

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

FOR PUBLICATION
April 17, 2012
9:05 a.m.

v

RODNEY LEE KOON,

Defendant-Appellee.

No. 301443
Grand Traverse Circuit Court
LC No. 2010-028194-AR

Before: SAWYER, P.J., and O'CONNELL and RONAYNE KRAUSE, JJ.

SAWYER, P.J.

This case presents the question whether the “zero tolerance” provision of MCL 257.625(8), which prohibits operating a motor vehicle with any amount of a Schedule 1 controlled substance in the driver’s body, still applies if the driver used marijuana under the Michigan Medical Marihuana Act (MMMA).¹ We conclude that it does.

Defendant was pulled over for speeding 83 miles an hour in a 55 mile an hour zone. The arresting officer smelled intoxicants, and defendant admitted to having consumed one beer sometime within the last couple of hours. Defendant consented to a pat down of his person, voluntarily removed a pipe, and explained that he had a medical marijuana registry card and had last smoked marijuana five to six hours previously. A blood test showed that defendant had active THC in his system. Defendant was charged with operating a motor vehicle with a Schedule 1 controlled substance in his body² under the “zero tolerance” law. The district court concluded that the MMMA protected defendant from prosecution under MCL 257.625(8), unless the prosecution could show that defendant was actually impaired by the presence of marijuana in his body. The circuit court affirmed and concluded that the MMMA supersedes the zero tolerance law. The prosecutor now appeals by leave granted.

This question can be resolved by looking to the pertinent statutory provisions and considering the basic rules of statutory construction. Like the interpretation of other statutes, our duty when analyzing an initiative law is to ascertain and effectuate the intent of the people,

¹ MCL 333.26421 *et seq.*

² MCL 257.625(8).

presuming that the people meant what the statute plainly expresses, giving all words their ordinary and customary meaning as the voters would have understood them.³

MCL 257.625(8) provides as follows:

(8) A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state if the person has in his or her body any amount of a controlled substance listed in schedule 1 under section 7212 of the public health code, 1978 PA 368, MCL 333.7212, or a rule promulgated under that section, or of a controlled substance described in section 7214(a)(iv) of the public health code, 1978 PA 368, MCL 333.7214.

Under MCL 333.7212(1)(c), marijuana remains a Schedule 1 controlled substance despite the passage of the MMMA.

Turning to the MMMA, MCL 333.26424(a) states in relevant part:

A qualifying patient who has been issued and possesses a registry identification card shall not be 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 the medical use of marihuana in accordance with this act, provided that the qualifying patient possesses an amount of marihuana that does not exceed 2.5 ounces of usable marihuana

MCL 333.26423(e) defines “medical use” of marijuana as

the acquisition, possession, cultivation, manufacture, use, internal possession, delivery, transfer, or transportation of marihuana or paraphernalia relating to the administration of marihuana to treat or alleviate a registered qualifying patient’s debilitating medical condition or symptoms associated with the debilitating medical condition.

The MMMA also recognizes a number of circumstances under which the medical use of marijuana is not permitted. One of those exceptions specifically states that the protections will not apply to operating a motor vehicle while under the influence of marijuana.⁴ Thus, the MMMA permits the medical use of marijuana, but it recognizes that the use of marijuana is inconsistent with engaging in some activities at the same time as the use of the marijuana. This is certainly not an irrational provision. For example, it is not uncommon for a medication, whether prescription or over the counter, to be accompanied by a warning not to drive while

³ *People v Redden*, 290 Mich App 65, 76; 799 NW2d 184 (2010).

⁴ MCL 333.26427(b)(4).

using the medication. The problem that develops in this case is that, while MCL 333.26423 defines a number of terms used in the MMMA, it does not define the phrase “under the influence of marijuana.”

What we are left with is the MMMA, which affords a certain degree of immunity from prosecution for possession or use of marijuana for a medical purpose, and the Michigan Motor Vehicle Code, which prohibits operating a motor vehicle while there is any amount of marijuana in the driver’s system. These two provisions are not in conflict. The MMMA (or the Legislature) could have rescheduled marijuana to one of the other schedules. But it did not. Therefore, marijuana remains a Schedule 1 controlled substance. Furthermore, while the MMMA does not provide a definition of “under the influence of marijuana,” MCL 257.625(8) essentially does, establishing that any amount of a Schedule 1 controlled substance, including marijuana, sufficiently influences a person’s driving ability to the extent that the person should not be permitted to drive.

