STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 1, 2014
v	No. 317447 Oakland Circuit Court
CYNTHIA ANN MAZUR, Defendant-Appellant.	LC No. 2012-243299-FH

Before: METER, P.J., and JANSEN and WILDER, JJ.

PER CURIAM.

Defendant appeals by leave granted the trial court's order denying her two motions to dismiss the charges against her[1] in accordance with the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*. We agree that the charges should not be dismissed under the MMMA and thus affirm and remand for further proceedings.

Defendant first argues that the trial court abused its discretion when it denied her motion to dismiss based on the immunity provision of the MMMA, MCL 333.26424. We disagree.

We review for an abuse of discretion a trial court's ruling concerning a motion to dismiss. *People v Bylsma*, 493 Mich 17, 26; 825 NW2d 543 (2012). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008).

"Although marijuana remains illegal in Michigan, the MMMA allows the medical use of marijuana by a limited class of individuals." *People v Carruthers*, 301 Mich App 590, 597; 837 NW2d 16 (2013). "[T]he MMMA's protections are limited to individuals suffering from serious or debilitating medical conditions or symptoms, to the extent that the individuals' marijuana use

[1] Defendant was charged with one count of possession with intent to deliver less than five kilograms or fewer than 20 plants of marihuana, MCL 333.7401(2)(d)(*iii*), and one count of manufacturing less than five kilograms or fewer than 20 plants of marihuana, MCL 333.7401(2)(d)(*iii*).

is carried out in accordance with the provisions of the MMMA." *Id*. (internal citations, quotation marks, and brackets omitted).

MCL 333.26424 grants broad immunity from arrest, prosecution, penalties, and the denial of any rights or privileges to qualifying patients, primary caregivers, and other persons in specific circumstances. A defendant has the burden of production to establish his or her eligibility for immunity. See *People v Nicholson*, 297 Mich App 191, 202; 822 NW2d 284 (2012) (holding that the defendant "must . . . establish that at the time of his arrest he was engaged in the medical use of marijuana in accordance with the MMMA"); see also *People v Danto*, 294 Mich App 596, 613; 822 NW2d 600 (2011) (affirming order precluding assertion of the affirmative defense, MCL 333.26428, because the defendants had "not met their burdens of production to establish that the marijuana was kept in an enclosed, locked facility, MCL 333.26424").

MCL 333.26424(g) provides:

> A person 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 providing a registered qualifying patient or a registered primary caregiver with marihuana paraphernalia for purposes of a qualifying patient's medical use of marihuana.

A "patient" or "qualifying patient" is "a person who has been diagnosed by a physician as having a debilitating medical condition," MCL 333.26423(i), and a "primary caregiver" is a person who is at least 21 years of age who has agreed to assist with a patient's medical use of marihuana, who has not been convicted of any felony within the past 10 years, and who has never been convicted of a felony involving illegal drugs or assault, MCL 333.26423(h).

While the MMMA does not define "marihuana paraphernalia," MCL 333.7451 defines "drug paraphernalia" as

> any equipment, product, material, or combination of equipment, products, or materials, which is specifically designed for use in planting; propagating; cultivating; growing; harvesting; manufacturing; compounding; converting; producing; processing; preparing; testing; analyzing; packaging; repackaging; storing; containing; concealing; injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance . . . .

MCL 333.7451 also contains a nonexclusive list of 13 items that are considered "drug paraphernalia," including "[t]esting equipment specifically designed for use in identifying or in analyzing the strength, effectiveness, or purity of a controlled substance," a "weight scale or balance specifically designed for use in weighing or measuring a controlled substance," and an "object specifically designed for use in ingesting, inhaling, or otherwise introducing marihuana, cocaine, hashish, or hashish oil into the human body." Each of the 13 subsections uses the phrase "specifically designed for use in" or "specifically designed to" or "specifically designed for use with," emphasizing that an object or kit is "drug paraphernalia" only if it was primarily

designed to use in association with controlled substances. MCL 333.7451. Further, MCL 333.7457(d) explicitly excludes from the definition of "drug paraphernalia" a "blender, bowl, container, spoon, or mixing device not specifically designed for a use described in" MCL 333.7451.

"Statutes that relate to the same subject or that share a common purpose are *in pari materia* and must be read together as one law, even if they contain no reference to one another and were enacted on different dates." *People v Shakur*, 280 Mich App 203, 209; 760 NW2d 272 (2008) (internal citation and quotation marks omitted). "Statutes relate to the same subject if they relate to the same person or thing or the same class of persons or things." *Id*. (internal citations and quotation marks omitted). "The object of the *in pari materia* rule is to give effect to the legislative intent expressed in harmonious statutes. If statutes lend themselves to a construction that avoids conflict, that construction should control." *Id*. at 209-210 (internal citations and quotation marks omitted). Because the MMMA and the controlled-substances article of the Public Health Code, MCL 333.7101 *et seq.*, relate to the same subject, i.e., restrict the use of controlled substances, they are *in pari materia* and it is appropriate to adopt the definition of "drug paraphernalia" found in MCL 333.7451 for the purposes of addressing defendant's assertion of immunity under MCL 333.26424(g). See *Shakur*, 280 Mich App at 209-210 (discussing the *in pari materia* rule generally).

