

Criminal Law Issues After Passage of the MRTMA

Uncertainty Remains

By Allison M. Arnold



At a Glance

Some issues remain complicated under the Michigan Regulation and Taxation of Marihuana Act. The primary areas of criminal law where questions remain are current penalties for marijuana-related conduct, definitions under the act affecting what is permissible, and limits on search and seizure.

The citizen-initiated 2018 Michigan Regulation and Taxation of Marihuana Act (MRTMA)¹ made marijuana legal for adults over 21 years old for recreational purposes.² Marijuana became legal for medical purposes a decade earlier by passage of the 2008 Michigan Medical Marihuana Act (MMMA).³ After enactment of the MMMA, there was resulting confusion surrounding what constituted criminal conduct by those claiming lawful medical use. Many thought legalization for recreational purposes would simplify issues regarding marijuana-related criminality. However, some issues remain complicated under the MRTMA. The primary areas of criminal law where questions remain are the current penalties for marijuana-related conduct, definitions under the MRTMA that affect what is permissible, and limits on search and seizure.

Before addressing these outstanding issues, we must determine what marijuana conduct is punishable in Michigan by answering three questions: First, is the conduct permitted under Section 5 of the MRTMA? Second, is the conduct forbidden by Section 4 of the act? Third, if the conduct is unlawful, is there a special penalty for the conduct under Section 15?

Conduct permitted by MRTMA Section 5

Section 5 of the MRTMA details what marijuana-related conduct is permissible.⁴ It effectuates the purpose of the act to “make marihuana legal under state and local law for adults 21 years of age or older.”⁵ Accordingly, and of primary significance, conduct involving marijuana use by youths remains unlawful. Adults may possess 2.5 ounces of marijuana (up to 15 grams of which may be concentrate) outside of their residence⁶ and up to 10 ounces of marijuana within their residence.⁷ Adults may give away these same quantities to other adults “without remuneration” and without advertising or promoting the transfer.⁸ Adults may also cultivate and possess up to 12 plants at their residence together with any marijuana produced from those plants.⁹

When a person’s conduct falls outside the limits of Section 5, it is subject to penalty. The question of which penalty applies involves examining whether there is a special penalty enumerated in Section 15 of the MRTMA.¹⁰ If there is not a

special penalty, the conduct may be prosecuted under more severe criminal statutes that predate the MRTMA.

Conduct forbidden by MRTMA Section 4

Section 4 provides a lengthy list of specific problematic behaviors prohibited by the MRTMA, including:

- operating a vehicle under the influence of marijuana;
- transferring marijuana to a person under 21;
- marijuana possession or consumption by a person under 21;
- butane extraction of marijuana in a public place, motor vehicle, or within the curtilage of a residence;
- consuming marijuana in public;
- cultivating marijuana where unsecured or visible to the public;
- consuming marijuana while in control of a vehicle or smoking within the passenger area on a public way;
- possessing or consuming marijuana at a school, in a school bus, or at a correctional facility; and
- possessing more than 2.5 ounces of marijuana at one’s residence, if unsecured.¹¹

As with Section 5, the consequences that may be imposed for a violation under Section 4 depend on whether there is a special penalty enumerated in Section 15. If not, the conduct may be prosecuted under other criminal statutes.

Special penalties under MRTMA Section 15

Section 15 provides special penalties for impermissible marijuana-related conduct that are less severe than the penalties under criminal statutes that predate the MRTMA. Application of this section is complex and requires examining three factors: the age of the offender, the amount of marijuana involved, and whether the violation involves behavior contrary to Section 4.

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For youths, the penalty differs based on the quantity of marijuana possessed. If a youth exceeds the permissible marijuana quantities allowed under the MRTMA for adults, the youth is subject to penalties outside of the MRTMA.¹² However, youths possessing up to 2.5 ounces of marijuana or cultivating up to 12 marijuana plants — which would be permissible under the MRTMA if they were adults — may only be cited with civil infractions for first or second violations under Section 15(3).¹³ When youths also violate Section 4(1)(a), (d), or (g), the civil infractions are not available.¹⁴ Thus, a third-time violation, as well as operating a vehicle under the influence of marijuana, butane extraction in an unlawful location, or smoking the drug in a vehicle by youths justifies prosecution under other criminal statutes — not the MRTMA.

