UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

TICKET NO. FBEH005C
MAGISTRATE JUDGE PATRICIA MORRIS

ANDREW NEECE,

Defendant.
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ORDER GRANTING MOTION TO DISMISS

I. Background and arguments of the parties

On August 12, 2017, Conservation Officer (CO) Sergeant Bobbi Lively had received information from Conservation Officer "Kyle Bader who was working with USFS [United States Forest Service] LEO [Law Enforcement Officer] Mike Phillips upstream of my location." Lively Report 8/12/2017 12:10 pm, Case No. 1799800840. "CO Bader informed [Lively] they observed what they believed to be the occupants of a silver canoe, one wearing American flag shorts, smoking a marijuana joint. CO Bader also informed me the canoe was with two kayaks, one was red, white, and blue." *Id.* A person named Stephens was identified as the occupant of the red, white, and blue kayak; while Defendant Neece was identified as the occupant of a green kayak. The occupants of the silver canoe were not identified in the report but it was established that the canoe and the two kayaks were traveling the river together. CO Sergeant Lively asked who had the

marijuana in the group and Defendant Neece indicated that the marijuana was his and he consented to the Officer searching the dry box in which three marijuana joints were found. The three joints were seized from Defendant Neece and they were "turned over to USFS LEO Mike Phillips." *Id.* Officer Phillips issued Defendant Neece a citation for possession of a controlled substance, marijuana, under 36 CFR 261.53(e). Statement of Probable Cause attached to FBEH005C violation.

Defendant argues that he is entitled to dismissal of his petty offense ticket because he is a licensed medical marijuana user under Michigan's Medical Marijuana Act (MMMA) and because prosecution would violate Congress's specific directive, under the rider to the Consolidated Appropriations Act, not to expend funds to prosecute possession, use, cultivation, or distribution of medical marijuana that is authorized by State law.[1] The government responds that Defendant "was kayaking down a river in the Huron Manistee National Forest when he was observed by law enforcement smoking marijuana. Ultimately, defendant was found to be in possession of three marijuana cigarettes." (Gov. Br. at 3.) The government posits that even if the court were to hold that persons who are acting in compliance with the MMMA should not be prosecuted in federal court, Defendant's motion to dismiss should not be granted because Defendant was not in compliance with the MMMA because he was seen smoking marijuana in a

[1]Defendant does not make any equal protection claim and if he had, it would likely not prevail. *United States v. Brecker*, No. 4:14-CR-250-CDP(TIA), 2015 WL 15653555, at *3 (E.D. Mo. Apr. 8, 2015)(upholding CSA under Tenth Amendment and equal protection challenges and noting that "every federal circuit court to consider the constitutionality of the scheduling of marijuana as a Class I drug also has applied the rational basis standard of review and has upheld the statute."); *accord, United States v. Olea,* No. 14-10304-DPW, 2016 WL 8730167, at *5 (D. Mass. Aug. 12, 2016).

public place. (Gov. Br. at 9.) Defendant replies that there is no allegation that he was not in compliance with the MMMA; thus, dismissal is appropriate.

II. Analysis

In 1969, President Nixon "declared a national 'war on drugs.'" *Gonzales v. Raich*, 545 U.S. 1, 10 (2005)(holding that application of the CSA to intrastate growers and users of marijuana for medical purposes did not violate the interstate commerce clause). "That effort culminated in the passage of the Comprehensive Drug Abuse Prevention and Control Act of 1970." *Id.*[2] Title II of this Act, the Controlled Substances Act (CSA), 21 U.S.C. § 801 et seq., repealed earlier laws and replaced them with a comprehensive regulatory system making it unlawful to manufacture, distribute, dispense, or possess any controlled substance except as authorized by the CSA. *Id.* Controlled substances are grouped into five schedules. 21 U.S.C. § 812. Schedule I (one) substances are the most highly regulated as they have the highest potential for abuse, do not have any currently accepted medical use or treatment in the United States, and there is a lack of accepted safety for use of the drug under medical supervision. § 812(b)(1). At the other end of the spectrum, Schedule V (five) substances are the least regulated because they have a low potential for abuse, they have currently accepted medical uses, and they may be used

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[2]Prior to this time, marijuana and other narcotics were subject only to regulation and revenue laws. In 1906, Congress enacted laws regulating the labeling on medications and prohibited mislabeling or misbranding of drugs traveling in interstate commerce. Then in 1914, the Harrison Narcotics Act required producers, distributers, and purchasers of narcotics (mostly cocaine and opiates) to register with and be taxed by the federal government. *Id.* at 10-11. Marijuana was not significantly regulated until 1937 after a study touting the addictive and physiological effects of marijuana prompted Congress to pass the Marihuana Tax Act. *Id.* at 11. This Act like the Harrison Act, did not criminalize the possession or sale of marijuana but instead focused on registration, reporting, and taxation (annual and transfer) requirements for those producing, importing or selling marijuana.