In order to conclude that the MMMA authorizes the operation of a motor vehicle with some marijuana in the driver’s system, we would have to supply a definition of “under the influence of marijuana” under MCL 333.26427(b)(4) that conflicts with the provisions of MCL 257.625(8). To do so, we would have to conclude that the MMMA repeals by implication MCL 257.625(8) as applied to marijuana. But it is well established that repeal by implication is disfavored.⁵ To do so, there must be a clear legislative intent to repeal, and there must not be another reasonable construction.⁶

But there is a reasonable construction: the Legislature has determined that it is illegal to operate a motor vehicle with any amount of marijuana in the driver’s system. Moreover, this is not in conflict with the MMMA. Not only does the MMMA not extend its protections of the medical use of marijuana to operating a motor vehicle while under the influence of marijuana, but it also recognizes other circumstances in which the medical use of marijuana is not permitted by the MMMA. For example, any medical use of marijuana is not permitted on a school bus, nor does it permit smoking marijuana, even for medical use, on public transportation.⁷

Indeed, this points out one of the flaws in the argument that defendant has the right to “internally possess” marijuana while driving. While the MMMA does include the term “internal possession” within its definition of “medical use,” that does not equate to a right to internally possess marijuana under any circumstance. As noted above, the MMMA specifically does not permit any medical use of marijuana on a school bus, which presumably includes even internal possession. Similarly, under other circumstances, some, but not all, types of medical use of marijuana is permitted; the example here being that of public transportation, where one can presumably internally possess it, but not smoke it.

⁵ *Wayne Co Prosecutor v Dep’t of Corrections*, 451 Mich 569, 576; 548 NW2d 900 (1996).

⁶ *Id.*

⁷ MCL 333.26427(b)(2)(A) and (3)(A).

Furthermore, the MMMA does not codify a *right* to use marijuana; instead, it merely provides a procedure through which seriously ill individuals using marijuana for its palliative effects can be identified and protected from prosecution under state law. Although these individuals are still violating the law by using marijuana, the MMMA sets forth particular circumstances under which they will not be arrested or otherwise prosecuted for their lawbreaking.⁸ In other words, the act grants immunity from arrest and prosecution, rather than the granting of a right. Thus, contrary to defendant's claim, he does not have a blanket right to internally possess medical marijuana.⁹

The point being that the MMMA does not permit all types of medical use of marijuana under all circumstances. There are circumstances under which some uses are permitted and others under which no use is permitted. If the drafters of the MMMA wanted to include immunity for the operation of a motor vehicle in section 4, the act would have to have an explicit grant of immunity either in MCL 333.26424(a) or in MCL 333.26423(e). It does not. Indeed, it explicitly does not permit the operation of a motor vehicle while under the influence of marijuana. And in the Motor Vehicle Code, the Legislature has provided a definition of what constitutes being under the influence of marijuana: the presence of any amount of a Schedule 1 controlled substance, including marijuana. That is to say, while "internally possessing" it.

The MMMA does not provide a protection against prosecution for violating MCL 257.625(8). Driving is a particularly dangerous activity; Schedule 1 substances are considered particularly inimical to a drivers' ability to remain in maximally safe control of their vehicles; and the danger of failing to do so affects not only the driver, but anyone else in the vicinity.

For these reasons, defendant was properly charged with a violation of MCL 257.625(8) and CJI2d 15.3a may be given at any trial in this case.

⁸ See *People v King*, 291 Mich App 503, 507-509; 804 NW2d 911 (2011), lv gtd 489 Mich 957 (2011); see also *Casias v Wal-Mart Stores, Inc*, 764 F Supp 2d 914, 922 (WD Mich, 2011).

⁹ Defendant contends that the MMMA grants him the "right" to "internally possess" marijuana and, therefore, as long as he does not break any other laws, he can go about his day-to-day activities, including operating a motor vehicle. Defendant further argues that as long as the marijuana does not affect his ability to operate a motor vehicle, he is immune from prosecution. Like most individuals, defendant misconstrues the MMMA. The MMMA does not codify a *right* to use marijuana, nor does it grant any citizen the "right" to use or possess marijuana. While this may seem strange to anyone who has encountered the act, it is the process set up by what many have referred to as an inartfully drafted act. What the MMMA does is set up a process where certain individuals cannot be arrested or prosecuted for their law-breaking. These protections, or immunities from lawbreaking, are very limited in scope. In essence, defendant is asking this Court to extend these protections to other activities, such as operating a motor vehicle, a boat, or an airplane. We respectfully decline; it is the Legislature's job to expand the law, not the court's responsibility.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ David H. Sawyer

/s/ Peter D. O'Connell

/s/ Amy Ronayne Krause