cups in which the plants had been cut and were just stalks. **Appendix p. 40a.** As to the location of the plants, he described that there was a wing in the house. The door to the wing was locked. After entering the wing, there were several rooms where he grew the marijuana. The doors to those rooms were not locked. **Appendix p. 41a.**

Appellee called no witnesses. **Appendix p. 44a.**

After hearing the evidence, the trial court denied Appellant's request to dismiss the charges based on § 4 of the MMMA without explanation, only agreeing with the prosecution's argument that he had too many plants, the room had not been locked, and he was not growing it for the purpose of treating a debilitating medical condition for either himself or the other five people. **Appendix p. 46a.** As to § 8, the trial court held that Appellant had failed to prove the elements necessary to use the affirmative defense because he did not provide evidence of a bona fide physician-patient relationship or a likelihood of receiving therapeutic or palliative benefit

from the medical use of marijuana, he possessed too much marijuana, and he had failed to prove that the use of marijuana was to alleviate a serious or debilitating medical condition or symptoms. **Appendix p. 47a.** The trial court granted a stay pending interlocutory appeal. **Appendix p. 48a.** The trial court's written opinion may be found at **Appendix p. 33a-34a.**

The Court of Appeals denied Appellant's application for leave to appeal. **Appendix p. 49a**. The Supreme Court remanded as on leave granted. **Appendix p. 50a**. The Court of Appeals issued an opinion affirming the trial court. **Appendix p. 51a-63a.** In pertinent part, the Court of Appeals stated:

> [D]efendant would nonetheless not qualify for § 4 immunity. His interpretation of the MMMA ignores the underlying medical purposes of the statute, explicitly referred to in § 4(d). Mere possession of a state-issued card—even one backed by a state investigation—does not guarantee that the cardholder's *subsequent* use and production of marijuana was "for the purpose of alleviating the qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition . . . ." MCL 333.26424(d)(2). Indeed, defendant's testimony provided ample evidence that he was not holding true to the medical purposes of the statute. He failed to introduce evidence of (1) some of his patient's medical conditions, (2) the amount of marijuana they reasonably required for treatment and how long the treatment should continue, and (3) the identity of their physician.
>
> . . .
>
> Section 8 outlines the possible defenses a defendant can raise when charged with violating the act. In so doing, the section weaves together the obligations of each individual involved in the prescription use, and production of marijuana for medical purposes. Under the act, doctors must have an ongoing relationship with their patients, where the doctor continuously reviews the patient's condition and revises his marijuana prescription accordingly. Further, patients must provide certain basic information regarding their marijuana use to their caregivers. And caregivers, to be protected under the MMMA, must ask for this basic information—specifically, information that details, as any pharmaceutical prescription would, how much marijuana the patient is supposed to use and how long that use is supposed to continue. Though patients and caregivers are ordinary citizens, not trained medical professionals, the MMMA's essential mandate is that marijuana be used for medical purposes. Accordingly, for their own protection from criminal prosecution, patients and caregivers must comply with this medical purpose—patients by supplying the necessary documentation to their caregivers, and caregivers by only supplying patients who provide the statutorily mandated information.

> Possession of a registry identification card, without more, does nothing to address these § 8 requirements. . . .

Appendix pp. 57a-58a, footnotes excluded.

Leave to appeal was granted by the Supreme Court, which asked that six (6) issues be briefed:

1. Whether a defendant's entitlement to immunity under § 4 of the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq.*, is a question of law for the trial court to decide;

2. Whether factual disputes regarding § 4 immunity are to be resolved by the trial court;

3. If so, whether the trial court's finding of fact becomes an established fact that cannot be appealed;

4. Whether a defendant's possession of a valid registry identification card establishes any presumptions for purposes of § 4 or § 8;

5. If not, what is a defendant's evidentiary burden to establish immunity under § or an affirmative defense under § 8;

6. What role, if any, do the verification and confidentiality provisions of § 6 of the act play in establishing entitlement to immunity under § 4 or an affirmative defense under § 8; and

7. Whether the Court of Appeals erred in characterizing a qualifying patient's physician as issuing a prescription for, or prescribing, marijuana.

