STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 11, 2016
v	No. 324545 Oakland Circuit Court
TERREY BARASH, Defendant-Appellant.	LC No. 13-248111-FH

Before: SERVITTO, P.J., and SAAD and O'BRIEN, JJ.

PER CURIAM.

Defendant, Terrey Barash, was convicted of delivering or manufacturing five to 45 kilograms of marijuana, MCL 333.7401(2)(d)(*ii*), and delivering or manufacturing less than five kilograms of marijuana, MCL 333.7401(2)(d)(*iii*), and was sentenced to concurrent terms of one day in jail and two years' probation for each conviction. He appeals as of right his October 2, 2014 judgment of sentence. We affirm.

I. BACKGROUND

Defendant was charged with the offenses listed above after law enforcement executed a search warrant on defendant's home and recovered 27 marijuana plants, approximately 613 grams of loose marijuana, and a variety of other marijuana-related items. At the time the search warrant was executed, defendant was a patient as well as a caregiver for five other patients under the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*. Defendant filed a motion to dismiss pursuant to MCL 333.26428(a) of the MMMA. After hearing the testimony of defendant and two of his patients, the trial court concluded that plaintiff failed to present prima facie evidence of all three elements under § 8(a). Thus, defendant was not entitled to present a § 8 defense to the factfinder. As stated above, defendant was subsequently convicted of both charges, and this appeal followed.

II. ANALYSIS

On appeal, defendant's sole argument is that the trial court erroneously prevented him from presenting a defense under § 8 of the MMMA in light of our Supreme Court's decision in *People v Hartwick*, 498 Mich 192; ___ NW2d ___ (2015). We disagree.

A. STANDARD REVIEW

"We review questions of statutory interpretation de novo." *Hartwick*, 498 Mich at 209. In interpreting the MMMA, we are to ascertain and give effect to the electorate's, not the Legislature's intent, as reflected the act's language itself. *Id*. at 209-210. Thus, we construe the MMMA's language according to its plain and ordinary meaning as would have been understood by the electorate. *Id*. See also *People v Kolanek*, 491 Mich 382, 393-397; 817 NW2d 528 (2012).

B. SECTION 8 DEFENSE

Section 8 of the MMMA provides medical marijuana patients and caregivers an affirmative defense to marijuana-related criminal charges. *Hartwick*, 498 Mich at 226. If a defendant proves all three elements under § 8(a) and no question of fact exists, he or she is entitled to dismissal of the charges. *Id*. at 227. If a defendant presents prima facie evidence of all three elements under § 8(a) and a question of fact remains, while not entitled to a dismissal of the charges, he or she is entitled to present a § 8 defense to the factfinder. *Id*. If a defendant does not present prima facie evidence of all three elements under § 8(a), his or her motion to dismiss must be denied, and he or she is not permitted to present a § 8 defense to the factfinder. *Id*.

In this case, we conclude that defendant did not present prima facie evidence of all three elements under § 8(a). Thus, the trial court properly concluded that he was not entitled to present a § 8 defense to the factfinder.

1. SECTION 8(A)(1)

The first element under § 8(a) provides as follows:

> (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 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.

In *Hartwick*, our Supreme Court reduced this element into three sub-elements: (1) a bona-fide physician-patient relationship must exist; (2) the physician must complete a full assessment of the patient's medical history and current medical conditions; and (3) as a result, the physician must be of the professional opinion that the patient has a debilitating medical condition and will likely benefit from using medical marijuana to treat that condition. 498 Mich at 229. The first element requires "proof of an actual and ongoing physician-patient relationship at the time the written certification was issued." *Id*. at 231. The second element requires "medical records or other evidence [demonstrating] that the physician actually completed a full assessment of the patient's medical history and current medical condition before concluding that the patient is likely to benefit from the medical use of marijuana and before the patient engages in the medical use of marijuana." *Id*. at 230-231. The third sub-element requires at least a registry identification card. *Id*. at 230. "A primary caregiver has the burden of establishing the elements

of § 8(a)(1) for each patient to whom the primary caregiver is alleged to have unlawfully provided marijuana." *Id*. at 232.

