Drip, Drip, Drip

When Did "Dry Enough" Become Dried Marijuana?

By Matthew R. Newburg

To say that the Michigan Medical Marihuana Act has been scrutinized and criticized would be an understatement. Since its passage in 2008, one question has remained: what constitutes dried marijuana? The question is important because the answer is the difference between absolute immunity and prosecution. The Michigan Court of Appeals has taken its best guess, and a law criticized for its ambiguity just became more ambiguous.

Two cases have addressed the definition of "dried marijuana": *People v Randall*[1] and *People v Rocafort*.[2]

People v Randall: Usable and unusable marijuana

In *Randall*, police seized from the defendant 92.8 ounces of marijuana in various states of drying and refinement.[3] Randall was a medical marijuana patient and caregiver permitted to possess 15 ounces of usable marijuana and 72 plants under the Michigan Medical Marihuana Act.[4] The trial court denied his motion to dismiss, finding that "usable marijuana doesn't necessarily have to be dry and ready to smoke and, thus, the 92.8 ounces of seized marijuana…was in excess of the 15 total ounces the defendant was permitted to possess…."[5] The trial court further ruled that the amount of stalks seized was not incidental due to its volume and, thus, was not permitted under the act.[6]

The Court of Appeals disagreed with the trial court's analysis, vacated the defendant's convictions, and reversed the trial court's denial of his motion to dismiss.[7] The Court found that the term "dried" used to define "usable marijuana" under MCL 333.26423(k) does not include wet or drying marijuana.[8] For purposes of the Michigan Medical Marihuana Act, usable marijuana includes only marijuana that has been fully dried, rendering it suitable for consumption. Because the seized marijuana had not been fully dried, it did not count toward the total amount of usable marijuana.[9]

The Court also found that the weight of stalks and stems was erroneously included in the total weight by the trial court. The error was in the court's conflation of the term "incidental" with the term "negligible."[10] The Court reasoned that the amount of stalks seized by the police, although forming a substantial portion of the total weight, was "'likely to happen in an unplanned or subordinate conjunction with' the process

of cultivating medical marijuana" and, therefore, was permitted under the act.[11]

People v Rocafort: "Dried enough" must mean dried?

In *Rocafort*, the Court of Appeals added a nuance to its holding in *Randall* and upheld the conviction of Ms. Rocafort, a Michigan medical marijuana patient and caregiver. The Court addressed the meaning and consequences of marijuana found to be in the curing stages, determining that the marijuana seized by law enforcement was dried marijuana—despite having moisture—and exceeded the amount the defendant could possess under the Michigan Medical Marihuana Act.[12] A jury found her guilty of maintaining a drug house and unlawfully manufacturing marijuana.

On September 15, 2012, Rocafort harvested marijuana from her plants and began the drying process, intending to produce hash oil. On September 19, she placed the harvested marijuana into canisters as part of the process. When she returned home from work that afternoon, she found police officers at her house. She approached the officers and told them she was a registered patient and caregiver under the Michigan Medical Marihuana Act. She told them the house was hers and that she used it only for producing marijuana. Police nevertheless seized approximately 5.8 pounds of marijuana that Rocafort had put into canisters. Before trial, the defendant moved the trial court to dismiss the charges against her pursuant to Section 4 of the act, MCL 333.26424(b). The trial court denied the defendant's motion, finding that the marijuana seized from the house was above the amount of usable marijuana permitted under Section 4. The defendant also moved the trial court to permit her to assert a defense pursuant to Section 8 of the act, MCL 333.26428(a). The trial court granted the motion.

The primary issues before the Court of Appeals were whether the seized marijuana was dried—thus exceeding the amount permitted under MCL 333.26424(a) and (b)—or whether the marijuana was still in the drying process and thus covered under *Randall*. In upholding the defendant's conviction, the Court relied heavily on testimony from Rocafort's expert, Christopher Conrad, who testified that "it usually takes 7 to 10 days to dry marijuana after harvesting it," but that even dried marijuana consists of approximately 10 percent moisture.[13] Conrad testified that, in his opinion, the marijuana seized from the defendant was not dried, but would have been "pretty dry" and that "[t]he bulk of its moisture would be gone at that point [September 19] because most of the drying happens at the beginning of the process."[14] Based on this testimony, the trial court concluded that although the seized marijuana may not have been dried to the full extent, it was "largely dried," and denied the defendant's motion to dismiss under Section 4 while permitting her to assert a Section 8 affirmative defense to the jury.[15]

FAST FACT

The distinction between dried and drying marijuana is significant: it is the difference between immunity from prosecution and having a felony record.

In a 2–1 opinion, the Court of Appeals upheld the trial court's decision to deny Rocafort's motion to dismiss under Section 4 of the Michigan Medical Marihuana Act. The majority held:

> This Court is not "left with a definite and firm conviction" that the trial court made a mistake in finding that defendant's seized marijuana was dried. *People v Rhodes*, 495 Mich 938, 938; 843 NW2d 214 (2014). Although testimony indicated that the process for drying marijuana took more than four days, there was also testimony that most of the drying took place in the beginning of the drying process. There was no dispute that the marijuana had been drying for four days when it was seized. In sum, the trial court did not clearly err in finding that the seized marijuana was dried, and thus usable under the MMMA.[16]

What is dried marijuana? When is the marijuana "dried enough" to strip a patient and caregiver of his or her immunity protections? The answer is simple: who knows? The ambiguity as it relates to this component of Section 4 immunity will likely be resolved in the Michigan Supreme Court. ■

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ENDNOTES

1. *People v Randall*, unpublished opinion per curiam of the Court of Appeals, issued January 13, 2015 (Docket No. 318740), pp 1–2.
2. *People v Rocafort*, unpublished opinion per curiam of the Court of Appeals, issued January 7, 2016 (Docket No. 321804).
3. *Randall*, unpub op at 1.
4. *Id.*
5. *Id.* at 2 (quotation marks omitted).
6. *Id.*
7. *Id.* at 5.
8. *Id.* at 3.
9. *Id.* at 4.
10. *Id.*
11. *Id.* at 4.
12. *Rocafort*, unpub op at 3.
13. *Id.* at 2.
14. *Id.*
15. *Id.*
16. *Id.* at 3.