STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 9, 2014
v	No. 320591 Berrien Circuit Court
SHAWN MICHAEL GOODWIN, Defendant-Appellant.	LC No. 2013-005000-FH

Before: MARKEY, P.J., and SAWYER and OWENS, JJ.

PER CURIAM.

In this interlocutory appeal involving Michigan's Medical Marihuana Act (MMMA),[1] defendant appeals by leave granted[2] the trial court's order, which denied defendant's motion to dismiss his criminal charges and precluded him from raising the affirmative defense contained in § 8 of the MMMA, MCL 333.26428. We affirm.

Defendant was charged with delivering or manufacturing a controlled substance (marijuana), MCL 333.7401(1) and (2)(d)(iii) (more than 50 grams, but less than 450 grams), and maintaining a drug vehicle, MCL 333.7405(1)(d). Defendant moved to dismiss the charges pursuant to the MMMA and provided notice of his intent to assert the affirmative defense provided in § 8, MCL 333.26428. The trial court denied defendant's motion, finding that he failed to satisfy all the elements of the § 8 defense.

First, defendant argues that the trial court erred by applying the definition of bona fide physician-patient relationship provided in *People v Tuttle*, 304 Mich App 72; 850 NW2d 484, lv gtd 496 Mich 851 (2014), and *People v Hartwick*, 303 Mich App 247; 842 NW2d 545 (2013), lv gtd 496 Mich 851 (2014), wherein this Court defined the phrase as meaning "a pre-existing and ongoing relationship with the patient as a treating physician." *Tuttle*, 304 Mich App at 90

[1] Although the MMMA uses "marihuana," this report uses the more common spelling "marijuana," which is preferred by this Court. See *People v Tuttle*, 304 Mich App 72, 75 n 1; 850 NW2d 484 (2014).

[2] *People v Goodwin*, unpublished order of the Court of Appeals, entered June 30, 2014 (Docket No. 320591).

(internal quotation marks and citation omitted); *Hartwick*, 303 Mich App at 266 (internal quotation marks and citation omitted). Defendant asserts that the trial court should have applied the Legislature's definition contained in § 3 of the MMMA. Our review of this issue is for plain error affecting substantial rights because whether the Legislature's definition of bona fide physician-patient relationship was applicable was never raised in the trial court; therefore, it is not preserved for appellate review. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). We agree that the trial court should have applied the Legislature's definition, but this error was not outcome determinative under the plain error standard of review as the application of the Legislature's definition yields the same outcome; thus, we conclude that it was not error for the trial court to deny defendant's motion to dismiss and to preclude him from asserting the § 8 defense.

Section 8 of the MMMA, MCL 333.26428, provides registered and unregistered patients and their primary caregivers an affirmative defense to any criminal prosecution involving the medical use of marijuana. See also *People v Kolanek*, 491 Mich 382, 398-399, 402-403; 817 NW2d 528 (2012). To invoke the defense, the evidence must show that:

> (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 seriousness or debilitating medical condition;
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> (2) The patient and the patient's primary caregiver, if any, were collectively 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 seriousness or debilitating medical condition or symptoms of the patient's seriousness or debilitating medical condition; and
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> (3) The patient and the patient's primary caregiver, if any, were engaged in the acquisition, possession, cultivation, manufacture, use, delivery, transfer, or transportation of marihuana or paraphernalia relating to use of marihuana to treat or alleviate the patient's serious or debilitating medical condition. [MCL 333.26428.]

In this case, after applying the definition of bona fide physician-patient relationship set forth in both *Tuttle* and *Hartwick*, the trial court concluded that defendant had failed to satisfy the first element of § 8. As defendant correctly points out, however, our Legislature amended § 3 of the MMMA, MCL 333.26423, effective April 1, 2013, see 2012 PA 512, to include a definition of bona fide physician-patient relationship, which provides:

> (a) "Bona fide physician-patient relationship" means a treatment or counseling relationship between a physician and patient in which all of the following are present:

(1) The physician has reviewed the patient's relevant medical records and completed a full assessment of the patient's medical history and current medical condition, including a relevant, in-person, medical evaluation of the patient.

(2) The physician has created and maintained records of the patient's condition in accord with medically accepted standards.

(3) The physician has a reasonable expectation that he or she will provide follow-up care to the patient to monitor the efficacy of the use of medical marihuana as a treatment of the patient's debilitating medical condition.

(4) If the patient has given permission, the physician has notified the patient's primary care physician of the patient's debilitating medical condition and certification for the use of medical marijuana to treat that condition. [MCL 333.26423(a).]

It is undisputed that the alleged criminal conduct occurred on November 16, 2013, after the statute was amended to include the definition of bona fide physician-patient relationship. "When a statute specifically defines a given term, that definition alone controls." *Haynes v Neshewat*, 477 Mich 29, 35; 729 NW2d 488 (2007). Therefore, the trial court was required to apply the statutory definition, not the definition set forth in *Tuttle* and *Hartwick*, and it erred in failing to do so. However, we conclude that this plain error was not outcome determinative.

