

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CRAIG GORDON BROWN,

Defendant-Appellant.

FOR PUBLICATION

May 22, 2008

No. 271164

Oakland Circuit Court

LC No. 04-194664-FH

Advance Sheets Version

Before: Zahra, P.J., and White and O’Connell, JJ.

WHITE, J. (*concurring in part and dissenting in part*).

I respectfully dissent from the majority’s conclusion that Mich Admin Code, R 338.3122(2) plainly and unambiguously provides that possession of Trenbolone in a form that is “expressly intended for administration through implants to cattle or other nonhuman species and which has been approved by the United States drug enforcement administration for such administration” is illegal if the possessor intends the Trenbolone for human consumption.

Defendant was convicted of possession and delivery of Trenbolone in a form that was expressly intended for administration through implants to nonhuman animals. The question is whether the Trenbolone defendant possessed is a controlled substance. Mich Admin Code, R 338.3122(1) states:

Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation that contains any quantity of an anabolic steroid, including its salts, isomers, and salts of isomers if the existence of such salts of isomers is possible within the specific chemical designation, is included in schedule 3. As used in this rule, the term “anabolic steroid” means any of the following drugs or hormonal substances which are chemically and pharmacologically related to testosterone, other than estrogens, progestins, and corticosteroids, and which promote muscle growth[.]

Mich Admin Code, R 338.3122(1)(w) expressly identifies, “Trenbolone.” Thus, unless specifically excepted, a mixture containing Trenbolone is included in schedule 3.

Rule 338.3122(2) states:

An anabolic steroid which is expressly intended for administration through implants to cattle or other nonhuman species and which has been approved by the United States drug enforcement administration for such administration is specifically excepted from schedule 3.

Trenbolone is an anabolic steroid that has been approved by the United States Secretary of Health and Human Services for administration through implants to cattle or other nonhuman species. 21 CFR 1308. Defendant possessed Trenbolone in implant form.

Read in conjunction, subsection 1 of Michigan Board of Pharmacy Rule 338.3122 lists Trenbolone as a schedule 3 substance, making any mixture containing Trenbolone a schedule 3 substance, but subsection 2 of the rule then excepts from schedule 3 any anabolic steroid which is “expressly intended for administration through implants to cattle or other nonhuman species and which has been approved by the United States drug enforcement administration for such administration”

The majority concludes that the rule clearly and unambiguously focuses on the possessor’s intent with respect to the substance, rather than the intent of the manufacturer or the seller. The majority concludes that although the Trebolone at issue is expressly intended for administration through implants to cattle, and would therefore not be a controlled substance in the hands of someone who intended to administer it to an animal, it is nevertheless a controlled substance in the hands of someone who does not intend to use it for this purpose.

I do not agree that no guesswork is required in applying Rule 338.3122, or that it plainly and unambiguously identifies Trenbolone as a controlled substance and only exempts its possession if the possessor expressly intends that the drug be administered through implants to cattle or other nonhuman species. Rule 338.3122 does not unambiguously so provide. Rather, it identifies Trenbolone as a schedule 3 controlled substance and then states that if it is expressly intended for administration through implants to animals, it, the Trebolone, rather than its use, is excepted from schedule 3. The focus is on the substance and whether it is a controlled 3 substance. The clause “and which has been approved by the United States drug enforcement administration for such administration” supports this interpretation. The United States Drug Enforcement Administration does not approve the possession and use of a drug by individuals, rather it approves the manufacture and use of a drug for specific purposes in specific forms. The phrase “which is expressly intended for administration through implants to cattle or other nonhuman species and which has been approved by the United States drug enforcement administration for such administration” strongly implies that the word “intended” is directed at the use for which the drug is expressly made and approved, and not the use intended by the possessor. A person of ordinary intelligence would not be on notice that Trenbolone that is in a form expressly intended for administration through implants to cattle is a schedule 3 substance.

/s/ Helene N. White