safely but if abused, may lead to physical or psychological dependence. § 812(b)(5). Schedule II (two) substances are similar to Schedule I substances except that they have a currently acceptable medical use. § 812(b)(2). Marijuana has been and remains listed as a Schedule I substance. § 812(c)(Schedule I)(c)(10),despite the efforts of the National Organization for the Reform of Marijuana Laws which began in 1972. *Raich*, 545 U.S. at 15, n. 23. Although the "CSA provides for the periodic updating of schedules and delegates authority to the Attorney General, after consulting with the Secretary of Health and Human Services, to add, remove, or transfer substances to, from, or between schedules," § 811, no such action has been taken with respect to marijuana even though its medical use has been nearly universally recognized. *Id.* at 14.[3]

Marijuana is "contraband for *any* purpose" under the CSA. In the event of a conflict between state law and federal law with respect to marijuana or any other topic, "federal law shall prevail." *Raich*, 54 U.S. at 27, 29(emphasis in original); *United States v. Hicks*, 722 F. Supp. 2d 829, 833 (E.D. Mich. 2010)("It is indisputable that state

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[3]In *United States v. Canori*, 737 F.3d 181 (2nd Cir. 2013), the Court considered an argument focused on Memos from Deputy Attorney Generals Ogden and Cole, which advised that federal prosecutors should focus their resources only on trafficking of marijuana in significant amounts, i.e., amounts that would be illegal even under the laws of States that allow some use of marijuana. The Court noted that the Memos reaffirmed that "[p]ersons who are in the business of cultivating, selling, or distributing marijuana , and those who knowingly facilitate such activities, are in violation of the Controlled Substances Act, regardless of state law." The Court therefore held that these Memos did not intentionally or "de facto" reschedule marijuana as a lesser controlled substance; instead, the Court held that marijuana remains a Schedule I controlled substance. 737 F.3d at 184-85.

medical-marijuana laws do not, and cannot, supercede federal laws that criminalize the possession of marijuana.")[4]

Nevertheless, as argued by Defendant, there is an appropriations provision passed by Congress that raises a question as to whether prosecution of this case should continue. In *United States v. McIntosh*, 833 F.3d 1163 (9th Cir. 2016), the Ninth Circuit considered the breadth of the rider enacted by Congress in the omnibus appropriations bill in December 2014. The rider states, "None of the funds made available in this Act to the Department of Justice may be used, with respect to the States of...Michigan...to prevent such States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana." *Id.* at 1169. This rider has been extended and reiterated with some added territories[5] and thus, has remained applicable since then. *Id.* at 1170-71; 131 Stat. at 135 (2017);Consolidated Appropriations Act, 2018, § 538.

The Court found that the "State Medical Marijuana Laws are those state laws that authorize the use, distribution, possession, or cultivation of medical marijuana. Thus, the CSA prohibits what the State Medical Marijuana Laws permit." *Id.* at 1176.[6] The Court

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[4]*Compare, United States v. Walsh*, 654 F. App'x 689, 693-96 (6th Cir. 2016)(due process rights not violated where court excluded evidence of compliance with state medical marijuana law because although such evidence could have provided a defense to any state law prosecution, it did not provide a defense under federal law).

[5] Guam and Puerto Rico.

[6]Although the federal and state laws may conflict, the Michigan Supreme Court has held that the MMMA is not preempted by the CSA because even though the two laws "differ with respect to medical use of

further found that "[i]f the federal government prosecutes [state law compliant] individuals, it has prevented the state from giving practical effect to its law providing for non-prosecution of individuals who engage in the permitted conduct." *Id.* at 1176-77. Therefore, the Court "conclude[]d that, at a minimum, §542 [of the Consolidated Appropriations Act of 2015] prohibits [the] DOJ from spending funds from relevant appropriations acts for the prosecution of individuals who engaged in conduct permitted by the State Medical Marijuana Laws and who are fully compliant with such laws." *Id.* at 1177.[7] Thus, the government should be enjoined from prosecuting cases against individuals who are fully compliant with their own State's medical marijuana laws. On the other hand, "[i]ndividuals who do not strictly comply with all state-law conditions regarding the use, possession, and cultivation of medical marijuana have engaged in conduct that is unauthorized, and prosecuting such individuals does not violate § 542." Id. at 1178.

The strict compliance test from *McIntosh* has been cited with favor in our district courts although the Sixth Circuit has not yet addressed the issue. *See, United States v. Bally*, No. 17-20135, 2017 WL 5625896, at *3 (E.D. Mich. Nov. 22, 2017)(Lawson,

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marijuana," the Michigan law does not "stand as an obstacle to the accomplishments and execution of the full purposes and objectives of the CSA." *Ter Beek v. City of Wyoming*, 495 Mich. 1, 15 (Mich. 2014).

[7] The Ninth Circuit has also held that this same rider does not "impact[] the ability of a federal district court to restrict the use of medical marijuana as a condition of probation." *United States v. Nixon*, 839 F.3d 885, 887 (9th Cir. 2016).

