The Evidentiary Value of "Wet" Marijuana

Throwing the Buds Out With the Bathwater

By Jason D. Osbourn

Recent decisions in the state Court of Appeals have created precedent for defendants to successfully assert immunity under the Michigan Medical Marihuana Act[1] even when they are in possession of copious amounts of wet or uncured marijuana. Though crafted to avoid unfair prosecution, these decisions are overly broad and open the door to abuse under the authority granted by the act to individuals who have no actual intention of producing marijuana for medical use.

Whether a person can assert immunity under the act often comes down to whether the marijuana they possess meets the statutory definition of "usable." For those unfamiliar, the act grants immunity to those using, possessing, or cultivating marijuana for medical purposes. Possession of a state-issued medical marijuana card immunizes that individual from arrest, prosecution, and conviction relating to the medical use of marijuana. Registered patients or caregivers in Michigan are presumed to be engaged in the medical use of marijuana so long as the quantity of marijuana they possess falls within certain limitations.[2] An individual may possess 12 plants individually or for each registered patient, any amount of incidental material (including seeds, stalks, and unusable roots), and up to 2.5 ounces of usable marijuana individually or for each registered patient.[3] "Usable marijuana" is defined under the act as "the dried leaves, flowers, plant resin, or extract of the marihuana plant, but does not include the seeds, stalks, and roots of the plant."[4] Marijuana cannot be smoked immediately after harvesting; it must first be dried. After harvesting but before drying, the marijuana is in a physical state not expressly regulated by the act. This marijuana twilight zone has created consternation for law enforcement, prosecutor's offices, and medical marijuana growers alike.

The Court of Appeals has attempted to bridge this gap by taking a strict approach to the statutory definition. Historically, the Court has ignored harvested but undried marijuana by repeatedly ruling that wet marijuana cannot be counted toward the amount of usable marijuana a defendant possesses. "Wet" marijuana refers colloquially to marijuana that has been adulterated with other substances such as formaldehyde or phencyclidine.[5] For the purposes of this article, wet marijuana

refers simply to marijuana with a water content greater than that which it contains once rendered usable. The primary authority comes from *People v Manuel*, in which the Court of Appeals held that marijuana that is drying but not yet dried is "not usable under the statutory definition."[6] In *Manuel*, the defendant possessed more than 1,000 grams (approximately 35 ounces) of marijuana that was found by the Court to still be in the curing process. Manuel was a marijuana patient and a registered caregiver to five other patients, allowing him to possess up to 15 ounces of usable marijuana and still assert immunity under § 4.[7] Even though the 35 ounces of marijuana was far in excess of the statutory limitation of usable marijuana, the Court held that because the marijuana was not fully dried, it did not meet the statutory definition of usable marijuana and could not be counted against the defendant's limits.[8] Excluding this wet marijuana, the defendant did not exceed his quantity limitations, and his assertion of immunity under § 4 was granted.

Much of the *Manuel* analysis came verbatim from the unpublished case of *People v Randall*.[9] In that case, the defendant was found in possession of 92.8 ounces of material, which was described as being "wet and green" when seized.[10] As in *Manuel*, the Court held that this wet, green material was not usable according to the statutory definition, and therefore did not prevent him from asserting immunity under § 4.

AT A GLANCE

In *People v Manuel*, the defendant possessed more than 1,000 grams of marijuana, which was "mostly dry." Even if the marijuana contained 50% water, it would have produced almost 20 ounces of usable marijuana, well in excess of the amount the defendant was permitted to possess under § 4 of the Michigan Medical Marihuana Act.

In Rhode Island, marijuana that is not fully dried is presumed to produce an amount of usable marijuana that weighs one-fifth of its present weight.

The Michigan Supreme Court has not ruled on this issue, but it telegraphed its agreement when it remanded a similar case for reconsideration in light of *Manuel*.[11] In that case, the defendant was caught in possession of almost six pounds of marijuana.[12] An expert's testimony summarized the state of the marijuana when he said that the marijuana was "pretty dry" and that "the bulk of the moisture [was] gone," but did not testify that the marijuana was fully dried.[13] Initially, the Court of Appeals denied the defendant's claim of immunity under § 4.[14] The defense appealed to the Supreme Court, which did not issue an opinion but rather ordered the Court of Appeals to reconsider in light of *Manuel*.[15] On remand, the Court of Appeals determined that the marijuana was not fully dried, excluded the undried marijuana from consideration, and held that the defendant properly asserted immunity under § 4.[16]

In 2018, the Court of Appeals took a dramatically different approach with an opposite result when it found, much to the delight of prosecutors across the state, that wet marijuana was outside the scope of the Michigan Medical Marihuana Act, and so a defendant possessing wet marijuana was not entitled to immunity.[17] This, too, produces an absurd result whereby an individual attempting to operate within the confines of the act is permitted to possess growing plants and dried, usable marijuana but not the transitional material between the two. This clearly cannot be the intent of an act aimed at creating a legally protected method for producing medical marijuana. Instead, wet marijuana is most accurately categorized with the other "incidental material." Like the seeds, stalks, and unusable roots, wet marijuana is not fit for consumption.