Appendix p. 64a.

Arguments

STANDARDS OF REVIEW.

Questions of statutory interpretation are reviewed de novo. *People v Kolanek*, 491 Mich. 283; 817 NW2d 528 (2012). A trial court's findings of fact are reviewed for clear error, and its ultimate decision on a motion to dismiss is reviewed de novo. *People v Dunbar*, 264 Mich App 240, 243; 690 NW2d 476 (2004).

1. A DEFENDANT'S ENTITLEMENT TO IMMUNITY UNDER § 4 OF THE MICHIGAN MEDICAL MARIHUANA ACT (MMMA), MCL 333.26421, *ET. SEQ.*, IS A QUESTION OF LAW FOR THE TRIAL COURT TO DECIDE.

The MMMA provides a defendant with immunity from prosecution so long as he/she complies with the requirements of the Act. It states:

> (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. The privilege from arrest under this subsection applies only if the qualifying patient presents both his or her registry identification card and a valid driver license or government-issued identification card that bears a photographic image of the qualifying patient.
>
> (b) A primary caregiver 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 of bureau, for assisting a qualifying patient to whom he or she is connected through the department's registration process with the medical use of marihuana in accordance with this act. The privilege from arrest under this subsection applies only if the qualifying patient presents both his or her registry identification card and a valid driver license or government-issued identification card that bears a photographic image of the primary caregiver. This

subsection applies only if the primary caregiver possesses an amount of marihuana that does not exceed:

> (1) 2.5 ounces of usable marihuana for each qualifying patient to whom is or she is connected through the department's registration process; and
>
> (2) for each registered qualifying patient who has specified that the primary caregiver will be allowed under state law to cultivate marihuana for the qualifying patient, 12 marihuana plants kept in an enclosed, locked facility; and
>
> (3) any incidental amount of seeds, stalks, and unusable roots.

MCL 333.26424.

A trial court must conduct an evidentiary hearing prior to trial to determine if a defendant is entitled to § 4 immunity, and it is a question of law for the trial court. *People v Jones*, 301 Mich App 566; 837 NW2d 7 (2013), relying on *Kolanek, supra.*

2. FACTUAL DISPUTES REGARDING § 4 IMMUNITY MUST BE RESOLVED BY THE TRIAL COURT.

The MMMA does not set forth a procedure for determining factual disputes that arise in an evidentiary hearing regarding § 4 immunity. In *Jones, supra,* the Court of Appeals was asked to identify who should decide questions of fact with regard to § 4 immunity. The Court of Appeals looked to *Kolanek, supra* for guidance and concluded that the trial court should act as fact finder. *Jones*, p. 577. It acknowledged that in general, questions of fact in a criminal case are for the jury to decide. *Jones*, p. 573. However, there are situations in which the trial court must make findings of fact, such as with motions to suppress evidence, whether consent to search was valid, and whether a defendant was entrapped. *Jones*, p. 574. The Court of Appeals also looked to the language of § 4, which, provides immunity from arrest. If this provision is to have any meaning, the Court reasoned, the question of immunity must be decided at the earliest stage of investigation or court proceedings. Thus, it concluded, the issue of § 4 immunity, both

law and facts, should be made by the trial court, even as early as at the preliminary examination.. *Jones*, p. 576-577.

3. THE FACTUAL DISPUTES REGARDING § 4 IMMUNITY MADE BY THE TRIAL COURT MAY BE APPEALED.

The trial court's factual findings made in the context of a § 4 immunity evidentiary hearing are appealable.

