

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LARRY ROBERT DARLING,

Defendant-Appellant.

UNPUBLISHED

June 18, 2020

No. 349947

Allegan Circuit Court

LC No. 18-021628-FH

Before: MURRAY, C.J., and JANSEN and MARKEY, JJ.

PER CURIAM.

In this criminal interlocutory appeal, defendant is charged with delivery of marijuana, MCL 333.7401(2)(d)(iii) (Count I), possession of marijuana with intent to deliver, MCL 333.7401(2)(d)(iii) (Count II); and possession of marijuana, MCL 333.7403(2)(d) (Count III). The trial court entered an order denying defendant’s motion to dismiss the charges pending against him on the basis of immunity under § 4 as authorized by the Michigan Medical Marihuana Act (the MMMA),¹ MCL 333.26421 *et seq.*

This Court granted defendant’s application for leave to appeal related to this issue.² Defendant argues that the trial court erred by denying his motion, asserting that he was entitled to § 4 immunity. The prosecution concedes that the trial court erred in relation to Counts II and III only. We agree, and accordingly, affirm in part, reverse in part, and remand for proceedings consistent with this opinion.

¹ The MMMA uses the variant “marihuana.” Throughout this report, we use the vernacular “marijuana” unless quoting from the statute.

² *People v Darling*, unpublished order of the Court of Appeals, entered January 2, 2020 (Docket No. 349947).

I. FACTUAL BACKGROUND

This case arises from the finding of marijuana in defendant's vehicle after defendant, a registered marijuana patient caregiver, sold marijuana to a confidential informant who was not one of defendant's registered patients. Defendant moved the trial court to dismiss all the charges pursuant to MMMA § 4 immunity,³ asserting that he was entitled to the § 4 presumption that he was engaged in the medical use of marijuana because he could show by the preponderance of the evidence that he possessed a valid registry identification card and complied with the requisite volume limitations.

At the hearing on the motion, defendant testified that he sold marijuana in March 2016 to a man who was not one of his registered patients and turned out to be a confidential informant. The confidential informant entered defendant's place of business and inquired about purchasing marijuana for his back pain. Defendant testified that he questioned the confidential informant about his marijuana patient registry card to ensure it was valid and about his medical use of marijuana for his back pain. Defendant retrieved the marijuana from a glass jar in a locked box in the trunk of his car and sold one gram to the confidential informant. The confidential informant then left. After defendant left his place of business, his vehicle was pulled over by the police pursuant to a search warrant. At the time of the traffic stop, defendant had six medical marijuana cards, including his own patient registry card, five caregiver cards, and less than 15 ounces of marijuana. Defendant claimed that the marijuana was for his own personal use, and for his patients' medical use.

Defendant was charged as noted *supra*. Defendant moved for dismissal of all charges on the basis of § 4 immunity. The trial court denied defendant's motion, finding a nexus between the improper conduct of defendant's sale to the confidential informant who was not his patient and the otherwise proper conduct of defendant's possession of a lawful amount of properly stored marijuana. The trial court found that there was a direct relationship between the marijuana sold to the confidential informant and the search of defendant's car where the marijuana was found.

Defendant appealed. In an unpublished order, this Court previously reversed the trial court's order regarding a separate MMMA issue and granted leave to appeal on the narrow issue of "whether the trial court erroneously denied § 4 immunity as to Counts II and III of the felony information." *People v Darling*, unpublished order of the Court of Appeals, entered January 2, 2020 (Docket No. 349947). We now address that sole issue.⁴

³ See MCL 333.26424.

⁴ We decline to address defendant's additional sentencing arguments related to Proposition 1. Defendant's argument is not presented in his questions presented and, therefore, this Court need not review the issue. See *Bouverette v Westinghouse Electric Corp*, 245 Mich App 391, 404; 628 NW2d 86 (2001) (independent issues not raised in the statement of questions presented are not properly presented for appellate review). Furthermore, the argument presents a hypothetical issue because, as of yet, defendant has not been convicted of any crime and is not being sentenced.

II. STANDARD OF REVIEW

This Court reviews for an abuse of discretion a trial court's ruling on a motion to dismiss and reviews de novo the trial court's rulings on underlying questions regarding the interpretation of the MMMA. *People v Bylsma*, 493 Mich 17, 26; 825 NW2d 543 (2012). "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes." *People v Duncan*, 494 Mich 713, 722-723; 835 NW2d 399 (2013). A trial court's findings of fact may not be set aside unless they are clearly erroneous, which is when the reviewing court is left with a definite and firm conviction that the trial court made a mistake. MCR 2.613(C); *Bylsma*, 493 Mich at 26.

III. ANALYSIS

Defendant argues that the trial court abused its discretion by denying his motion to dismiss Count II and Count III where he was entitled to § 4 immunity of the MMMA. The prosecution concedes, and we agree, that the trial court abused its discretion in denying his motion to dismiss in relation to Counts II and III.

