# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellant, | UNPUBLISHED<br>February 10, 2011 |
| v | No. 295497<br>Ottawa Circuit Court |
| BENJAMIN CURTIS WALBURG,<br><br>Defendant-Appellee | LC No. 09-033711-FH |

Before: TALBOT, P.J., and SAWYER and M. J. KELLY, JJ.

PER CURIAM.

The prosecution appeals as of right from an order dismissing a charge of delivery and manufacture of marijuana based on the Michigan Medical Marihuana Act[1] ("MMMA"). We reverse and remand. This appeal has been decided without oral argument.[2]

Benjamin Walburg was charged with the delivery and manufacture of marijuana[3] following the discovery of marijuana plants in his home.[4] At the time of his arrest, Walburg did not have a registry identification card as provided for pursuant to § 4 of the MMMA.[5] Walburg claimed that he used the marijuana to treat a severe anxiety disorder and insomnia and did obtain an affidavit from a physician, after his arrest, regarding Walburg's therapeutic use of marihuana. In granting Walburg's motion to dismiss, the circuit court concluded that Walburg was not required to have a valid registry card to assert an affirmative defense in accordance with § 8 of the relevant statutory provision.[6]

[1] MCL 333.26421 *et seq*.

[2] MCR 7.214(E).

[3] MCL 333.7401(2)(d)(*iii*).

[4] Walburg disputed the number of plants recovered.

[5] MCL 333.26424.

[6] MCL 333.26428.

Although the prosecutor challenges this determination, this Court recently addressed this issue and has ruled in accord with the circuit court's determination.[7] Another panel of this Court ruled, in relevant part:

> [T]he MMMA provides two ways in which to show legal use of marijuana for medical purposes in accordance with the act. Individuals may either register and obtain a registry identification card under § 4 or remain unregistered and, if facing criminal prosecution, be forced to assert the affirmative defense in § 8.
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> The plain language of the MMMA supports this view. Section 4 refers to a "qualifying patient who has been issued and possesses a registry identification card" and protects a qualifying patient from "arrest, prosecution, or penalty in any manner . . . ."[7] MCL 333.26424(a). On the other hand, § 8(a) refers only to a "patient," not a qualifying patient, and only permits a patient to "assert the medical purpose for using marihuana as a defense to any prosecution involving marihuana . . . ." MCL 333.26428(a). Thus, adherence to § 4 provides protection that differs from that of § 8. Because of the differing levels of protection in sections 4 and 8, the plain language of the statute establishes that § 8 is applicable for a patient who does not satisfy § 4.
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> [7] A "[q]ualifying patient is defined as "a person who has been diagnosed by a physician as having a debilitating medical condition." MCL 333.26423(h).[8]

Contrary to the prosecution's contention, Walburg was not required to possess a registry identification card in order to assert an affirmative defense in accordance with § 8 of the statutory provision.[9]

The necessity of possession of a valid registry identification card is the sole issue set forth in the prosecution's statement of question on appeal.[10] While we are not required to address additional arguments by the prosecutor not contained within the statement of questions[11],

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[7] *People v Redden*, ___ Mich App ___; ___ NW2d ___ (Docket No. 295809, issued September 14, 2010).

[8] Slip op at 10.

[9] MCL 333.26428(a) ["less than 5 kilograms or fewer than 20 plants"].

[10] MCR 7.212(C)(5).

[11] *People v Anderson*, 284 Mich App 11, 16; 772 NW2d 792 (2009).

in this instance we elect to do so because sufficient facts are available and the assertions involve a question of law.

The prosecutor argues that Walburg could still be prosecuted because he had 25 plants, which allegedly exceeded the statutory amount. The prosecutor bases this assertion on the statutory language contained in § 4 of the MMMA, which provides in pertinent 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. . . .* [Emphasis added.]

The statutory section relied on by the prosecutor is inapplicable. The correct statutory provision, § 8, permits for the 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."[12] Contrary to the prosecutor's contention, this Court has determined:

> [T]he plain language of the statute does not support that the amount stated in § 4 is equivalent to the "reasonably necessary" amount under § 8(a)(2). Indeed, if the intent of the statute were to have the amount in § 4 apply to § 8, the § 4 amount would have been reinserted into § 8(a)(2), instead of the language concerning an amount "reasonably necessary to ensure . . . uninterrupted availability . . . ." MCL 333.26428(a)(2). Without any evidence on this element of the affirmative defense, the district court could not have properly found the affirmative defense established as a matter of law. There was a colorable question of fact concerning whether the amount possessed was in accordance with the statute.[13]

Based on this reasoning, the limitation of § 4 is not applicable and the quantity of plants possessed is not conclusive. Unfortunately, the Legislature neglected to define the term

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[12] MCL 333.26428(a)(2).

[13] *Redden*, slip op at 14.

"reasonably necessary" within the statute[14], leaving it open to interpretation based on the individual circumstances in each case.

Yet, because this Court has recently made a determination regarding the relevant statutory language, we must conclude that Walburg cannot submit his having obtained a physician's approval of use subsequent to his arrest to raise the affirmative defense. The applicable statutory section[15] provides, in relevant part:

> (a) [A] patient . . . 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:
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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 marihuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition;
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> (2) The patient . . . [was] . . . 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
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> (3) The patient . . . [was] 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.
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> (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).* [Emphasis added.]

This Court has just recently interpreted the statutory language as follows:

> The primary substantive question . . . is how to interpret the requirement in MCL 333.26428(a)(1), that "[a] physician *has stated*" the medical benefit to the

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[14] MCL 333.26423.

[15] MCL 333.26428.

> patient. We conclude that "has stated" requires that the physician's opinion occur prior to arrest. First, because the term is past tense, the initiative must have intended that the physician's opinion be stated prior in time to some event. That even would reasonably be "any prosecution involving marihuana," MCL 333.26428(a), for which the defense is being presented. Thus, because the arrest begins, the prosecution, the physician's opinion must occur prior to the arrest.
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> Furthermore, § 8(a)(1) speaks of a physician stating that "the patient *is* likely *to* receive therapeutic or palliative benefit from the medical use of marijuana [sic]." (Emphasis added.) Thus, the language contemplates a situation where a physician, at the time of providing the statement, is envisioning the future possession and use of marijuana and rendering an opinion that it will benefit the patient when it is later used.
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> The interpretation is also consistent with the fact that the right to bring a motion to dismiss . . . requires a showing at an evidentiary hearing of "the elements listed in subsection (a)." It would not make sense to permit someone to "show the elements in subsection (a)," which requires that a physician "has stated" the benefits, by bringing a physician to the motion hearing to state, for the first time, that the defendant would receive such benefit.[16]

Because we are bound by the holding of this decision[17] and Walburg did not obtain a physician statement before his arrest, we reverse the dismissal of the charges and remand to the trial court for further proceedings.

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

/s/ Michael J. Talbot
/s/ David H. Sawyer
/s/ Michael J. Kelly

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[16] *People v Kolanek*, ___ Mich App ___; ___ NW2d ___ (Docket No. 295125, issued January 11, 2011), slip op at 5-6.

[17] MCR 7.215(J)(1); *Straman v Lewis*, 220 Mich App 448, 451; 559 NW2d 405 (1996).