STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 17, 2017
v	No. 334677 Isabella Circuit Court
JOHN ROY BENDELE, Defendant-Appellant.	LC No. 2015-002155-FH

Before: BOONSTRA, P.J., and METER and GADOLA, JJ.

PER CURIAM.

Defendant appeals by right his convictions, following a jury trial at which defendant represented himself, of felon in possession of a firearm, MCL 750.224f, felon in possession of ammunition, MCL 750.224f(6), possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, delivery of marijuana, MCL 333.7401(2)(d)(*iii*), and knowingly keeping or maintaining a drug house, MCL 333.7405(d). The trial court sentenced defendant as a second habitual offender, MCL 769.10, to concurrent prison terms of six months to five years for both felon in possession convictions, six months to four years for the delivery of marijuana conviction, and six months to two years for the drug house conviction, to be served consecutively to his sentence of two years for the felony-firearm conviction. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Officer David Feger of the Saginaw Chippewa Tribal Police conducted a traffic stop of a vehicle and, upon searching the vehicle with permission, discovered marijuana in its center console. Several of the vehicle's occupants indicated that they had obtained the marijuana from defendant's residence; they denied having a medical marijuana card. With that information, Feger secured a search warrant for the residence. When police officers executed the search warrant, they found 102 marijuana plants, over 13 pounds of marijuana, multiple firearms, scales, and a ledger listing various names.

At his preliminary examination, defendant indicated that he wished to represent himself. The trial court engaged in a colloquy with defendant both at that hearing and at every subsequent hearing to ensure that defendant was and remained aware that he had the right to an attorney and that he was waiving that right.

Before trial, defendant filed a motion asserting § 4 immunity[1] under the Michigan Medical Marihuana[2] Act (MMMA), MCL 333.26421 *et seq*. The prosecution admitted that defendant possessed both a patient and a caregiver card under the MMMA. Defendant did not call any witnesses in support of his motion. The trial court ultimately determined, after hearing Feger's testimony on direct and cross-examination, that defendant had exceeded the amount of usable marijuana and marijuana plants that he was permitted to possess under the MMMA, and it therefore denied defendant's motion.

Defendant did not file a motion in the trial court to assert a § 8 affirmative defense[3] under the MMMA. Therefore, the prosecution moved in limine to preclude defendant from making reference to the MMMA at trial or from referring to a § 8 affirmative defense. The trial court ruled that because defendant had failed to file any motion regarding a § 8 defense, as is required under the MMMA, defendant would be allowed to "say what he wants to the jury" including informing them that he had a medical marijuana card and that he was a registered caregiver, "but there won't be any legal instructions indicating that that is an affirmative defense."

Before trial, the trial court held, in response to a filing by defendant entitled "Judicial Notice to Correct the Record of the Court," that defendant's 1991 conviction for breaking and entering an unoccupied building, MCL 750.110, was a "specified felony" for purposes of his felon in possession charges, see MCL 750.224f.

At trial, defendant asserted that he believed that he was in compliance with the MMMA and that he was permitted to own firearms. He admitted that he had been convicted in 1991 of breaking and entering an unoccupied building and that he had not taken any steps to restore his right to own firearms. Defendant was convicted as described.

At sentencing, the trial court again questioned defendant regarding whether he would like a lawyer to represent him. Defendant stated that he had been "in communication" with a lawyer, but he ultimately responded "I have to" when the trial court asked if he intended to represent himself that day. Defendant successfully argued at sentencing that Offense Variable (OV) 14 (leader in a multiple offender situation) should be scored at zero points rather than 10 points, and he also achieved the correction of other portions of his pre-sentence investigation report (PSIR). Defendant's recommended minimum guidelines sentencing range for each conviction other than felony-firearm, with the corrected PSIR, was zero to 11 months. Defendant was sentenced to a minimum sentence of six months imprisonment for each of his convictions apart from the mandatory two years required for his felony-firearm conviction. This appeal followed.

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[1] See MCL 333.26424.

[2] Apart from direct quotation of statutory language, in this opinion we will use the more common spelling "marijuana."

[3] See MCL 333.26428(a).

II. WAIVER OF RIGHT TO COUNSEL

Defendant argues that he did not waive his right to counsel. We disagree. Defendant did not raise any issues below regarding his decision to act as his own attorney; as a result, this issue is unpreserved. See *People v Campbell*, 316 Mich App 279, 894 NW2d 72 (2016). We review unpreserved issues for plain error affecting substantial rights. See *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1990).

A person who is accused of a crime and is facing the possibility of incarceration has a constitutional right to have the assistance of an attorney at every critical stage in the criminal process. *People v Williams*, 470 Mich 634, 641; 683 NW2d 597 (2004), citing *Maine v Moulton*, 474 U S 159; 106 S Ct 477; 88 L Ed 2nd 481 (1985). "The United States Constitution does not, however, force a lawyer upon a defendant; a criminal defendant may choose to waive representation and represent himself." *Id*., citing *Iowa v Tovar*, 541 U S 77; 124 S Ct 1379; 158 L Ed 2nd 209 (2004). When a defendant elects to represent himself, the trial court must determine that the three requirements stated in *People v Anderson*, 398 Mich 361; 247 NW2d 857 (1976), are met: (1) that "the defendant's request is unequivocal," (2) that "the defendant is asserting the right knowingly, intelligently, and voluntarily after being informed of the dangers and disadvantages of self-representation," and (3) that "the defendant's self-representation will not disrupt, unduly inconvenience, and burden the court and the administration of the court's business." *People v Willing*, 267 Mich App 208, 219; 704 NW2d 472 (2005), citing *Anderson*, 398 Mich at 367-368. Our court rules provide similar safeguards—a trial court "may not permit the defendant to make an initial waiver of the right to be represented by a lawyer" unless the trial court first advises the defendant "of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation[.]" MCR 6.005(D)(1). The trial court must also "offer[] the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer." MCR 6.005(D)(2). After the initial waiver, the trial court record "need show only that the court advised the defendant of the continuing right to a lawyer's assistance (at public expense if the defendant is indigent) and that the defendant waived that right." MCR 6.005(E).

