The Michigan Court of Appeals' Holding

Carruthers, the accused, is not entitled to immunity under Section 4 of the MMMA because the marihuana that was possessed was not usable material as defined by the Act.

Defendant possessed an extract of marihuana that was infused into a food product, and thus the material possessed was a substance outside the definition of usable material. Section 4 of the act only protects a registered patient for their possession of usable material and not marihuana or any other form of marihuana that is not within the definition of usable material.

Facts

“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 4 then would prohibit his prosecution. 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.”

The COA’s opinion also indicated that “a forensic 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… 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 COA remanded Mr. Carruthers case back to the Oakland Circuit Court for further proceedings consistent with their opinion.

The Ruling

The protections for immunity from arrest in section 4 extend only to the possession of marihuana that does not exceed 2.5 ounces of usable marihuana:

333.26423 Definitions.
(k) "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.

Therefore any substance or material that is possessed by a caregiver or a patient that is not the dried leaves and flowers of the marihuana plant, and any mixture or preparation, excluding the seeds, stalks and roots of the plant, is a material that is not within the definitions of material that is protected by Section 4 of the MMMA.

All other materials that are not within the definition of usable material, defined above by default, fall into the category of marihuana:

(e) "Marihuana" means that term as defined in section 7106 of the public health code, 1978 PA 368, MCL 333.7106.

Marihuana is defined more broadly in the Michigan statutes and includes all marihuana, specifically marihuana that the medical cannabis community has come to define as unusable.
This ruling says that all of the other material that is not within the limited meaning of usable material, is now defined as unusable or contained within the broader definition of marihuana from the Public Health Code, is material or a substance that, when possessed by a patient or caregiver, subjects the possessor of that substance to arrest and prosecution. Or said another way, the MMMA provides absolutely no protections from arrest for patients or caregivers who possess any form of marihuana that is not “usable marihuana” or the “seeds, stalks, and roots of the plant,” which are excluded from the definition of usable marihuana, but explicitly allowed within sections 4(a) and 4(b).

The Meaning for the Patients and Caregivers

We have heard people say that the recently harvested soaking wet plants hanging from the ceiling drying, the uncured flower in that jar, that big bag of leaves, is all unusable material and should not count against the section 4 limits of no more than 2.5 ounces of usable material.
Well this is no longer true.

Instead, the scenarios described above, or the possession of any marihuana material in any form in the stages immediately prior to the final drying of the leaves and flowers of the marihuana plant subjects a registered patient or caregiver to arrest and prosecution.

Question: What is a registered patient or caregiver allowed to possess and still have immunity from arrest?

Answer: Immunity from the arrest, prosecution and any penalty associated with the prohibitions outlines in Marihuana laws in Michigan MCL 333.7401-333.7403, applies to

I. 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).

II. 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).

III. A Registered Patient or a Registered Caregiver is entitled to the protections of the Section 4 immunity provisions for the possession of not more than 2.5 ounces of usable material.

IV. The usable material a registered patient or registered caregiver may possess and still be immune from arrest is defined in MCL 333.26423 Definitions. “(k) "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.

V. Anything else that does not meet the definition of the dried leaves and flowers of the marihuana plant, and any mixture or preparation thereof, would not provide immunity from arrest, prosecution or the penalties referenced in MCL 333.7401-333.7403.

Question: What types of marihuana if possessed will exclude a patient from the immunity protections of section 4 of the Act?

Answer: Any other delivery system that does not come directly from the dried leaves and flowers of the marihuana plant.

Short List: Edible marijuana products, topical cannabis products, oil- or cream-based preparations that are infused similarly to edible products, by heating and infusing directly, or other infusion with an extract, all of the non-psychoactive oils, lotions,

butters, vaporizer pens, filled with essential extracts of cannabis, any other mixture of the extracts (instead of directly from the plant itself),other spray devices, or other delivery systems that utilize the extractions from the plant and not the dried leaves and flowers directly (without the extraction) .

Attorney Michael Komorn - Opinion

The Court of Appeals completely missed the point of medical use, this decision is a huge set back to medical marijuana patients and it targets any patient who utilizes a delivery system other than smoking or vaporizing. I remember a prosecutor saying a while back that she found it difficult to imagine that 55,000 (at that time) patients were recommended to smoke by doctors.
I remember thinking how silly this comment was, knowing how many patients were finding relief from ingesting other non-smokeable forms of cannabis.

Since 2008 the medical use of cannabis and its various applications has been evolving and the caregivers providing for the patients have become more and more sophisticated in perfecting alternative delivery systems and dosing. After five years patients have multiple options to use and apply cannabis, some of which are even non-psychoactive, exclusively intended for external use. This is good for patients.