In this case, defendant did not present prima facie evidence as required by § 8(a)(1). Defendant did not present prima facie evidence regarding the first sub-element. Instead of presenting "proof of an actual and ongoing physician-patient relationship at the time the written certification was issued," *Hartwick*, 498 Mich at 231, defendant answered affirmatively when asked whether, "[a]fter the one-time visit, [the physician] sign[ed] off for medical marijuana[.]" While he did state that he saw the physician, "Dr. Zia Kassab" (who, according to defendant, was a cardiologist), on a second occasion, he also admitted that the subsequent visit "was one year later to renew [his] certification[.]" In short, defendant's own testimony clearly demonstrated that there was not an actual or ongoing physician-patient relationship between he and Dr. Kassab. He also did not present evidence of the second sub-element, that the physician completed a full assessment of the patient's medical history and current medical conditions. Instead of presenting "medical records or other evidence [demonstrating] that the physician actually completed a full assessment of the patient's medical history and current medical condition before concluding that the patient is likely to benefit from the medical use of marijuana and before the patient engages in the medical use of marijuana," *Id*. at 230-231, defendant and one of his patients testified that they did not bring any medical records to their only interaction with Dr. Kassab before he recommended medical marijuana. Furthermore, there is no evidence in the record regarding defendant's other three patients. Accordingly, because defendant did not present prima facie evidence of the first and second sub-elements under § 8(a)(1), the trial court correctly concluded that § 8(a)(1) was not satisfied.

2. SECTION 8(A)(2)

The second element under § 8(a) provides as follows:

> (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[.]

As our Supreme Court explained in *Hartwick*, a registry identification card "does not guarantee that an individual will always possess only the amount of marijuana allowed under the MMMA." 498 Mich at 233-234. It also explained that "nothing in the MMMA supports the notion that the quantity limits found in the immunity provision of [MCL 333.26424] should be judicially imposed on the affirmative defense provision of § 8." *Id*. at 234. Instead, "[p]rimary caregivers must establish the amount of usable marijuana needed to treat their patients' debilitating medical conditions and then how many marijuana plants the primary caregiver needs to grow in order [to] ensure 'uninterrupted availability' for the caregiver's patients." *Id*. at 235. This can be established through "testimony regarding how much usable marijuana each patient required and how many marijuana plants and how much usable marijuana the primary caregiver needed in order to ensure each patient the 'uninterrupted availability' of marijuana." *Id*.

In this case, defendant did not present prima facie evidence as required by § 8(a)(2). When asked "[h]ow [he was] able to determine what's reasonably necessary" for his patients, he answered as follows: "Each patient could have up to two-and-a-half ounces according to the state of Michigan. That's the law." However, as stated above, "nothing in the MMMA supports the notion that the quantity limits found in the immunity provision of § 4 should be judicially imposed on the affirmative defense provision of § 8." *Hartwick*, 498 Mich at 234. Instead, defendant was required to "establish the amount of usable marijuana needed to treat their patients' debilitating medical conditions and then how many marijuana plants the primary caregiver needs to grow in order [to] ensure 'uninterrupted availability' for the caregiver's patients." *Id*. at 235. He failed to do so. He was unaware of how much medical marijuana was necessary to treat his patients' debilitating conditions and could only provide a vague description of his patients' debilitating conditions when prompted with their "paperwork." In fact, according to one of defendant's patients, he smoked marijuana cigarettes with "[l]ess than one gram" of marijuana daily. That patient estimated that he used "[m]aybe four grams" of marijuana per week. Thus, if defendant provided this patient two-and-a-half ounces of marijuana, he provided him enough marijuana for approximately 17.5 weeks. Yet, that same patient also testified that he obtained marijuana from defendant "[o]nce a week." In short, this did not constitute "testimony regarding how much usable marijuana each patient required and how many marijuana plants and how much usable marijuana the primary caregiver needed in order to ensure each patient the 'uninterrupted availability' of marijuana." *Id*. Furthermore, there is no evidence in the record regarding defendant's other three patients. Accordingly, because defendant did not present prima facie evidence under § 8(a)(2), the trial court correctly concluded that § 8(a)(2) was not satisfied.