The MMMA provides an exception to the Public Health Code's prohibition on the use of controlled substances by permitting the medical use of marijuana when carried out in accordance with the MMMA's provisions. *Bylsma*, 493 Mich at 27. Section 4 of the MMMA provides protections for the medical use of marijuana; defendant claims that § 4(b) entitles him to immunity as a registered primary caregiver. Section 4(b) provides:

A primary caregiver who has been issued and possesses a registry identification card is not subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for assisting a qualifying patient to whom he or she is connected through the department's registration process with the medical use of marihuana in accordance with this act. The privilege from arrest under this subsection applies only if the primary caregiver presents both his or her registry identification card and a valid driver license or government-issued identification card that bears a photographic image of the primary caregiver. This subsection applies only if the

Accordingly, we also decline to address defendant's Proposal 1 arguments as moot because there is no possible relief that we could provide and this Court does not declare rules of law that have no practical legal effect in a case. See *City of Warren v City of Detroit*, 471 Mich 941, 941-942; 690 NW2d 94 (2004) (MARKMAN, J., concurring).

We also decline to address defendant's argument related to the Regulation and Taxation of Marijuana Like Alcohol Act, as well as defendant's arguments relating to whether he is entitled to § 4 immunity with respect to Count I, because these arguments are outside of the scope of the appeal granted. See *Darling*, unpub order.

primary caregiver possesses marihuana in forms and amounts that do not exceed any of the following:

(1) For each qualifying patient to whom he or she is connected through the department's registration process, a combined total of 2.5 ounces of usable marihuana and usable marihuana equivalents.

(2) For each registered qualifying patient who has specified that the primary caregiver will be allowed under state law to cultivate marihuana for the qualifying patient, 12 marihuana plants kept in an enclosed, locked facility.

Defendant is entitled to claim § 4 immunity if he can establish by a preponderance of the evidence that, at the time of the charged offenses, he

(1) was issued and possessed a valid registry identification card,

(2) complied with the requisite volume limitations of § 4(a) and § 4(b),

(3) stored any marijuana . . . in an enclosed, locked facility, and

(4) was engaged in the medical use of marijuana. [*Hartwick*, 498 Mich at 217-218, citing MCL 333.26424(a) and (b).]

The record is clear that at the time of the charged offenses, i.e., during the lawfully executed traffic stop, defendant possessed a valid registry identification card, was in compliance with § 4(a) and § 4(b) volume limitations, and had appropriately stored his marijuana in an enclosed, locked facility. Indeed, at issue here is only whether defendant was engaged in the medical use of marijuana at the time of the offenses.

If defendant can establish by a preponderance of the evidence the first three elements of immunity, which he has done, he is entitled to the rebuttable presumption that he was engaged in the medical use of marijuana under § 4(d). MCL 333.26424(d); *Hartwick*, 498 Mich at 220-221. This presumption is rebuttable.

The prosecution may rebut this presumption “by presenting evidence that the defendant’s conduct was not for the purpose of alleviating the registered qualifying patient’s debilitation medical condition[.]” Additionally, “the non-MMMA-compliant conduct may rebut the . . . presumption of medical use for otherwise MMMA-compliant conduct if a nexus exists between the non-MMMA-compliant conduct and otherwise MMMA-compliant conduct.” “[I]f the prosecution rebuts . . . the presumption of the medical use of marijuana, the defendant may still establish, on a charge-by-charge basis, that the conduct underlying a particular charge was for the medical use of marijuana.” [*People v Manuel*, 319 Mich App 291, 305-306; 901 NW2d 118 (2017), quoting *Hartwick*, 498 Mich at 202-203.]

The trial court in this case properly concluded that defendant was entitled to the presumption that he was engaged in the medical use of marijuana at the time of the offenses.

However, on appeal defendant, and the prosecution, take issue with the trial court's conclusion that there existed a sufficient nexus between defendant's MMMA-compliant conduct that formed the basis for Count II and Count III, and defendant's non-MMMA-compliant conduct—selling an ounce of marijuana to the confidential informant who was not defendant's patient—which formed the basis for Count I. We agree.

In *Hartwick*, our Supreme Court explained that illicit conduct that violates the MMMA can only be used to rebut the presumption of medical use when the illicit conduct forms the basis of the charges. Specifically, the Court concluded:

In other words, the illicit conduct and the otherwise MMMA-compliant conduct must have a nexus to one another in order to rebut the § 4(d) presumption. This is consistent with the conclusion that the fourth element of immunity – medical use – is dependent only on the conduct forming the basis for each particular criminal charge and that immunity is claimed and generally proved on a charge-by-charge basis.” [*Hartwick*, 498 Mich at 225.]

The non-MMMA-compliant conduct in this case is the sale of marijuana to the confidential informant where the confidential informant was not one of defendant's registered patients. This conduct forms the basis for Count I, and defendant is not entitled to § 4 immunity from Count I. However, the conduct that forms the basis for Count II and Count III stems from defendant's lawful possession of marijuana at the time a lawful traffic stop was affected pursuant to a valid search warrant. When the conduct that forms the basis of Count II and Count III is looked at on a charge-by-charge basis, it is clear that at all times during the traffic stop, defendant was in compliance with § 4(a)–(c). On the basis of the foregoing, defendant was entitled to the presumption that he was engaged in the medical use of marijuana. The prosecution concedes defendant's non-MMMA-compliant conduct cannot be imputed to his MMMA-compliant conduct, and therefore it cannot rebut that presumption. Accordingly, we conclude that the trial court erred by concluding that a nexus existed between defendant's non-MMMA-compliant conduct and the MMMA-compliant conduct that formed the basis for Count II and Count III. Moreover, we conclude that the trial court abused its discretion by failing to dismiss Count II and Count III where defendant is entitled to § 4 immunity as to those charges only.

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Kathleen Jansen
/s/ Jane E. Markey