Unfortunately today's decision ignores all the hard work the Michigan patient-caregiver system has provided to the patient community in the research and development of a multitude of choices of delivery systems for cannabis. The first read of the headlines and the media reports seemed to suggest that these other delivery systems, such as food items would be included within the protections outlined in the immunity section of the MMMA. Instead, the words “the extractions of the plant are not considered usable material” really means that the only marihuana that a registered patient and caregiver can possess and be within compliance with Section 4 of the act is that material that meets the definition of usable material. Or said another way, the possession of unusable material is not protected by the Section 4 of the MMMA. That the protections from arrest, prosecution or any penalty in Section 4 only includes the possession of no more than 2.5 ounces of usable material. The court found that the unusable material is not material that is within the section 4 immunity protections.

In its analysis finding that Brownies were not usable marihuana under the MMMA and patients and caregivers in possession of any material that is not the “dried leaves and flowers of the marihuana plant” the Court states:

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.

Notably, the MMMA's definition of "usable marihuana" excludes much of the 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.

Utilizing this very strange analysis in the contrast of the definitions of marihuana and usable marihuana the Court ignored logic and reason and found that section 4 only protects the possession of no more than 2.5 ounces of usable material, and not those things that have commonly become known as unusable material:

"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)." From the opinion.

To me the most egregious portions of the opinion, and my biggest disagreement with the COA, is the several references to the intent of the voters and the health welfare of its citizens, while at the same time rendering an opinion that will effectively deny immunity for the medicinal use of marijuana by a delivery system other than smoking or vaporizing:

"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. 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."

The logic that it is too difficult to test these other methods of delivery, the extracts of the plant, and the mixtures with the extracts, so it is therefore best to just call it all material that is not usable and therefore not within section 4 immunity protections is a cop out.

I also strongly disagree with the idea that that the Court of Appeals has any idea of what it is talking about when it claims that given the **unmeasurable nature of the highly potent THC contained in such edibles, the health and welfare of Michigan citizens would be threatened if they did not reach the decision they did.** Here the Court

speaks in the voice of the uninformed, without a relevant citation, nor even an explanation of the threat.

1. The use of the word unmeasurable only refers to the law enforcement agency not being able to measure the potency of THC in edibles.

Foot Note 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."*

Obviously a patient or caregiver on behalf of the patient knows how much THC is within the edible, because they made it. The suggestion that the edible is unmeasurable is not really an accurate statement.

2. The suggestion that the edible is "highly potent in THC" conflicts with the Courts statement that it is unmeasurable. How can the Court honestly say that the edible is highly potent in THC, when they have conceded that they cannot measure the level of THC just that THC is detectable? (see foot note 8)

3. The statement that citizens of Michigan will be threatened if edibles are considered protected under the act is insulting. The Court can't measure the levels of THC in the edible, they can't identify why it is threatening, yet feel obligated to protect the citizens of Michigan from patients and caregiver by making them arrestable if they possess such items. I adamantly disagree with this conclusion and believe that the voters of Michigan who overwhelmingly supported the medical use of marihuana contemplated the possession and use of edibles as behavior that should be protected from consequence when they voted for the MMMA in 2008.

4. The suggestion here is that the voters of Michigan would prefer that a cancer patient who has five brownies that weigh more than 2.5 ounces but contain only a few grams of THC should not be protected against from arrest, because the law enforcement community doesn't have the capabilities to verify the THC quantities, is simply not honest. Or said another way, this decision is needed so the government can arrest the patient because if they don't, the patient won't be safe.

5. I also strongly disagree with the Court of Appeals that prosecutions for possession and use of edibles containing higher-than-allowed quantities of THC would be systematically thwarted.
The suggestion here is that the voters of Michigan want a continued war on medical marihuana and that support for the prosecution of the possession of edibles by medical marihuana patients is an actual desire of the Michigan voters.

6. All of these justifications are flawed, cite no authority for the Court's position, and sound more of a political statement than a legal decision.

7. It is dishonest to suggest that high concentrations of THC absorbed through the skin could ever be considered dangerous or warrant concern for the health and well-being of Michigan citizens when topical's are completely non-psychoactive.

Legislating From The Bench

As we have seen in other Court of Appeals opinions (compared to the Michigan Supreme Court) regarding the MMMA, when the Court states that it is merely interpreting the words in their plain meaning and not legislating from the bench, the paragraphs that usually follow are the Judges legislating from the Bench, the opinion evidences this here:

"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." From the opinion.