3. SECTION 8(A)(3)

The third element under § 8(a) provides as follows:

> (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.

As our Supreme Court recognized in *Hartwick*, this element closely resembles the "medical use" requirement set forth in § 4. 498 Mich at 236. It requires that patients "present prima facie evidence regarding their use of marijuana for a medical purpose regardless whether they possess a registry identification card" and that primary caregivers "present prima facie evidence of their own use of marijuana for a medical purpose and any patients' use of marijuana for a medical purpose." *Id*. at 237.

In this case, defendant did not present prima facie evidence as required by § 8(a)(3). While it is true that defendant denied that he would give someone marijuana "if someone came to [him] and said, 'I'm a patient. I want . . . you to give me marijuana" and testified about his own use, the record is void of evidence regarding at least three of his patients' use of marijuana for a medical purpose. "A registry identification card merely qualifies a patient for the medical use of marijuana. It does not establish that at the time of the charged offense, the defendant was

actually engaged in the protected use of marijuana." *Hartwick*, 498 Mich at 237. Thus, the mere fact that defendant's other patients presented defendant with their "paperwork," alone, is insufficient for purposes of § 8(a)(3). Accordingly, because defendant did not present prima facie evidence under § 8(a)(3), the trial court correctly concluded that § 8(a)(3) was not satisfied.

C. "NEED" FOR REMAND

Defendant also requests that, regardless of whether the evidence he presented at the evidentiary hearing was sufficient under § 8, "this Court remand this matter for further proceedings based on the intervening change in the law." We decline to do so. Defendant failed to present prima facie evidence of all three elements under § 8(a), and that remains true in light of the *Hartwick* decision. While defendant claims that this Court has remanded similar matters to determine whether defendant possessed more medical marijuana than was reasonably necessary under § 8(a)(2), citing *People v Anderson*, 298 Mich App 10; 825 NW2d 641 (2012); *People v Agro*, unpublished opinion per curiam of the Court of Appeals, issued January 22, 2013 (Docket No. 305725), he ignores the fact that he also failed to present prima facie evidence as to the remaining two elements under § 8(a). He also ignores the fact that the issue in each of those cases was whether provisions in § 4 applied to a defendant's attempt to raise a § 8 defense, *Anderson*, 298 Mich App at 18; *Agro*, unpub op at 1, which is not at issue in this case. We also feel it necessary to point out that those cases were each decided more than two years *before* the *Hartwick* decision. Moreover, defendant fails to recognize that our Supreme Court expressly concluded that this Court correctly concluded that both defendants in the *Hartwick* case were not entitled to the § 8 affirmative defense. 498 Mich at 239, 243; *People v Hartwick*, 303 Mich App 247, 260-270; 842 NW2d 545 (2013); *People v Tuttle*, 304 Mich App 72, 84-95; 850 NW2d 484 (2014). Thus, while he relies on the fact that our decision in *Hartwick* was subsequently overruled, it is important to point out that our § 8 analysis and decision, i.e., the *only* issue in this case, was correct.

III. CONCLUSION

In sum, because defendant did not present prima facie evidence of all three elements under § 8(a), the trial court correctly concluded that he was not entitled to present a § 8 defense at trial. We therefore affirm defendant's conviction and sentence.

Affirmed.

/s/ Deborah A. Servitto
/s/ Henry William Saad
/s/ Colleen A. O'Brien