Court of Appeals, State of Michigan

ORDER

People of MI v Brian Bebout Reed

Docket No. 296686

LC No. 09-002368 FH

Donald S. Owens
Presiding Judge

Peter D. O'Connell

Patrick M. Meter
Judges

The Court orders that the opinion in this case is hereby AMENDED to correct a clerical error in the caption. The correct release date for this opinion is August 30, 2011, not July 30, 2011. In all other respects, the opinion remains unchanged.

The Clerk is directed to provide a copy of this order to the Reporter's Office so the change can be incorporated into the opinion during the publishing process.

A true copy entered and certified by Larry S. Royster, Chief Clerk, on

AUG 31 2011

Date

Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v BRIAN BEBOUT REED, Defendant-Appellant.	FOR PUBLICATION July 30, 2011 9:05 a.m. No. 296686 Montmorency Circuit Court LC No. 09-002368-FH

Before: OWENS, P.J., and O'CONNELL and METER, JJ.

METER, J.

Defendant appeals by leave granted from the denial of a motion to dismiss a charge of manufacture of marijuana, MCL 333.7401(2)(d)(iii). We affirm.

This case requires us, in part, to consider the applicability of the affirmative-defense portion of the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*. See MCL 333.26428(a). Defendant's marijuana plants were discovered before any physician authorization, but defendant was not arrested until after he had obtained physician authorization, as well as a registry identification card from the Michigan Department of Community Health (MDCH). See MCL 333.26424. We stated in *People v Kolanek*, ___ Mich App ___; ___ NW2d ___; 2011 WL 92996 (2011), lv granted 489 Mich 956; 798 NW2d 509 (2011), slip op at 7, that the relevant deadline for obtaining the physician's statement required to establish the affirmative defense in MCL 333.26428 was the time of a defendant's arrest. We now extend that ruling and hold that, for the affirmative defense to apply, the physician's statement must occur before the commission of the purported offense. We further hold that defendant has no immunity under MCL 333.26424 because defendant did not possess a registry identification card at the time of the purported offense.

The facts in this case are undisputed. Defendant suffers from chronic back pain due to a degenerative disk disease for which he underwent surgery over a decade ago. Upon the passage of the MMMA, defendant began to inquire about the possibility of becoming registered to use marijuana to help relieve his pain. He began at Thunder Bay Community Health Service, the clinic that he generally attended for treatment of his condition. However, two separate doctors there told him that they would not be issuing any certifications for medical marijuana because they received federal funding. Defendant searched for another place to receive certification

following these initial consultations, but he had not formally consulted with another doctor before his marijuana was discovered.

On August 25, 2009, the Huron Undercover Narcotics Team (HUNT), during an aerial surveillance, spotted six marijuana plants growing at defendant's residence. At that time, defendant had not received any certifying statement by a physician. See MCL 333.26428(a)(1). On September 16, 2009, defendant finally received a certification to use medical marijuana from a doctor. He received his registry identification card from MDCH on October 6. Ten days later, on October 16, he was arrested and charged with the manufacture of marijuana.

Defendant filed a motion to dismiss the charge under MCL 333.26428(b), arguing that the trial court was obligated to dismiss the case because defendant satisfied all three elements of the affirmative defense. Additionally, defendant argued that he should have been immune from arrest under MCL 333.26424(a). The trial court denied the motion. We then granted leave to appeal.

This case involves statutory interpretation, which we review de novo. *People v Redden*, 290 Mich App 65, 76; 799 NW2d 184 (2010). "Generally, the primary objective in construing a statute is to ascertain and give effect to the Legislature's intent." *Id*. The MMMA was enacted based on an initiative adopted by voters. "The words of an initiative law are given their ordinary and customary meaning as would have been understood by the voters." *Welsh Foods, Inc v Attorney General*, 213 Mich App 459, 461; 540 NW2d 693 (1995). Moreover, "[t]his Court must avoid a construction that would render any part of a statute surplusage or nugatory, and '[w]e must consider both the plain meaning of the critical words or phrases as well as their placement and purpose in the statutory scheme.'" *Redden*, 290 Mich App at 76-77, quoting *People v Williams*, 268 Mich App 416, 425; 707 NW2d 624 (2005).

Defendant first argues that he may use MCL 333.26428(a) as an affirmative defense to the charge of manufacturing marijuana. MCL 333.26428(a) states:

> Except as provided in section 7, a patient and a patient's primary caregiver, if any, may assert the medical purpose for using marihuana as a defense to any prosecution involving marihuana, and this defense shall be presumed valid where the evidence shows 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 marihuana 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 marihuana 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 marihuana or paraphernalia relating to the use of marihuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition.[1]

Defendant argues that under our recent decision in *Kolanek*, he may satisfy the requirement that "[a] physician *has stated* that . . . the patient is likely to receive therapeutic or palliative benefit from the medical use of marihuana," see MCL 333.26428(a)(1) (emphasis added), by obtaining this statement at any time before arrest.

In *Kolanek*, *supra*, slip op at 1, the defendant was arrested after a search of his vehicle revealed eight marijuana cigarettes. He filed a motion to dismiss under MCL 333.26428(b), claiming the § 8 affirmative defense because he used the marijuana to treat his Lyme disease. *Kolanek*, *supra*, slip op at 1-2. The defendant's doctor authorized his marijuana use after his arrest and testified at trial that the amount he had in his possession was reasonable. *Id*., slip op at 2. In affirming the trial court's denial of the defendant's motion to dismiss, this Court held that "the language in MCL 333.26428(a)(1) that '[a] physician has stated' requires that a physician's statement of the benefit of medical marijuana occur prior to arrest." *Kolanek*, *supra*, slip op at 7. Defendant argues that this language validates, for purposes of the § 8 affirmative defense, his doctor's approval, which occurred on September 16, 2009, one month before his arrest. We disagree.