Adults who comply with Section 5 but violate certain minor provisions of Section 4 may only be charged with a civil infraction under Section 15(1).¹⁵ Specifically, when these persons violate MRTMA Section 4(1)(e) for public consumption, (f) for cultivating where visible in public or unsecure, or (i) for possessing more than 2.5 ounces of unsecure marijuana in one's residence, the result is a \$100 civil fine and forfeiture of the marijuana.¹⁶

Under Section 15(2), adults who possess, cultivate, transfer, or possess with intent to deliver up to twice the amount allowed by Section 5 but do not violate any provision of MRTMA Section 4 are responsible for civil infractions for the first and second violations. Third and subsequent violations may be punished as misdemeanors.¹⁷ The penalties for these civil infractions and misdemeanors are limited to fines and forfeiture of the marijuana.¹⁸

Adults who possess, cultivate, or transfer without remuneration more than twice Section 5 amounts but do not violate any provision of MRTMA's Section 4 are responsible for a misdemeanor without jail under Section 15(4).¹⁹ Jail may only be imposed if the violation was either "habitual, willful, and for a commercial purpose" or if the offense involved violence.²⁰

Section 4 conduct punishable outside the MRTMA

Certain conduct under Section 4(1) of the MRTMA has no enumerated lesser penalty under Section 15 of the act.²¹ This conduct is punishable under preexisting law. First, Section 4(1)(a) prohibits operating any vehicle while "under the influence of marijuana" and may be punishable by the misdemeanor for operating while intoxicated.²² Further, it appears the lesser offense of operating while impaired is also a viable charge.²³ In *People v. Dupre*, the Michigan Court of Appeals recently ruled that this exact "under the influence of marijuana" standard under the MMMA for otherwise MMMA-compliant behavior allows charges for the lesser offense.²⁴ By analogy, operating while impaired should be an allowable charge under the MRTMA. However, there is likely no chargeable offense for merely driving with marijuana in one's system without resulting impairment by one engaged in MRTMA-authorized consumption — the Michigan Supreme Court held there is none for MMMA-authorized consumption under *People v. Koon*.²⁵

The second, Section 4(1)(b) forbidding any transfer to youths, also has no alternate MRTMA penalty. Thus, unless the conduct is protected by the MMMA, such a transfer is punishable by felony statutes for delivery of marijuana.²⁶

The third type of conduct, any butane extraction in a prohibited area, is prohibited by Section 4(1)(d) and, again, no MRTMA penalty. Accordingly, it is punishable by the felony statute for manufacture of marijuana.²⁷ A recent appeal questioned whether one engaged in butane extraction for personal use could be charged with the felony manufacturing offense. In *People v. Korkigian*, the Michigan Court of Appeals ruled that although preparation for personal use does not constitute felony manufacture of marijuana, butane extraction, which is more than mere preparation, does.²⁸

The fourth type of conduct with no Section 15 penalty is consumption of marijuana while in control of a vehicle or smoking within the passenger area of the vehicle on a public way contrary to Section 4(1)(g). This behavior would be punishable by the use of marijuana misdemeanor.²⁹

The final type of conduct — possessing marijuana on the grounds of a school, a school bus, or correctional facility contrary to Section 4(1)(h) — has no Section 15 penalty for adults. Punishment for these individuals is found in criminal statutes outside the MRTMA. However, youths who engage in this behavior are generally only subject to civil infractions under the MRTMA when they possess less than 2.5 ounces of marijuana.³⁰

An important issue yet to be resolved is to what extent conduct in violation of Section 4 without a Section 15 penalty allows prosecution for accompanying conduct. For example, does an adult smoking marijuana in a vehicle upon a public way only face charges based on the use of marijuana or, if they also have MRTMA-compliant amounts of marijuana in the vehicle, may they additionally be charged with possession considering the Section 4 smoking violation? In *People v. Hartwick*, the Michigan Supreme Court ruled violating part of the MMMA does not taint other MMMA-compliant behavior.³¹ But *Hartwick's* applicability to the MRTMA is unknown. Specific conduct that falls outside of a special MRTMA penalty may or may not taint or preclude the availability of a special MRTMA penalty for all other conduct that is part of the criminal transaction.

Definitional issues under the MRTMA

More questions arise when one considers the quantities of marijuana an individual may lawfully possess based on the definition of marijuana under the MRTMA. One complication is that the definition under the MRTMA includes “marijuana-infused products” but excludes all the ingredients within these products combined with marijuana to prepare them.³² For example, the weight of marijuana within a marijuana-infused chocolate bar specifically excludes the chocolate and ingredients other than those derived from marijuana. Separating the weight of the marijuana within these products from the other ingredients is problematic; it may be impossible to calculate in most situations. To avoid this issue on the medical side, the

state legislature amended the MMMA to specify allowable limits on marijuana-infused products that combined both the marijuana and the other ingredients in them.³³ No such equivalence presently exists in the MRTMA.

Another definitional ambiguity is that the MRTMA does not specify at what stage in the cultivation process marijuana becomes a plant. In *People v. Ventura*, an MMMA case, the Michigan Court of Appeals ruled a marijuana cutting achieves plant status upon “observable evidence of root formation.”³⁴ A definition of what constitutes a plant was later added to the statute.³⁵ Without an MRTMA definition, the *Ventura* root formation standard may apply to home growers.