Neither of these extreme positions adequately address this recurrent issue. A different approach must be found.

The cherry riddle

This strict definitional approach overlooks inferences that may be reasonably drawn from a quantity of wet marijuana. First, it is worth noting that the rationale employed by the court serves a necessary purpose. Because the act imposes possession limits on the amount of usable marijuana, it would be unfair and contrary to the statute to factor in the weight of water that would be drawn off before the marijuana became usable. In other words, because the statute imposes a limit on an amount of usable marijuana, it impliedly permits the possession of a greater quantity of wet marijuana to account for the inert moisture content.

On the other hand, automatically excluding the entire weight of wet marijuana is an unnecessarily harsh remedy and likely to produce absurd results. Under this interpretation, a defendant can possess virtually

unlimited amounts of marijuana so long as he or she does not allow the marijuana to fully dry. This opens the door to shrewd defendants intending to produce usable marijuana well in excess of the statutory limits who avoid conviction by deliberately inhibiting the drying process or rewetting their marijuana.[18] Under the strict adherence to the definitional language expressed by the courts, a defendant would be protected by immunity under the act even if he or she possessed a one-ton pallet of processed, yet not fully dried, marijuana. Surely this cannot be the result intended by the act.

Absurd results can be avoided if the court considers how much usable marijuana will be rendered from a quantity of wet marijuana once dried. This can be calculated with certainty since the drying process removes only a portion of the inert water and not the solid material. Current weight and moisture content are easily determined, as they simply require an accurate measurement of the marijuana in its current state. Establishing a goal moisture content is the hardest part of this process. At least one jurisdiction has established a legal presumption that wet marijuana will produce usable marijuana weighing one-fifth of its wet weight.[19] Unfortunately, Michigan authority makes no such presumption. Scientific evidence on this issue is scant. However, that limited evidence agrees with the apparent consensus in the cannabis community that a maximum water content of approximately 10% is typical for marijuana intended to be smoked.[20] If the current weight, current moisture content, and a target moisture content are known, predicting the weight of the marijuana once dried to a usable state requires only some ninth-grade math. To understand how, consider the following riddle:

> John has a crate containing 1,000 lbs of cherries. He measures the moisture content of the cherries and finds that they are 99% water. The next day he returns and re-measures only to find that the moisture content has fallen to 98%. How much do the cherries weigh now? The answer is 500 pounds.

The answer comes from realizing that cherries, which are 99% water, are also 1% solid; that this 1% of solids weighs 10 pounds; and, finally, that this 10 pounds of solid material does not change from one day to the next. On the second day, the cherries still contain 10 pounds of solids, which now constitute 2% of the total mass of the cherries. The ratio between the 10 pounds of solids to the unknown total is equivalent to 2% (or 2/100ths). This can be illustrated by the following equation, where x equals the total weight of the cherries:

$$\frac{10}{x} = \frac{2}{100}$$

Remember from algebra class that x can be found by cross multiplying and dividing. Ten times 100 equals 1,000 which, divided by 2, equals 500. The cherries at 98% water weigh 500 pounds.

Apply this riddle to the issue of wet marijuana. Suppose police search a defendant's house and find 1,000 grams of marijuana not yet fully dried. Laboratory analysis reveals the moisture content to be 50%. This means that solids comprise 50% of the weight and, therefore, weigh 500 grams. If the moisture content is reduced to 10%, then the 500 grams of solids, which does not change, will comprise 90% (or 9/10ths) of the total weight. This can be expressed as:

$$\frac{500}{x} = \frac{9}{10}$$

Ten times 500 equals 5,000 which, divided by 9 equals approximately 555.56. The marijuana will weigh about 555½ grams once dried to contain 10% water. Therefore, if the police had not intervened, the defendant would have produced almost 20 ounces of usable marijuana if he had been allowed to complete the drying process.

Using this calculation to defeat immunity under the Michigan Medical Marihuana Act

Math alone will not carry the day. The court must find the statutory authority to deny a defendant immunity. To this end, the courts are correct that the words of the statute impose no limits on wet marijuana. However, as previously stated, there is a fair implication that a limit on usable marijuana necessarily imposes a corresponding limit on wet marijuana. Strictly adhering to the definition contained in the statute defies logic and is likely to promote abuse and absurd results.