In *Kolanek*, the defendant was charged the day after his marijuana was seized. *Id*., slip op at 1. It appears that the seizure and the arrest were simultaneous; indeed, the *Kolanek* Court gave no indication that it was considering a situation where the crime and arrest were not coterminous. Accordingly, we cannot place substantial emphasis on the *Kolanek* Court's use of the term "arrest" in describing its holding. Moreover, the *Kolanek* Court stated: "[I]t is reasonable to assume that the affirmative defense created in § 8 was intended to protect those who actually had a medical basis for marijuana use recognized by a physician *prior to said use* and was not intended to afford defendants an *after-the-fact exemption for otherwise illegal activities*." *Id*., slip op at 7 (emphasis added). The Court, in making this statement, was clearly focusing on a defendant's purportedly illegal *conduct*, not on the defendant's arrest. We note that statutes should be construed so as to avoid absurd results. *McAuley v General Motors Corp*, 457 Mich 513, 518; 578 NW2d 282 (1998), abrogated in part on other grounds by *Rafferty v Markowitz*, 461 Mich 265, 272 n 6; 602 NW2d 367 (1999). It would qualify as absurd if it were possible to assert the § 8 affirmative defense by obtaining a physician's statement after the crime

[1] Defendant's compliance with MCL 333.26428(a)(2) and (3) are not at issue here.

has been committed but before an arrest has been made.[2] The law would provide less incentive to obtain a qualifying physician's statement if it were construed the way defendant argues. This interpretation would also place too much emphasis on the police decision to arrest a suspect rather than the illegal conduct undertaken by that suspect.

The Oregon Court of Appeals, interpreting that state's affirmative defense contained in ORS 475.319(1), agrees. That court stated: "[W]e conclude that, in order for defendant to have availed himself of the 'medical marijuana' affirmative defense in ORS 475.319(1), his attending physician's advice regarding the use of medical marijuana had to occur *before the incident for which he was arrested . . . .*" *Oregon v Root*, 202 Or App 491, 497; 123 P3d 281 (2005) (emphasis added). We note that *Kolanek* relied on *Root*. See *Kolanek*, *supra*, slip op at 6-7.

In light of the above considerations, we hold that, for a § 8 affirmative defense to apply, the physician's statement must occur before the purportedly illegal conduct.

Generally, a defendant is not barred from asserting a § 8 defense at trial simply because his pretrial motion to dismiss was denied. See the concurring opinion of M. J. KELLY, J., in *People v Anderson*, ___ Mich App ___; ___ NW2d ___; 2011 WL 2202553 (2011), slip op at 15.[3] See also *Kolanek, supra*, slip op at 9 ("As the statute does not provide that the failure to bring, or to win, a pre-trial motion to dismiss deprives the defendant of the statutory defense before the fact-finder, defendant's failure to provide sufficient proofs pursuant to his motion to dismiss does not bar him from asserting the Section 8 defense at trial nor from submitting additional proofs in support of the defense at that time."). However, the *Anderson* Court also held that, when there is no issue of fact to present to a jury that might establish a § 8 defense, "a trial court might be warranted in barring a defendant from presenting evidence or arguing at trial that he or she is entitled to the defense stated under § 8(a)." *Anderson*, *supra*, slip op at 15. The relevant standard is whether, "given the undisputed evidence, no reasonable jury could find that the elements of the § 8 defense had been met." *Id*., slip op at 15-16.

In *Anderson*, it was undisputed that the defendant possessed more than 12 marijuana plants and that some of them were not kept in an enclosed, locked facility. *Id*., slip op at 16. No reasonable jury could have found, given this fact and the applicable law, that the defendant was entitled to assert the § 8 defense. *Id*. Thus, the Court held that "[t]he trial court did not err when it precluded Anderson from presenting a § 8 defense at trial." *Id*. Here, it is undisputed that defendant did not acquire the required physician's statement until after his marijuana had been discovered by HUNT. No reasonable jury could find that defendant is entitled to the § 8 defense, and thus defendant is barred from asserting it at trial.

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[2] In effect, defendant's argument would have us apply the law in a "reverse ex post facto" manner, allowing one who has committed a crime to avoid punishment by taking action to obtain a physician's statement after the illegality of his actions have been discovered.

[3] The majority opinion states that the panel joins in section "II. C. 3." of M. J. KELLY, J.'s concurring opinion, the section at issue here. *People v Anderson*, ___ Mich App ___; ___ NW2d ___; 2011 WL 2202553 (2011), slip op at 1.

Defendant also argues that he should have been immune from prosecution based on § 4 of the MMMA, which states, in relevant part:

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

Defendant's argument fails because at the time of the offense he did not possess a registry identification card. The statute states that "[a] qualifying patient who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty . . . for the medical use of marihuana in accordance with this act . . . ." The statute ties the *prior issuance* and possession of a registry identification card to the medical use[4] of marijuana, and much of the same reasoning that applies to the § 8 timing applies equally to the timing regarding registry identification cards. See, e.g., *Kolanek*, *supra*, slip op at 6-7; see also the prior analysis in this opinion. Defendant did not have the card at the applicable time and therefore is not immune from arrest, prosecution, or penalty.

Affirmed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Donald S. Owens
/s/ Peter D. O'Connell

[4] We note that the definition of "[m]edical use" under the MMMA includes "cultivation." MCL 333.26423(e).