Although there was sufficient evidence presented to satisfy the first prong of the Legislature's definition, regarding review of the patient's medical history and assessment of the current medical condition, there was insufficient evidence to establish the second prong of the definition, i.e., whether the doctor created and maintained records of the patient's condition in accord with medically accepted standards. The only records of Dr. Vernon Proctor offered and admitted at the hearing were his patients' intake history questionnaires and other required paperwork for medical marijuana use, such as the physician certifications, health care release forms, and required state applications. Dr. Proctor also testified that he does not always keep the patients' medical records. He stated that if he needed them, he could use the patient-signed authorization to obtain them from the primary care physician. Further, testimony of Dr. Proctor and the four patients reveals that he only saw those patients for certification and renewal of certification and did not schedule any follow-up appointments to check on the patients, their condition, and the efficacy of the medical marijuana. There was also no evidence presented regarding the medically accepted standard of creating and maintaining records. Accordingly, based on this record, there was insufficient evidence whether Dr. Proctor created and maintained records of the patients' conditions.

There was also insufficient evidence to establish the third prong of the definition, i.e., whether Dr. Proctor had a reasonable expectation that he would provide follow-up care to the patients and monitor the efficacy of the use of medical marijuana as a treatment of their conditions. Dr. Proctor's testimony, as well as his patients' testimony, was clear that he never provided follow-up care to the patients, and he did not monitor the efficacy of the medical marijuana. Although he made himself available for questions if needed, Dr. Proctor only saw the

patients for certification and renewal of certification, which was once per year. The record is clear that Dr. Proctor had no intent, let alone a reasonable expectation, to monitor his patients' use of medical marijuana.

Finally, with regard to the fourth prong, there was no testimony from any of the patients whether they gave Dr. Proctor permission to notify their primary care physicians of their medical conditions and use of medical marijuana. In sum, defendant presented insufficient evidence to meet the Legislature's four-prong definition of a bona fide physician-patient relationship. Therefore, although the trial court erred by failing to apply that definition, the error was not outcome determinative.

Additionally, the trial court further denied defendant's motion for failure to satisfy the second element of the § 8 defense, i.e., whether

> The patient and the patient's primary caregiver, if any, were collectively 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 seriousness or debilitating medical condition or symptoms of the patient's seriousness or debilitating medical condition. [MCL 333.26428(a)(2).]

The trial court's findings and decision in this regard were not erroneous. To satisfy this element, defendant must present evidence of "(1) possession and (2) knowledge of what amount of marijuana is 'reasonably necessary' for the patient's treatment." *Tuttle*, 304 Mich App at 93. Although defendant was not given the opportunity to testify as to his knowledge, testimony from defendant's four patients and Dr. Proctor reveals that a reasonably necessary amount was never discussed between Dr. Proctor and his patients. All four patients testified that they used approximately an ounce and half per month; however, Dr. Proctor never followed up with his patients to monitor the efficacy of the marijuana and to determine whether the amount they were each using was reasonably necessary to treat their conditions. Therefore, even if defendant had presented evidence that a bona fide physician-patient relationship existed per the Legislature's definition, he failed to present evidence to establish the second element of the § 8 defense, and thus, the trial court did not err by denying defendant's motion to dismiss and precluding defendant from asserting the defense at trial.

Defendant also argues that the trial court prematurely denied his § 8 motion because it failed to consider the admitted exhibits and to allow defendant to testify before it denied the motion. Because this argument was raised before, and decided by the trial court, we review for an abuse of discretion the trial court's ruling in this regard. *People v Bylsma*, 493 Mich 17, 26; 825 NW2d 543 (2012). We conclude that the trial court did not err in this regard.

On appeal, defendant does not state how the admitted exhibits would have helped his case or established the elements of the defense. As plaintiff correctly points out, " 'Defendant may not leave it to this Court to search for a factual basis to sustain or reject his position.' " *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001), quoting *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990). Nevertheless, according to the record, the only exhibits admitted at the hearing were defendant's patient and caregiver card, and the patients'

intake medical history questionnaires, required state applications, physician certifications, and health care release forms. Whether the patients were certified to use medical marijuana and whether defendant was a certified caregiver were not issues before the trial court. Rather, the main issues were whether a bona fide physician-patient relationship existed and whether the amount of marijuana defendant possessed was reasonably necessary for his patients' treatment. The other exhibits involved records that Dr. Proctor reviewed prior to certifying his four patients, the contents of which he testified to at the hearing. Therefore, given that there was testimony regarding these exhibits at the hearing, it would not have been an abuse of discretion if the trial court failed to review them before making its decision.

Defendant further asserts that it was "anticipated that additional witnesses would be allowed to testify at a continued hearing, and [defendant] himself was anticipated to testify following the court's resolution of issues relating to suppression of evidence." Again, defendant does not assert how this anticipated additional testimony would have established the elements of the defense. In fact, defendant does not even identify these anticipated additional witnesses. It is not the province of this Court to search for factual support for defendant's argument. *Traylor*, 245 Mich App at 464. Further, defendant has not shown how his testimony would have made a difference, particularly where it was clear from Dr. Proctor's and his patients' testimony that Dr. Proctor did not maintain records or monitor the patients' medical conditions and efficacy of the medical marijuana and did not discuss a reasonably necessary amount of marijuana to use with his patients.

Finally, to the extent defendant argues that the trial court erred when it disregarded the purposes of the MMMA and when it erroneously construed the protections afforded under the act, he has abandoned his argument because it was not raised in the questions presented. MCR 7.212(C)(5); *Ypsilanti Fire Marshal v Kircher*, 273 Mich App 496, 543; 730 NW2d 481 (2007). Further, as discussed, any error by the trial court in applying the Legislature's definition was not outcome determinative.

Affirmed.

/s/ Jane E. Markey
/s/ David H. Sawyer
/s/ Donald S. Owens