Marijuana cannot be smoked immediately after harvesting; it must first be dried. After harvesting but before drying, the marijuana is in a physical state not expressly regulated by the act. This marijuana twilight zone has created consternation for law enforcement, prosecutor's offices, and medical marijuana growers alike.

Nevertheless, overcoming the current interpretation will require the court to make three distinct findings: first, that there is a threshold moisture content that renders marijuana usable; second, that the calculation described above is able to predict with certainty how much usable marijuana will be produced; and third, that the defendant's ability to assert immunity is immediately barred for actions that have yet to take effect.

The first and second points may be established by expert testimony. The third point presents the major hurdle. By failing to address the processing issue, the act establishes a window in which a defendant may set events in motion that will result in the deprivation of criminal immunity but have no apparent immediate effect. There is no corollary in criminal law from which we can draw guidance. Every other immunity is direct and instantaneous; you either have it or you don't.

Nevertheless, a defendant who sets these events in motion demonstrates his or her intent to act outside the scope of the act. This intent is not merely a thought, but is manifested by an affirmative act. In doing so, the defendant indicates that he or she is no longer engaged in the medical use of marijuana and cannot assert immunity under the statute.

For these reasons, the decision of the Court of Appeals in *Manuel* is overly broad. Ideally, this issue would be addressed by an amendment to the statute that would establish quantity limitations on presumed production of wet marijuana, just as Rhode Island has done. Until that time, wet marijuana should prevent a defendant from asserting § 4 immunity under the act only when it is calculated to produce a quantity of usable marijuana in excess of the limits established by the act. ■

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ENDNOTES

1. MCL 333.26421 *et seq.* Note on spelling of the popular name for cannabis: Michigan law has consistently used the "marihuana" spelling since the Federal Marihuana Tax Act of 1937. The author uses the generally accepted spelling "marijuana" throughout the article. "Marihuana" is only used in direct quotations from the act.
2. MCL 333.26424(e) (known commonly as a "§ 4 defense").
3. MCL 333.26424(a).
4. MCL 333.26423(n).
5. Gilbert et al, *"Smoking Wet": Respiratory Failure Related to Smoking Tainted Marijuana Cigarettes*, 40 Tex Heart Inst J 64 (2013) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3568288> [https://perma.cc/X9ZC-NKRN]. All websites cited in this article were accessed March 14, 2019.
6. *People v Manuel*, 319 Mich App 291, 302; 901 NW2d 118 (2017).
7. *Id.* at 300–301.
8. *Id.* at 303.
9. *People v Randall*, unpublished per curiam opinion of the Court of Appeals, issued January 13, 2015 (Docket No. 318740).
10. *Id.* at 2.
11. *People v Rocafort*, 501 Mich 867; 901 NW 2d 396 (2017).
12. *People v Rocafort*, unpublished per curiam opinion of the Court of Appeals, issued January 7, 2016 (Docket No. 321804).
13. *Id.*
14. *Id.*
15. *Rocafort*, 501 Mich at 867.
16. *People v Rocafort*, unpublished per curiam opinion of the Court of Appeals, issued January 2, 2018 (Docket No. 321804).
17. *People v Mansour*, 325 Mich App 339; ___ NW2d ___ (2018).
18. *US v Carter*, 110 F3d 759 (CA 11, 1997) (defendant soaked the marijuana before transporting it to Georgia).
19. R.I. Gen. Laws § 21-28.6-3(23) (establishing a presumption that wet marijuana will yield 20% of its current weight of usable marijuana).
20. Hazekamp, *An evaluation of the quality of medicinal grade cannabis in the Netherlands*, 1 Cannabinoids 1, 4 (2006) (scientific analysis of medical-grade marijuana found moisture content ranging from 3.9% to 8%) <https://www.ncsm.nl/cfsystem/userData/pdf/1318193390__document__2006-pharmacy-vs-coffeeshop-eng.pdf> [https://perma.cc/3VXW-MSF6]; *Moisture Residue Analysis, Optimal Levels*, digipathLabs <http://digipathlabs.com/moisture-residue-analysis> ("properly cured medicinal cannabis should contain a water moisture level of between 6% and 9%"); and Rosenthal, *Testing the Moisture Content of Marijuana*, CannabisNow (2018) <https://cannabisnow.com/testing-moisture-content-marijuana> [https://perma.cc/D9NB-RURF] (proposed standard for a "pleasant smoke" established at 10%–12% moisture content).