In *People v Fyda*, 288 Mich App 446; 793 NW2d 712 (2010), the defendant appealed the trial court's denial of his motion to dismiss due to entrapment. The Court of Appeals stated that whether entrapment occurred is determined by considering the facts of each case and is a question of law for the court to decide de novo. The trial court must make specific findings regarding entrapment, and the Court of Appeals would review those findings under the clearly erroneous standard.

Given the reasoning that factual issues that arise in evidentiary hearings regarding § 4 immunity and the defense of entrapment are to be decided by the trial court, it is only reasonable that factual findings on immunity hearings would be reviewable on appeal, just as those made during hearings regarding entrapment.

4. A DEFENDANT'S POSSESSION OF A VALID REGISTRY IDENTIFICATION CARD ESTABLISHES A PRESUMPTION THAT HE/SHE IS ENGAGED IN THE MEDICAL USE OF MARIJUANA IN ACCORDANCE WITH THE ACT FOR PURPOSES OF § 4 AND SHOULD BE ALLOWED TO ESTABLISH THE SAME PRESUMPTION UNDER § 8.

The immunity provision of § 4, the MMMA provides that a qualifying patient or caregiver is presumed to be engaged in the medical use of marijuana if he/she has possession of a

registry identification card and is in possession of the amounts not exceeding the statutory limits. MCL 333.26424(d)(1) and (2). The presumption may be rebutted by evidence that the defendant's "conduct related to marihuana was not for the purpose of alleviating the qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition, in accordance with this act." MCL 333.26424(d)(2).

The § 8 affirmative defense is presumed valid if the defendant presents evidence that:

> 1. A physician has stated that, in the physician's professional opinion, after having completed a full assessment of the patient's medical history and current medical condition made in the course of a bona fide physician-patient relationship, the patient is likely to receive therapeutic or palliative benefit from the medical use of marijuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition;
>
> 2. The patient and the patient's primary caregiver, if any, were collectively in possession of a quantity of marihuana that was not more than was reasonably necessary to ensure the uninterrupted availability of marijuana for the purpose of treating or alleviating the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition; and
>
> 3. The patient and the patient's primary caregiver, if any, were engaged in the acquisition, possession, cultivation, manufacture, use, delivery, transfer, or transportation of marijuana or paraphernalia relating to the use of marijuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition.

MCL 333.26428(a).

While a registry identification card is not required to raise the § 8 affirmative defense (*Kolanek,* p. 403), it is Appellant's position that a defendant possessing such a card should be entitled to the presumption contained in § 4 when raising the § 8 affirmative defense. As discussed above, the § 4 rebuttable presumption is that a qualifying patient or caregiver is engaged in the medical use of marijuana if he/she has possession of a registry identification card and is in possession of amounts not exceeding the statutory limits. MCL 333.26424(d)(1) and (2). The first requirement under § 8 is that:

> A physician has stated that, in the physician's professional opinion, after having completed a full assessment of the patient's medical history and current medical condition made in the course of a bona fide physician-patient relationship, the patient is likely to receive therapeutic or palliative benefit from the medical use of marijuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition.

MCL 333.26428(a)(1).

The language of 333.26428(a)(1) mirrors the language found on the physician's certification that must be provided to and verified by the State. **Appendix p. 67a**. Therefore, a defendant possessing a registry identification card who raises the § 8 affirmative defense should be entitled to the presumption that he/she is involved in the medical use of the marijuana, which would be rebutted if the prosecution could prove that the defendant was not in compliance with MCL 333.26428(a)(2) and (3). Allowing a defendant the rebuttable presumption of medical use of marijuana if he/she has a registry identification card would encourage medical marijuana users to register with the State and abide by the rules and regulations enacted by the State, as well as to comply with the intention of the electorate, as discussed below.