Search and seizure under the MRTMA

The MRTMA has further modified search and seizure analysis. Evaluating whether there is reasonable suspicion for a stop or probable cause for a search requires making that determination with respect to the legality of the marijuana-related behavior under the MRTMA. Suspicion of what used to be illegal but now is lawful recreational use will no longer suffice for an intrusion under the Fourth Amendment of the U.S. Constitution.

One area of search and seizure transformed by the MRTMA is that of marijuana-related vehicle searches. Prior to adoption of the MMMA or MRTMA, the Michigan Supreme Court in *People v. Kazmierczak* held that the odor of marijuana in a vehicle by one trained to recognize it typically provided probable cause for a search.³⁶ Whether the smell of marijuana alone provides probable cause after the MRTMA's passage depends on context. Smell of marijuana alone where the occupants of the vehicle are adults may not provide probable cause as the possession may be legal. However, the smell of *burning* marijuana in a vehicle by one trained to recognize it should generally suffice for probable cause as MRTMA Section 4 prohibits smoking in public or in a vehicle upon a public way. Prior cases interpreting the MMMA may be instructive as to when the odor of marijuana in a vehicle may justify a search.

In *People v. Anthony*, an MMMA case, the Michigan Court of Appeals ruled that the smell of burning marijuana emanating from a vehicle in a public street provided probable cause to search it, as such public use of marijuana was prohibited by the act.³⁷ *Anthony's* holding will similarly apply when there is cause to believe there is MRTMA-prohibited consumption in public places.

The odor of marijuana not specified as burned may still provide probable cause to search a vehicle when combined with other suspicious factors. In the MMMA case of *People v. Moorman*, the Michigan Court of Appeals ruled there was requisite probable cause based upon the odor of marijuana from a vehicle along with the driver's initial denial of any marijuana within it even though he presented a caregiver card allowing possession of some marijuana. The court ruled the



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combined factors provided probable cause that his possession was not in compliance with the MMA.³⁸ Similar facts would likely justify a search under the MRTMA.

Probable cause necessary to justify the search of buildings is also altered by the MRTMA. In the past, evidence of marijuana cultivation alone within a building could suffice for probable cause to search. Now, sufficient cause to justify a search where marijuana is grown will generally require evidence that the cultivation violates the act through factors like exceeding allowable limits or the accompanying distribution for remuneration or to those under 21.

Conclusion

When it comes to criminality under the Michigan Regulation and Taxation of Marijuana Act, uncertainty remains. Enactment of the Michigan Medical Marijuana Act caused similar difficulty. Years of litigation and statutory reform were necessary to clarify the MMA. The same may be needed to elucidate areas of the MRTMA, such as the current penalties for marijuana-related conduct, definitions under the act affecting what is permissible, and limits on search and seizure. ■



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ENDNOTES

1. MCL 333.27951 *et seq.*
2. MCL 333.27952.
3. MCL 333.26421 *et seq.*
4. MCL 333.27955.
5. MCL 333.27952. For purposes of this article, "youths" refers to individuals 20 years old and younger. "Adults" are individuals 21 years and over.
6. MCL 333.27955(1)(a).
7. MCL 333.27955(1)(b).
8. MCL 333.27955(1)(d).
9. MCL 333.27955(1)(b).
10. MCL 333.27965.
11. MCL 333.27954(1).
12. MCL 333.27965(3).
13. *Id.*
14. *Id.*
15. MCL 333.27965(1).
16. *Id.*
17. MCL 333.27965(2).
18. MCL 333.27965(2)(a), (b), and (c).
19. MCL 333.27965(4).
20. *Id.*
21. MCL 333.27954(1).
22. MCL 333.27954(1)(a) and MCL 257.625(1).
23. MCL 333.27954(1)(a) and MCL 257.625(3).
24. *People v Dupre*, unpublished per curiam opinion of the Court of Appeals, issued December 17, 2020 (Docket No. 350386).
25. *People v Koon*, 494 Mich 1; 832 NW2d 724 (2013).
26. MCL 333.7401(d).
27. *Id.*
28. *People v Korkigian*, unpublished per curiam opinion of the Court of Appeals, issued October 29, 2020 (Docket No. 352444).
29. MCL 333.7404(2)(d).
30. MCL 333.27965(3).
31. *People v Hartwick*, 498 Mich 192; 870 NW2d 37 (2015).
32. MCL 333.27953(e).
33. MCL 333.26424(c).
34. *People v Ventura*, 316 Mich App 671, 676; 894 NW2d 108 (2016).
35. MCL 333.26423(j).
36. *People v Kazmierczak*, 461 Mich 411; 605 NW2d 667 (2000).
37. *People v Anthony*, 327 Mich App 24, 45; 932 NW2d 202 (2019).
38. *People v Moorman*, 331 Mich App 481; 952 NW2d 597 (2020).