Practical Implication of the Opinion

Edible marijuana products, produced by patients and caregivers as an alternate delivery system to smoking or vaporizing, are also subject to arrest. A worst case scenario could be that the police begin looking specifically for these items, knowing that they fall outside the protections of section 4 and allow them to arrest.

Topical cannabis products are oil- or cream-based preparations that are infused similarly to edible products, by heating and infusing directly, or by infusing with an extract. Even though these products are completely non-psychoactive in use, since they do not fall under the definition of usable material as interpreted by the Court of Appeals, they are no longer immune under section 4.

Vaporizer pens, filled with essential extracts of cannabis, have become a popular delivery system for medical cannabis in recent years because of their cleanliness, lack of smell, and ease of titrating dosage. Because these devices rely on high-quality extractions for their purity and consistency of dosage, their possession is no longer immune from arrest (if filled with extract). Even mixing these extracts with plant material is no guarantee of immunity, as the police are likely to assert that it is not flower, leaf, or a mixture or preparation thereof, and force the patient or caregiver to prove their method in court, after arrest.

Capsules containing ground cannabis flower or leaf are the only commonly used method of medical cannabis oral ingestion that remain immune under section 4, and one must plan on the police weighing the entire capsule, not just the contents. In other words, do not pack 2.5 ounces of ground flower or leaf into capsules, as the entire preparation will weigh more than 2.5 ounces, which again falls outside the immunity protections offered by section 4.

Though there may be grounds to argue that the opinion is illogical or ignorant of basic science, I would not rely upon section 4 at this time for any conflict arising from the possession of these edible products, topicals, or other extracts.

In other words and as difficult as it is to say, if registered patients or caregivers possess any other form of marihuana other than the “dried leaves and flowers of the marihuana plant” they will not be afforded the Immunity protections of Section 4 of the MMMA.

The Patient and or Caregiver is Entitled to Assert a Section 8 Affirmative Defense.

Looking for the silver lining in this decision requires a lot of effort. The only good news one could argue is that the case had absolutely no implications on the accused right to present a medical use affirmative defense pursuant to Section 8 of the MMMA.

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.

Unfortunately this case represents a trend in the way the Courts have resolved the disputes over the interpretation of the MMMA. When given the chance to expand the protections from arrest, prosecution or any penalty of the Section 4 immunity provisions,

the Courts have passed. Simultaneously they have lowered the requirements and the standard of proof for the presentation of the medical use, affirmative defense of Section 8.

The other major decisions the Courts have addressed resulting in the limitations of the immunity section are**:**

Bylsma

People v Bylsma - Michigan Supreme Court
People v Bylsma - Court Of Appeals

More than one patient (even husband and wife) growing medical marihuana plants, in an enclosed locked facility are not immune from arrest, but can assert a medical use affirmative defense.

McQueen

People v McQueen – Court Of Appeals
People v McQueen – Michigan Supreme Court

Registered caregiver Section 4 immunity extends only the sale of marihuana to one of his/her (no more than 5) registered patients to whom the caregiver is registered to through LARA.

Foot Note 10 of the Carruthers opinion

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.

The above opinions taken in light of the Carruthers ruling represent the examples of the failed implementation of the MMMA. While it is true that all of the contested issues mentioned above can still be litigated via the section 8 affirmative defense, but did the voters intend for more litigation to evolve with the passing of the MMMA, they expected less. This principle is outlined in the Preamble section of the MMMA and specifically states:

333.26422 Findings, declaration.
(b) Data from the Federal Bureau of Investigation Uniform Crime Reports and the Compendium of Federal Justice Statistics show that approximately 99 out of every 100 marihuana arrests in the United States are made under state law, rather than under federal law. Consequently, changing state law will have the practical effect of protecting from arrest the vast majority of seriously ill people who have a medical need to use marihuana.

I don't believe the 63 percent of Michigan voters who approved the MMMA in 2008 believed a husband and wife who grew their medical marihuana plants in the same basement room should be subject to arrest and dragged into court to defend themselves. I don't believe the voters who passed the MMMA ever envisioned that a patient who possessed or using cannabis edibles should be arrested. I don't believe that the Michigan voters believed that the patient community who would utilize cannabis as a medicine would endorse the only delivery system of cannabis allowed to be smoking or vaporizing. And I believe instead that the voters expected patients to be using a variety of other delivery systems other than smoking.

People v Carruthers - Michigan Court Of Appeals
People v Carruthers – Michigan Supreme Court - Order of Denial