5. ASSUMING *ARGUENDO* THAT A DEFENDANT'S POSSESSION OF A VALID REGISTRY IDENTIFICATION CARD DOES NOT ESTABLISH ANY PRESUMPTIONS FOR PURPOSES OF § 4 OR § 8, A DEFENDANT'S EVIDENTIARY BURDEN TO ESTABLISH IMMUNITY UNDER § 4 OR AN AFFIRMATIVE DEFENSE UNDER § 8 WOULD INCLUDE PROOF OF MEDICAL USE OF THE MARIJUANA, WHICH WAS NOT INTENDED BY THE ELECTORATE.

As this Court is well aware, the MMMA was proposed in a citizen's initiative petition that was elector-approved in November 2008 and became effective December 4, 2008. *Kolanek*, p. 393. Since the MMMA was the result of a voter initiative, the Court's goal is "to ascertain and give effect to the intent of the electorate, rather than the Legislature . . . . [It] must give the

words of the MMMA their ordinary and plain meaning as would have been understood by the electorate." *Kolanek*, p. 397.

There is no requirement in the MMMA that a caregiver have contact with a medical marijuana patient's physician, or that he/she be privy to the patient's medical condition for which the medical marijuana was recommended. While some would imply that this contact is implied in the statute, Appellant does not believe that is true. There are no requirements that caregivers have any special education or training; they are common people. Furthermore, HIPAA provides confidentiality for patients. 42 USC 1320d, *et seq*. Appellant compares a caregiver to a pharmacist—the patient presents a registration identification card ("prescription") and the caregiver fills it. A pharmacist does not have access to a patient's confidential records or know the medical condition for which the drug is prescribed. Why would a caregiver be required to have more responsibilities or knowledge than a pharmacist? Certainly the electorate would not have understood this to have been a requirement.

That being said, the facts a defendant must prove to benefit from the immunity provision of § 4 or to assert the affirmative defense of § 8 are set forth in the statute at MCL 333.26424(a) and (b) and MCL 333.26428(a).

To have immunity as a patient, the MMMA requires evidence that:

- The defendant has been issued and possesses a registry identification card;
- The defendant does not possess more than 2.5 ounces of usable marijuana, and
- If the defendant has not selected a primary caregiver, that he or she possesses no more than 12 marijuana plants that are kept in an enclosed, locked facility.

MCL 333.26424(a).

To have immunity as a caregiver, the MMMA requires evidence that:

- The defendant has been issued and possesses a registry identification card;

- The defendant possesses an amount of marijuana that does not exceed 25 ounces of usable marijuana for each qualifying patient to whom he or she is connected through the department' registration process; and

- For each qualifying patient, no more than 12 marijuana plants kept in an enclosed, locked facility.

MCL 333.26424(b).

It is the position of the Appellee, trial court, and Court of Appeals that in addition to the above, a defendant must also prove medical use of the marijuana. Appellant disagrees. The statute makes is clear that possession of a registry identification card creates a presumption that the marijuana is being used for medical purposes. This is supported by the fact that both subsections give a defendant immunity from *arrest* if he or she presents the registry identification card and photo identification to a police officer. MCL 333.26424(a) and (b). This, taken together with the presumptions set forth in MCL 333.26424(d)(1) and (2) illustrate that it was not the intent that a defendant prove that the marijuana was being used for medical purposes to be immune from prosecution, unless the prosecution rebuts the presumption, at which time the defendant would then have to produce medical evidence.

With regard to the § 8 affirmative defense, a patient or caregiver must prove:

> 1. A physician has stated that, in the physician's professional opinion, after having completed a full assessment of the patient's medical history and current medical condition made in the course of a bona fide physician-patient relationship, the patient is likely to receive therapeutic or palliative benefit from the medical use of marijuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition;
>
> 2. The patient and the patient's primary caregiver, if any, were collectively in possession of a quantity of marihuana that was not more than was reasonably necessary to ensure the uninterrupted availability of marijuana for the purpose of treating or alleviating the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition; and

3. The patient and the patient's primary caregiver, if any, were engaged in the acquisition, possession, cultivation, manufacture, use, delivery, transfer, or transportation of marijuana or paraphernalia relating to the use of marijuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition.

