STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED August 10, 2010
V	No. 293397 Barry Circuit Court
JUSTIN J. MALIK, Defendant-Appellee.	LC No. 09-100048-FH

Before: STEPHENS, P.J., AND GLEICHER AND M.J. KELLY, JJ.

PER CURIAM.

In this case, the prosecution appeals by leave granted the trial court's order, which invalidated MCL 257.625(8) on due process grounds. We reverse and remand.

The prosecution presents only one issue on appeal, arguing that the trial court erroneously invalidated MCL 257.625(8) on due process grounds in contravention of our Supreme Court's decision in *People v Derror*, 475 Mich 316; 715 NW2d 822 (2006). We review constitutional challenges de novo. *People v Hrlic*, 277 Mich App 260, 262; 744 NW2d 221 (2007). "Statutes are presumed to be constitutional unless there is a clear showing of unconstitutionality." *People v Dewald*, 267 Mich App 365, 382; 705 NW2d 167 (2005).

At approximately 9:50 p.m. on October 17, 2008, defendant's automobile collided with Christopher Yonkers's motorcycle on M-43 near Usborne Road in Barry County, Michigan. Yonkers died due to "atlanto-occipital dislocation" or an injury where his head connected with his neck. At the scene, Michigan State Police Trooper Michael Behrendt smelled intoxicants on defendant. Defendant admitted that he had consumed three beers before driving, with the last beer approximately 30 minutes before the accident. Trooper Behrendt administered three field sobriety tests on defendant, and Trooper Behrendt was "satisfied" with the results. Trooper Behrendt, nonetheless, believed that defendant was intoxicated based on "horizontal gaze nystagmus."[1]

[1] At the preliminary examination, Trooper Behrendt explained "horizontal gaze nystagmus":

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At the preliminary examination, the parties stipulated to the admission of defendant's subsequent blood test, which contained the presence of alcohol and marihuana. Defendant's blood alcohol content was .01 percent. At a subsequent motion hearing, Michigan State Police Trooper Ernest Felkers testified that defendant admitted to smoking marihuana at some point after coming home from work at 3:30 p.m. on the day in question. Defendant's blood test revealed four nanograms of parent tetrahydrocannibinol (THC), and 15 nanograms of 11-carboxy-THC. Dr. McCoy opined that the THC levels in defendant's blood were consistent with defendant's claim that he last smoked marihuana at 4:00 or 5:00 p.m. McCoy nonetheless "could not reach a final conclusion whether or not THC caused any impairment in this situation."

Defendant was charged, as an habitual offender, second offense, MCL 769.10, with operating a vehicle while intoxicated and causing death, MCL 257.625(4)(a), operating a vehicle with a suspended or revoked license and causing death, MCL 257.904(4), and negligent homicide, MCL 750.324. In order to secure a conviction for violation of MCL 257.625(4)(a), the prosecution sought to prove that defendant violated MCL 257.625(8).MCL 257.625(8) criminalizes the operation of a motor vehicle by an individual who has any amount of a schedule I controlled substance in his or her body, regardless of whether that individual has exhibited signs of impairment. MCL 333.7211 provides a general definition of schedule 1 controlled substances, while MCL 333.7212 designates specific substances as schedule 1 controlled substances. THC is one such schedule 1 controlled substance. Furthermore, our Supreme Court previously concluded in *Derror* that 11-carboxy-THC qualified as a controlled substance. *Derror*, 475 Mich at 319-320.

Defendant filed a number of pretrial motions, including a challenge to the constitutionality of MCL 257.625(4). At the subsequent hearing, defendant primarily argued that the statute was unconstitutional because there was no rational basis for criminalizing the operation of a motor vehicle while 11-carboxy-THC is present in the body. Following the July 7, 2009 motion hearing, the trial court ruled that the prosecution had to prove that defendant was under the influence of marihuana and/or marihuana and alcohol at the time of the accident. In a subsequent written opinion and order, the trial court concluded that "MCL 257.625(8) is fundamentally unfair, does nothing to promote public safety, and bears no rational relationship to any legitimate governmental interest," and it invalidated MCL 257.625(8) on due process grounds. In reaching its conclusion, the trial court first observed that our Supreme Court found that MCL 257.625(8) passed constitutional muster in *Derror*, 475 Mich at 316; however, the trial court held that our Supreme Court's statements on the due process issues constituted obiter dictum, and were not binding. The trial court's ultimate decision to invalidate MCL 257.625(8)

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> When there's alcohol and some drugs present in a person's system, certain physiological effects occur that can't be controlled by the human body. One of these is when . . . a person is told to follow a stimulus. If there is alcohol present, the eyes will lack smooth pursuit . . . instead of following the stimulus smoothly they will start and stop. There would be an onset of nystagmus, which is the involuntary jerking on the eyes, prior to 45 degrees, and there will also be nystagmus at maximum deviation which is when a person looks as far left or right away from center as possible.

was based on a rational basis analysis, where it concluded in part that "[t]here is no rational basis between prevention of impaired driving and criminalizing consumption or passive inhalation of a drug which occurred days or weeks prior to the driving, long after any impairment ended."

The prosecution appealed from the trial court's decision. After oral arguments were held in this Court, our Supreme Court issued its opinion in *People v Feezel*, ___Mich ___; ___ NW2d ___ (Docket No. 138031, entered June 8, 2010). Of relevance to the present case, the Court in *Feezel* overturned the portion of *Derror* that held that 11-carboxy-THC constitutes a controlled substance pursuant to MCL 333.7212. A review of defendant's argument before the lower court reveals that defendant's entire argument regarding constitutionality was premised on the fact that, unlike THC, 11-carboxy-THC can remain in the system for weeks after passive inhalation and has no pharmacological effect. The trial court found the statute unconstitutional because of the inclusion of 11-carboyxt-THC. Consequently, the trial court's holding must be reversed in light of *Feezel*. Because MCL 333.7212 no longer classifies 11-carboxy-THC as a controlled substance, defendant's concerns about the rational basis of the legislation have been alleviated.

Defendant has not alleged that it is unconstitutional to criminalize operating a motor vehicle while under the influence of THC. Consequently, we hold that the trial court's ruling regarding the constitutionality of MCL 333.7212 must be reversed and this matter is remanded for trial. At trial, the evidence of the positive test for 11-carboxy-THC is inadmissible as it is now irrelevant. However, the evidence of the presence of THC in defendant's system is still relevant in determining whether he was operating his motor vehicle while intoxicated.

In reaching our conclusion, we also reject the trial court's reliance on the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq.*, to support its ruling. The trial court noted that, by definition, a schedule I substance has no accepted medical use. Therefore, the court reasoned that it was improper to classify marihuana as a schedule I substance in light of the passage of the MMMA. Although there may ultimately be a need to determine whether the MMMA alters the current legal classification of marihuana, the present case does not require us to address that topic. The charged offenses occurred on October 17, 2008, before the MMMA's effective date of December 4, 2008. MCL 333.26421. There is no indication that the Legislature intended the MMMA to apply retroactively. *People v Conyer*, 281 Mich App 526, 529; 762 NW2d 198 (2008). Therefore, at the time of the alleged offense, there is no evidence that marihuana did not fall within the statutory definition of a schedule I substance.

Reversed and remanded. We do not retain jurisdiction.

/s/ Cynthia Diane Stephens
/s/ Elizabeth L. Gleicher
/s/ Michael J. Kelly