Defendant argues that the trial court abused its discretion when it denied her motion to dismiss the charges against her on the basis that she was immune from prosecution under MCL 333.26424(g); she argues that she wrote the harvest dates of marihuana plants on two sticky notes she provided to her husband, David Mazur, and that these constituted marihuana paraphernalia. She maintains that these acts were "all that is required for immunity." We disagree.

That defendant was completely isolated from the possibility of prosecution, arrest, or other penalty for all of her alleged marihuana-related activity by virtue of having written harvest dates on two sticky notes is contrary to the principle of statutory interpretation that statutes must be construed to prevent absurd results. *People v Tennyson*, 487 Mich 730, 741; 790 NW2d 354 (2010). Given the strict requirements registered patients and caregivers must follow in order to remain in compliance with the MMMA, including the access restrictions that David did not follow as indicated by his convictions, it would be an absurd conclusion that the Legislature intended to accord such significance to the act of writing dates on a piece of paper. If a person provides a patient or caregiver with paraphernalia, it is only that isolated act of providing paraphernalia that cannot be penalized under MCL 333.26424(g), and not, as defendant by implication urges this Court to hold, all of the person's marihuana-related activity. This Court "may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *People v Breidenbach*, 489 Mich 1, 10; 798 NW2d 738 (2011) (internal citations and quotation marks omitted).

In addition, the notes were not paraphernalia. Application of the *in pari materia* rule, *Shakur*, 280 Mich App at 209-210, leads to the conclusion that the Legislature intended to grant immunity to a person who provides a registered qualifying patient or caregiver with "marihuana paraphernalia for purposes of a qualifying patient's medical use of marihuana," MCL 333.26424(g), that is, items *specifically* designed to facilitate the use of marihuana. Objects that

serve as ordinary household and office supplies, such as sticky notes, are outside the ambit of what the Legislature contemplated when it created the paraphernalia-immunity provision. MCL 333.7451; MCL 333.26424(g).

Defendant also argues that she was immune from prosecution under MCL 333.26424(i), which provides that "solely . . . being in the presence or vicinity of the medical use of marihuana in accordance with this act, or . . . assisting a registered qualifying patient with using or administering marihuana" is not a ground for arrest, prosecution, or other penalty.[2] Defendant only seeks protection under the first clause, asserting that she was merely present in the house while David, a registered patient and caregiver, grew marihuana in the locked basement. The prosecution argues that immunity is only available if the use was "in accordance with [the MMMA]" and that David's guilty pleas are evidence that the marihuana activity in defendant's house was not in accordance with the MMMA.[3]

We need not decide whether David's *convictions* should have been persuasive in deciding whether defendant was eligible for immunity under MCL 333.26424(i) because the evidence failed to show that the growing operation was in accordance with the MMMA. One officer testified that police recovered marihuana from the kitchen and a bathroom, and there was no evidence that these areas were locked. Marijuana was also recovered from the garage, and the police officer indicated that it could not have been locked because officers were able to enter without breaking the door. While defendant and David said that the basement was ordinarily locked, it was not locked on the day of the raid and it contained marihuana. David admitted that the basement was not locked and simply had an unsecured bolt. The MMMA requires patients and caregivers to keep marihuana in an "enclosed, locked facility." MCL 333.26424(a) (patients); MCL 333.26424(b)(2) (caregivers); see also *Danto*, 294 Mich App at 606-607. Evidence showed that the marihuana activity at issue in this case was not in accordance with the MMMA because the storage requirements were violated. Therefore, the trial court did not abuse its discretion in finding that defendant was not eligible for immunity under MCL 333.26424(i)

Defendant next argues that the trial court erred when it denied defendant a second, discrete evidentiary hearing to allow her to assert the affirmative defense under MCL 333.26428. We disagree.

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[2] "Medical use" means "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." MCL 333.26423(f).

[3] In separate proceedings, David pleaded guilty to one count of possession with intent to deliver less than five kilograms or fewer than 20 plants of marihuana, MCL 333.7401(2)(d)(*iii*), and one count of manufacturing less than five kilograms or fewer than 20 plants of marihuana, MCL 333.7401(2)(d)(*iii*).

An affirmative defense involves admitting "the doing of the act charged, but seeks to justify, excuse, or mitigate it. It does not negate selected elements or facts of the crime." *People v Kolanek*, 491 Mich at 382, 398 n 36; 817 NW2d 528 (2012) (internal citations, quotation marks, and punctuation omitted). MCL 333.26428 contains an affirmative defense to a prosecution involving marihuana and provides, in part:

> (a) Except as provided in [MCL 333.26427(b)], a patient and a patient's primary caregiver, if any, may assert the medical purpose for using marihuana as a defense to any prosecution involving marihuana, and this defense shall be presumed valid where the evidence shows 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 serious 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 serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition; and
>
> (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 the use of marihuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition.
>
> (b) A person may assert the medical purpose for using marihuana in a motion to dismiss, and the charges shall be dismissed following an evidentiary hearing where the person shows the elements listed in subsection (a).