MCL 333.26428(a).

A registry identification card is not required to establish a § 8 defense. If a defendant does not possess a card, Appellant concedes that he/she must present medical evidence to fulfill the § 8 requirements. However, as discussed above, it is Appellant's contention that in the situation where a defendant possesses a registry identification card but is not entitled to immunity under § 4, he/she should be afforded the rebuttable presumption from MCL 333.26424(d)(1) or (2).

6. THE VERIFICATION PROVISION OF § 6 OF THE ACT PLAYS A ROLE IN ESTABLISHING ENTITLEMENT TO AN AFFIRMATIVE DEFENSE UNDER § 8, WHILE THE CONFIDENTIALITY PROVISION OF § 6 PLAYS NO ROLE AS TO IMMUNITY OR AN AFFIRMATIVE DEFENSE.

The MMMA provides the following verification requirements:

The department shall verify the information contained in an application or renewal submitted pursuant to this section, and shall approve or deny an application or renewal within 15 days of receiving it. The department may deny an application or renewal only if the applicant did not provide the information required pursuant to this section, or if the department determines that the information provided was falsified. Rejection of an application or renewal is considered a final department action, subject to judicial review. Jurisdiction and venue for judicial review are vested in the circuit court for the county of Ingham.

MCL 333.26426(c)

A copy of the application is attached at **Appendix p. 65a-67a.** The information the department must verify includes the patient and caregiver's acknowledgment that if he or she provides false information, they could be criminally charged. The application also contains

medical information and an attestation from a physician that the patient was fully assessed, examined, and that in the doctor's opinion, the patient is likely to receive therapeutic or palliative benefit from the medical use of marijuana to treat or alleviate the patient's debilitating medical condition or symptoms associated with the debilitating medical condition.

Appellant believes the verification requirements should assist a defendant in establishing the first element of an affirmative defense under § 8 if he/she is in possession of a registry identification card.[1]

The Act also contains the following confidentiality provision:

> (1) Subject to subdivisions (3) and (4), applications and supporting information submitted by qualifying patients, including information regarding their primary caregivers and physicians, are confidential.
>
> (2) The department shall maintain a confidential list of persons to whom the defendant has issued registry identification cards. Except as provided in subdivisions (3) and (4), individual names and other identifying information on the list is confidential and is exempt from disclosure under the freedom of information act . . . .
>
> (3) The department shall verify to law enforcement personnel whether a registry identification card is valid, without disclosing more information than is reasonably necessary to verify the authenticity of the registry identification card.
>
> (4) A person, including an employee or official of the department or another state agency or local unit of government, who discloses confidential information in violation of this act is guilty of a misdemeanor . . . . Notwithstanding this provision, department employees may notify law enforcement about falsified or fraudulent information submitted to the department.

MCL 333.26426(h).

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[1] "A physician has stated that, in the physician's professional opinion, after having completed a full assessment of the patient's medical history and current medical condition made in the course of a bona fide physician-patient relationship, the patient is likely to receive therapeutic or palliative benefit from the medical use of marijuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition." MCL 333.26428(a)(1).

Appellant does not believe that this confidentiality section plays a role in establishing immunity or an affirmative defense.

7. THE COURT OF APPEALS ERRED IN CHARACTERIZING A QUALIFYING PATIENT'S PHYSICIAN AS ISSUING A PRESCRIPTION FOR, OR PRESCRIBING MARIJUANA.

The federal government classifies marijuana as a Schedule 1 drug, which means that licensed physicians cannot legally prescribe it. 21 USC 812(c). The Court of Appeals erred in characterizing a physician's recommendation as a prescription.

8. THE TRIAL COURT AND COURT OF APPEALS ERRED IN HOLDING THAT APPELLANT WAS NOT ENTITLED TO § 4 IMMUNITY OR TO RAISE AN AFFIRMATIVE DEFENSE UNDER § 8 WHEN APPELLANT MET HIS BURDEN OF PROOF AT THE EVIDENTIARY HEARING.

