STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 20, 2012
v	No. 303644 Lapeer Circuit Court
ANTHONY ORLANDO II, Defendant-Appellant.	LC No. 10-010352-FH

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

PER CURIAM.

Defendant appeals by right from his jury trial conviction of manufacturing marijuana, MCL 333.7401(2)(d)(iii). Defendant was sentenced as a third habitual offender, MCL 769.11, to serve 18 months' probation, with the first 60 days to be served in the county jail. We affirm.

On July 28, 2009, police, acting pursuant to a search warrant, discovered five marijuana plants growing in a locked shed behind defendant's home. On August 11, 2009, defendant was charged with manufacturing marijuana. Six days after being charged, defendant, complaining of chronic lower back pain, was examined by Dr. Robert D. Kenewell. Following this examination, Dr. Kenewell signed an affidavit stating that defendant was his patient, that defendant suffered from severe and chronic lower back pain, and that the use of medical marijuana was likely to be a palliative or therapeutic benefit to defendant. After receiving this affidavit from Dr. Kenewell, defendant applied for and received a medical marijuana registry card from the Michigan Department of Health on September 14, 2009.

After acquiring his medical marijuana registry card, defendant moved to have the criminal charges against him dismissed pursuant to § 8, MCL 333.26428, of the Michigan Medical Marijuana Act, MCL 333.26421 *et seq*. The trial court denied the motion on the ground that defendant did not possess and had not applied for a medical marijuana registry card at the time the search warrant was issued.

Prior to this holding by the trial court, the prosecution had moved to exclude from trial any evidence showing that defendant subsequently possessed a medical marijuana registry card or that defendant was using marijuana for medical purposes. The trial court granted the motion

on the basis that defendant's actions subsequent to the search warrant were irrelevant and that any probative value would be more prejudicial than substantive.[1]

Subsequently, defendant filed another motion to assert a § 8 defense. The trial court denied this motion on the same ground as it had denied defendant's first motion, and also noted that defendant had failed to get a physician's statement prior to the date of his arrest. Defendant was subsequently convicted of manufacturing of marijuana.

We review questions of statutory interpretation de novo. *People v Swafford*, 483 Mich 1, 7; 762 NW2d 902 (2009). We review a trial court's ruling on a preserved evidentiary issue for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). A trial court abuses its discretion when its determination falls outside of the range of principled outcomes. *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010).

Defendant argues that the trial court erred by denying his motion to assert a medical marijuana defense. We disagree.

Section 8 of the MMMA, MCL 333.26428, reads in relevant part:

> (a) Except as provided in section 7, 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:
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> (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
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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

[1] Defendant sought interlocutory leave to appeal on the issue whether he could assert a § 8 defense at trial. This Court denied the application. *People v Orlando*, unpublished order of the Court of Appeals, entered November 24, 2010 (Docket No. 299899).

> 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.

A defendant must have received the required physician statement prior to the commission of the offense. *People v* Reed, ___ Mich App ___; ___ NW2d ___ (No. 296686, issued July 30, 2011), slip op at 1.

It is undisputed that defendant did not receive a physician's statement prior to the date of the offense; indeed it is undisputed that he had not even been examined by a physician prior to the date of the offense. As such, defendant is not entitled to assert a defense under § 8 of the MMMA. Defendant contends, however, that this Court's holding in *People v Kolanek*, 291 Mich App 227, 241; 804 NW2d 870 (2011), only supports the denial of his motion to dismiss the charges, but does not support the denial of his motion to assert a § 8 defense. The *Kolanek* Court held:

> Because the statute does not provide that the failure to bring, or to win, a pretrial motion to dismiss deprives the defendant of the statutory defense before the factfinder, defendant's failure to provide sufficient proofs pursuant to his motion to dismiss does not bar him from asserting the § 8 defense at trial nor from submitting additional proofs in support of the defense at that time. [*Kolanek*, 291 Mich App at 241.]

But as this Court explained in *Reed*, slip op at 4, the trial court may bar presentation of the defense at trial if there is no issue of fact that would allow the jury to find that the defense applies.

In *Kolanek*, there was such an issue of fact. The defendant had been seeing his physician for nine years prior to being arrested for possession of marijuana. Moreover, the defendant presented evidence that he had discussed the issue of medical marijuana with his physician prior to the date of his arrest, and that his physician had been receptive to the idea. *Kolanek*, 291 Mich App at 229-230.[2] Thus, there were legitimate questions of fact as to whether the defendant in *Kolanek* had received the sort of physician's statement called for under § 8 of the MMMA.

By contrast, in the instant case there is no question as to whether defendant had received the sort of physician's statement called for under § 8 of the MMMA only after the date of the offense. Defendant does not claim, nor does the record suggest, that there are any proofs that defendant could submit at trial that would establish he received a qualifying physician's statement on any date other than August 17, 2009.

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[2] Because the only statements regarding the use of medical marijuana that the defendant established at the trial court level occurred prior to the enactment of the MMMA, we still found that denying the defendant's motion to dismiss was proper in *Kolanek*. 291 Mich App at 239-241.

Therefore, because defendant did not receive the necessary physician's statement prior to the date of his arrest, and because the record shows there is no evidence that defendant could present to establish otherwise, the trial court did not err by denying defendant's motion to assert a § 8 defense under the MMMA.

Affirmed.

/s/ Peter D. O'Connell
/s/ David H. Sawyer
/s/ Michael J. Talbot