"[T]o establish the elements of the affirmative defense in [MCL 333.26428], a defendant need not establish the elements of [MCL 333.26424]." *Kolanek*, 491 Mich at 403. "Any defendant, regardless of registration status, who possesses more than 2.5 ounces of usable marijuana or 12 plants not kept in an enclosed, locked facility may satisfy the affirmative defense under [MCL 333.26428]." *Id*. "As long as the defendant can establish the elements of the [MCL 333.26428] defense and none of the circumstances in [MCL 333.26427(b)] exists, that defendant is entitled to the dismissal of criminal charges." *Id*. However, defendant's argument that her entitlement to assert the affirmative defense necessarily follows from her ineligibility for immunity under MCL 333.26424 lacks merit. Contrary to the premise of that argument, the trial court's determination that she was not eligible for immunity under MCL 333.26424(g) and (i) did not conclusively establish, as she claims, that she was "involved" in David's marihuana

activity, and being "involved" in marihuana activity is not sufficient to trigger eligibility for the affirmative defense, which is available only to patients and their caregivers, terms that are each specifically defined in the MMMA. MCL 333.26428(a).[4]

There was no evidence that defendant used marihuana—defendant denied smoking marihuana while David grew it—so whether defendant was entitled to use the affirmative defense depends on whether she was a "primary caregiver." The unifying theme of defendant's and David's testimony, however, was that she was not involved with the cultivation of marihuana in her house or with David's provision of marihuana to patients. Rather, she initially opposed the idea of David growing marihuana, telling him she "wasn't very happy about" the idea because she "didn't think it was a good idea to have [marihuana] in [her] home with [her] children." Indeed, the only suggestion that defendant was a caregiver under the MMMA came from a police officer's recollection of his interview with defendant, wherein defendant told the officer, "[W]e were following the law in providing medication to people that needed it."

However, defense counsel attempted to distance defendant from that evidence below, and defendant explains on appeal that while she said "we," she was not referring to herself because "married couples . . . frequently refer to each one of them collectively and not singularly."[5] The upshot of defendant's "we" argument is that she has offered no evidence that she was a primary caregiver as defined by the MMMA; because she also was not a "patient," she was not eligible to use the affirmative defense found in MCL 333.26428.

In the brief accompanying her written motion, defendant asserted that she would "provide sufficient evidence at the evidentiary hearing to show" that "[e]ach [p]rong" of the affirmative defense would be satisfied, but she did not offer any of that evidence in her brief or at the hearing that did occur, and she did not state whether she qualified for the affirmative defense as a patient or a caregiver. The following colloquy took place at the hearing that did occur:

> *Ms. O'Brien (attorney for the prosecution)*: The Court will recall that Defendant had filed some motions under [MCL 333.26424], a separate one under [MCL 333.26428], and then a separate one with regard to suppression of some evidence. The Court's already ruled on the evidence[-]suppression motion, and denied that, so, following that court order, counsel and I spoke and agreed we'd go forward under the Defendant's claim that she's immune from prosecution under [MCL 333.26424], and that the Court would hold Defendant's motion

[4] As noted earlier, a "patient" is "a person who has been diagnosed by a physician as having a debilitating medical condition," MCL 333.26423(i), and a "primary caregiver" is a person who is at least 21 years of age who has agreed to assist with a patient's medical use of marihuana, who has not been convicted of any felony within the past 10 years, and who has never been convicted of a felony involving illegal drugs or assault, MCL 333.26423(h).

[5] The appellate brief for the defense makes reference to "*[defendant's] husband's* medical marijuana activities . . ." (emphasis added).

regarding [MCL 333.26428] in abeyance because the results of this hearing might be dispositive on that motion. Did I say that right?

Mr. Rudoi (attorney for the defense): I would—yes, I agree. [Underlining added.]

This exchange placed defendant on notice that the trial court's ruling on her motions under both MCL 333.26424 and MCL 333.26428 would rely on the evidence introduced at the initial hearing, and defense counsel agreed with the procedure. See *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999), overruled in part on other grounds by *People v Thompson*, 477 Mich 146; 730 NW2d 708 (2007) (discussing waiver). Defendant was afforded an adequate opportunity to introduce evidence concerning her motions to dismiss under the immunity and affirmative-defense sections of the MMMA, and the trial court did not err in finding that she was not immune from prosecution or entitled to use the affirmative defense.

We acknowledge, however, that defendant may very well have a case for an acquittal at trial based on traditional defense principles. Our opinion today merely addresses her argument that she be afforded protections under the MMMA.

Affirmed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Kathleen Jansen
/s/ Kurtis T. Wilder