D.J.); *United States v. Samp*, No. 16-CR-20263, 2017 WL 1164453, at *2 (E.D. Mich. Mar. 29, 2017)(Ludington, D.J.).[8]

Although Michigan's MMA is a complicated statute to apply, here the issue is a narrow one. In arguing that Defendant was not in compliance with the MMMA, the government relies solely on the fact that Defendant was seen smoking marijuana in a public place. (Gov. Br. at 9.) The MMMA does prohibit even otherwise compliant medical marijuana users from smoking marijuana "[i]n any public place." MCL 333.26427(b)(3)(B). I suggest that the national forest should be considered a public place under Michigan law. *See, People v. Carlton*, 313 Mich. App. 339, 349 (Mich. Ct. App. 2015)(defendant smoking marijuana in a car in the parking lot of a casino was smoking in

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[8]The government argues that *McIntosh* is distinguishable because in "the instant case, unlike in *Mcintosh*, Neece possessed marijuana on federal property" and "made a knowing decision to bring marijuana on federal property, where federal regulations are posted and those who violate them are ticketed."(Gov. Br. at 6.) However, research has not revealed any case law to suggest that possession of marijuana on federal property located within a State should be treated any differently than possession of marijuana on any other property located within a State for purposes of the appropriations rider. I note that the Ninth Circuit has held that "restrictions imposed by §538 [extending appropriations rider] do not apply to marijuana cultivation on federal land." *United States v. Gilmore*, 886 F.3d 1288, 1290 (9th Cir. 2018). As noted by that Court, "[n]othing in California law purports to authorize the cultivation of marijuana on federal land" so enforcing the prohibition of cultivating marijuana on federal land "does not 'prevent' California from otherwise implementing its medical marijuana regime" *Id.* Although it could be argued that Michigan has not attempted to authorize the possession of marijuana on federal land; thus, enforcing the prohibition of possession on federal land would not interfere with Michigan's medical marijuana regime, I find that possession and cultivation are sufficiently different activities to render *Gilmore* unpersuasive as to this discrete issue. The State cannot purport to authorize cultivation, which requires a turning of the land itself, on any particular owner's property, including land owned by the federal government because to do so would be to authorize a trespass. On the other hand, the State could purport to authorize possession of marijuana anywhere within its borders including on lands owned by others. If, however, the federal government had its own regulations that disallowed possession of marijuana on its federally owned land, then the state authorization would have to capitulate to the federal regulation because of the supremacy of the federal government. However, in the instant case, there is no Huron National Forest regulation which expressly prohibits possession or use of marijuana. Instead, as charged on the instant ticket, the regulation cited applies to "special closures" for "public health and safety." 36 C.F.R. §261.53(e). Due to this gap in the regulations, at times, possession of marijuana tickets within the national forest will reference 21 U.S.C. §844. Since the rider would prevent use of funds to prosecute individuals under §844 who are compliant with the MMMA, it would follow that the same logic would prevent prosecution of compliant individuals within the national forest, especially where no federal regulation expressly prohibits the possession or use of marijuana within the forest.

a public place in violation of MCL §333.26427(b)(3)(B) even if no member of the public could see him).

Accordingly, if there were any allegation, supported by probable cause, that Defendant was smoking in the national forest, he would be non-compliant with the MMMA and the motion to dismiss would need to be denied.

However, the probable cause statement and Lively report do not indicate that Defendant was seen smoking marijuana since the only people observed to be smoking marijuana were in a silver canoe; whereas, Defendant was in a green kayak. Although the canoe and kayaks were traveling down the river together, CO Bader's statement is that he observed the occupants of the silver canoe smoking what was believed to be a marijuana joint. Defendant Neece admitted to and consented to a search revealing his possession of three marijuana joints but the reports do not contain any statement that Defendant admitted to smoking the marijuana while traveling down the river in his green kayak.

Since there is no allegation in the probable cause statement that Defendant was seen smoking marijuana in a public place, and since smoking in a public place is the only alleged non-compliance with MMMA, I find that there is no probable cause to believe that Defendant was not in strict compliance with the MMMA. Therefore, the government should be enjoined from expending funds in prosecuting the ticket and the motion to dismiss should be and is granted.[9]

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[9]A Magistrate Judge in our district came to the opposite conclusion and denied a motion to dismiss a petty offense ticket for possession of marijuana where the defendant acted in compliance with state law and argued that the Consolidated Appropriations Act prohibited her prosecution, *United States v. Angela Lowry*, Ticket No. 3162104 (MJ Whalen, July 20, 2016). However, Judge Whalen did not have the benefit of the *McIntosh* decision or cases

Review of this order is governed by 28 U.S.C. § 636(b)(1), Fed. R. Civ. P. 72, and E.D. Mich. LR 72.1(d).

Date: May 30, 2018

S/ PATRICIA T. MORRIS
Patricia T. Morris
United States Magistrate Judge

CERTIFICATION

I hereby certify that the foregoing document was sent via First Class Mail to Andrew R. Neece at 71601 Weeks Road, Richmond, MI 48062, Plaintiff's Counsel, Michael Komorn, at 30903 Northwestern Hwy #240, Farmington Hills, MI 48334, and Assistant U.S. Attorney Roy Kranz at 101 First Street, Suite 200, Bay City, MI 48708.

Date: May 30, 2018

By s/Kristen Castaneda
Case Manager

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from our district citing *McIntosh* at the time he issued his opinion since *McIntosh* was decided one month later in August of 2016.