The trial court denied Appellant's motion to dismiss the charges under § 4 of the MMMA because it found that he had too much marijuana, the room had not been locked, and he was not growing it for the purpose of treating a debilitating medical condition for either himself or the other five people. This was clearly error of both fact and law.

As discussed above, under § 4, a primary caregiver who has been issued and possesses a registry identification card for himself and/or others is immune from prosecution so long as:

1. He does not possess more than 2.5 ounces of usable marijuana for each qualifying patient;

2. He does not possess more than 12 marihuana plants for each registered qualifying patient; and

3. The plants are kept in an enclosed, locked facility.

MCL 333.26424(b).

There is a presumption that a primary caregiver is engaged in the medical use of marijuana in accordance with the act if: (1) he is in possession of a registry identification card; and (2) he is in possession of an amount of marijuana that does not exceed the amount allowed under the Act. MCL 333.26424(d). The presumption may be rebutted by evidence that conduct related to the marijuana was not for the purpose of alleviating the qualifying patient's debilitating medical condition or symptoms. MCL 333.26424(d)(2).

In this case, there is no question that Appellant was in possession of registry identification cards for five patients, as well as himself. **Appendix p. 30a-32a, 37a, 39a.** Therefore, he was allowed to possess up to 15 ounces (425.24 grams[2]) of usable marijuana and up to 72 plants.

The parties stipulated that Appellant possessed 104.6 grams of usable marijuana, which is equal to 3.69 oz., well below the amount allowed. **Appendix p. 39a.** The contested facts were the amount of plants and whether they were kept in a locked room.

Appellant testified that he had 71 plants and six pots with stalks only and they were kept in a wing of the home that was locked. **Appendix p. 38a, 40a, 41a.** (Under the Act, Appellant would have been allowed to have 72 plants). Appellee presented no evidence to the contrary, but did cross-examine Appellant about a police officer's testimony at the preliminary exam in which he testified that 77 plants had been confiscated and that the room had not been locked. **Appendix p. 40a-41a.**

The trial court made findings of fact that Appellant had too many plants and they were not in a locked room. This was error. The only evidence properly before the Court was Appellant's testimony that showed he was in compliance with the MMMA. The police officer's testimony at the preliminary examination was not properly before the Court. The court could not

[2] 1 gram = .0352739619 ounces.

assess the credibility of the police officer compared to the Appellant. (It is interesting to Appellant that the police have lost photographs of the plants, so it is impossible to count how many were confiscated. Furthermore, one of the investigating officers in this case was later fired for perjury in another case.)

Additionally, the trial court erred in finding that Appellee had successfully rebutted the presumption that Appellant was in compliance with the Act because Appellant could not identify the debilitating medical condition for himself or the other five people. Appellant did not have to present that evidence because he was in possession of a registry identification card, he did not possess more plants or usable marijuana than allowed by statute, and the plants were in a locked wing of his home. Since Appellant had been in compliance with the Act, he did not have to prove any medical evidence. Additionally, the trial court denied Appellant's request to hire an expert to testify about medical marijuana and his patient's medical conditions, effectively precluding him for proving this element, if it in fact needed to be proved. **Appendix p. 11a.**

If this Court accepts Appellant's argument that a defendant in possession of a registry identification card should be entitled to the presumption of medical use found under § 4 in a § 8 motion, then the trial court also erred in denying Appellant's motion to use the § 8 affirmative defense at trial, where the jury would have to decide if the amount of marijuana was "reasonably necessary" under the Act.

Relief Requested

Appellant seeks reversal of the trial court and Court of Appeals with instructions to allow the jury to determine the factual issues at dispute and then rule on the immunity issue.

Respectfully submitted,

FREDERICK J. MILLER (P41207)

NANCY E. MILLER (P47860)

Dated: August 4, 2014