

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

UNPUBLISHED
May 16, 2013

v

ANGELA JEAN FRANCE,

Defendant-Appellee.

No. 309822
Oakland Circuit Court
LC No. 2010-234351-FH

Before: BORRELLO, P.J., and K.F. KELLY and MURRAY, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order dismissing the charge of possession with intent to deliver or manufacture marihuana, MCL 333.7401(2)(d)(iii). We reverse and remand for further proceedings consistent with this opinion.

I. FACTS AND PROCEEDINGS

In September 2010, defendant grew marihuana inside her home as the primary caregiver for her husband, Daniel France, who was the patient. After the police received a complaint that France was selling marihuana from his house, the police went to defendant's home to investigate. Upon searching the premises, the police discovered three marihuana plants in the master bedroom and 17 marihuana plants in the master bathroom.

Defendant was charged with possession with intent to deliver or manufacture marihuana. After being bound over for trial, defendant filed a motion to dismiss in circuit court, arguing that § 8 of the Michigan Medical Marihuana Act, MCL 333.26428, prohibited her prosecution. Initially, the trial court denied defendant's motion to dismiss because it concluded that under *People v King*, 291 Mich App 503; 804 NW2d 911 (2011) rev'd by *People v Kolanek*, 491 Mich 382; 817 NW2d 528 (2012), defendant was not able to use MCL 333.26428 as a defense because she failed to comply with MCL 333.26424 because 1) the marihuana was not in an enclosed, locked facility; 2) the marihuana was equally accessible to both defendant and France; and 3) defendant was in possession of more than 12 marihuana plants. Subsequently however, the trial court, *sua sponte*, decided to reconsider this ruling based on the rule of lenity and requested that the parties brief the issue. Thereafter, the trial court granted reconsideration and entered an order dismissing the charge against defendant. The trial court found that the rule of lenity applied because the interplay between MCL 333.26424 and MCL 333.26428 was unclear and ambiguous. From this order, plaintiff appeals as of right.

II. ANALYSIS

Plaintiff argues that the trial court erred in applying the rule of lenity to the MMMA. A trial court's decision on a motion for reconsideration is reviewed for an abuse of discretion. *People v Walters*, 266 Mich App 341, 352; 700 NW2d 424 (2005). Questions of statutory interpretation and of law are reviewed de novo. *People v Flick*, 487 Mich 1, 9; 790 NW2d 295 (2010).

The rule of lenity "provides that courts should mitigate punishment when the punishment in a criminal statute is unclear." *People v Denio*, 454 Mich 691, 699; 564 NW2d 13 (1997). The rule of lenity applies only if the statute is ambiguous or "in absence of any firm indication of legislative intent." *Id.* at 700 n 12, quoting *People v Wakeford*, 418 Mich 95, 113-114; 341 NW2d 68 (1983). However, the rule of lenity does not apply when construing the public health code provisions, MCL 333.1101 *et seq.*, because the Legislature mandated in MCL 333.1111(2) that those provisions are to be "liberally construed for the protection of the health, safety, and welfare of the people of this state." *Denio*, 454 Mich at 699, quoting *People v Morris*, 450 Mich 316, 326-327; 537 NW2d 842 (1995); see *Morris*, 450 Mich at 327 ("Pursuant to the statutory directive of both the Public Health Code and the Penal Code, we must interpret the [public health code] statute in a manner that most effectively protects the health, safety, and welfare of the people of this state and effects the object sought to be advanced by the statute.").

Under MCL 333.26424(b), a primary caregiver is not subject to arrest, prosecution, or any other penalty when certain conditions are satisfied:

(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 . . . 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, provided that 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 he 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.

However, when a prosecution is maintained, the MMMA defenses are found in MCL 333.26428, which provides in the relevant part:

(a) 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.

(b) A person may assert the medical purpose for using marihuana in a motion to dismiss, and the charges shall be dismissed following an evidentiary hearing where the person shows the elements listed in subsection (a).

The rule of lenity should not have been used because these are public health statutes not subject to the rule, *Denio*, 454 Mich at 699, and moreover, the statutes were not unclear or ambiguous. At the time of the offense, case law indicated that a defendant must be found in compliance with MCL 333.26424 in order to avail herself of the defense in MCL 333.26428, *People v Bylsma*, 294 Mich App 219, 235-236; 816 NW2d 426 (2011) rev'd in part 493 Mich 17 (2012); *King*, 291 Mich App at 510. It is undisputed that defendant was not in compliance with MCL 333.26424 because 20 marihuana plants were seized and defendant allowed France access to the marihuana plants. Thus, it was clear that under *King* and *Bylsma*, defendant could not have availed herself of the defense in MCL 333.26428. Therefore, it was an abuse of discretion for the trial court to evoke the rule of lenity to mitigate punishment when at the time binding case law provided a clear answer.

But, in *People v Kolanek*, 491 Mich 382; 817 NW2d 528 (2012), the Michigan Supreme Court determined that a person need not comply with MCL 333.26424 in order to use the defense of MCL 333.26428:

Accordingly, we hold that to establish the elements of the affirmative defense in § 8 [MCL 333.26428], a defendant need not establish the elements of § 4 [MCL 333.26424]. 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. [*Kolanek*, 491 Mich at 403.]

In this case, defendant properly raised the defense of MCL 333.24648 in a pretrial motion to dismiss. According to the *Kolanek* Court, once the defense is properly raised, the trial court must hold an evidentiary hearing to determine whether “a defendant raise[d] a defense but fail[ed] to present evidence from which a reasonable jury could [have] conclude[d] that the elements of the defense ha[d] been met [If not,] then the defendant is not entitled to the defense instruction and the jury is precluded from considering the defense.” *Kolanek*, 491 Mich at 411. “Conversely, if a defendant produces sufficient evidence of the elements of the defense, then the question whether defendant has asserted a valid defense is for the jury to decide.” *Id.* at 411-412. Thus, “if a defendant raises a § 8 defense, there are no material questions of fact, and the defendant ‘shows the elements listed in subsection (a),’ then the defendant is entitled to dismissal of the charges following the evidentiary hearing.” *Id.* at 412, quoting MCL 333.26428(b). “Alternatively, if a defendant establishes a prima facie case for this affirmative defense by presenting evidence on all the elements listed in subsection (a) but material questions of fact exist, then dismissal of the charges is not appropriate and the defense must be submitted to the jury.” *Id.* (footnote omitted). Consequently, the appropriate remedy is a remand for an evidentiary hearing where the trial court must determine whether defendant may avail herself of MCL 333.24648 as an affirmative defense. *People v Anderson (On Remand)*, 298 Mich App 10, 18; 825 NW2d 641 (2012).

Reserved and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Kirsten Frank Kelly
/s/ Christopher M. Murray