Trial courts must substantially comply with the requirements of *Anderson* and MCR 6.005(D). See *People v Adkins (After Remand)*, 452 Mich 702, 726, 551 NW2d 108 (1996). "Substantial compliance requires that the court discuss the substance of both *Anderson* and MCR 6.005(D) in a short colloquy with the defendant, and make an express finding that the defendant fully understands, recognizes, and agrees to abide by the waiver of counsel procedures." *Id*. at 726–727. "The nonformalistic nature of a substantial compliance rule affords the protection of a strict compliance rule with far less of the problems associated with requiring courts to engage in a word-for-word litany approach." *Id*. at 727. "[I]t is a long-held principle that courts are to make every reasonable presumption against the waiver of a fundamental constitutional right, including the waiver of the right to the assistance of counsel." *People v Russell*, 471 Mich 182, 188, 684 NW2d 745 (2004).

Defendant claims that the trial court failed to obtain a knowing and intelligent waiver of his right to counsel at trial because the trial court failed to substantially comply with the requirements of *Anderson* and MCR 6.005(D). This argument is meritless. At the preliminary

examination, defendant was informed of the charges he faced and the maximum penalties on each charge. Defendant affirmatively stated that he understood the charges and maximum penalties. The court noted that defendant was not represented by a lawyer, and defendant responded "I represent myself" and affirmed that he "intend[ed] to represent [himself]." The court informed defendant of the risks of self-representation and defendant indicated that he understood but wanted to proceed without a lawyer. This initial colloquy substantially complied with the requirements of *Anderson* and MCR 6.005(D). *People v Adkins (After Remand)*, 452 Mich at 726.

At each subsequent hearing through trial, the trial court noted that defendant was representing himself and that he had the right to a lawyer. Each time, defendant stated that he was not interested in a lawyer. The trial court again engaged in a colloquy that complied with the requirements of MCR 6.005(E). We therefore conclude that the trial court did not plainly err by accepting defendant's waiver of his right to counsel at trial. See *Carines*, 460 Mich at 763.

Defendant further argues that, even if his waiver of his right to counsel at trial was valid, he did not unequivocally waive his right to counsel at sentencing and is therefore entitled to resentencing. Defendant contends that because he informed the trial court that he had been "in communication" with a lawyer and that he would "have to" represent himself at sentencing, his waiver of the right to counsel at sentencing was not unequivocal. Defendant's statements could arguably be read as expressing some equivocation regarding his self-representation at sentencing. However, defendant has not alleged that his lack of counsel at sentencing prejudiced him in any way. In *People v Lane*, 453 Mich 132; 551 NW2d 382 (1996), the Court concluded that even a *complete* failure to adhere to MCR 6.005(E) is harmless when a defendant has not alleged that such failure prejudiced him in any way. *Lane*, 453 Mich at 141. Further, in light of defendant's successful arguments at sentencing, including the reduction of his OV score to zero points (which substantially reduced his minimum guidelines sentencing range) the record suggests that no "other result would have been possible, even with the assistance of counsel." *Id*. Therefore, any error by the trial court in this regard is harmless and does not require resentencing. *Id*.; see also *Carines*, 460 Mich at 763.

III. MMMA IMMUNITY AND AFFIRMATIVE DEFENSE

Defendant argues that he should have been afforded the protections of § 4 and § 8 of the MMMA. We disagree. We review for an abuse of discretion a trial court's ruling on a motion to dismiss a defendant's case based on § 4 immunity, *People v Bylsma*, 493 Mich 17, 26; 825 NW2d 543 (2012), or on the applicability of the affirmative defense found in § 8, *People v Bylsma*, 315 Mich App 363, 376; 889 NW2d 729 (2016). "The trial court abuses its discretion when its decision falls outside the range of principled outcomes or when it erroneously interprets or applies the law." *People v Lane*, 308 Mich App 38, 51; 862 NW2d 446 (2014). The trial court is charged with resolving all factual disputes, and we review its factual findings for clear error. See *Hartwick*, 498 Mich at 201. "The clear error standard asks whether the appellate court is left with a definite and firm conviction that a mistake has been made." *People v Rhodes*, 495 Mich 938, 938; 843 NW2d 214 (2014).

The history and purpose of the MMMA has been explained by the Michigan Supreme Court:

> The MMMA was proposed in a citizen's initiative petition, was elector-approved in November 2008, and became effective December 4, 2008. The purpose of the MMMA is to allow a limited class of individuals the medical use of marijuana, and the act declares this purpose to be an "effort for the health and welfare of [Michigan] citizens." To meet this end, the MMMA defines the parameters of legal medical-marijuana use, promulgates a scheme for regulating registered patient use and administering the act and provides for an affirmative defense, as well as penalties for violating the MMMA.
>
> The MMMA does *not* create a general right for individuals to use and possess marijuana in Michigan. Possession, manufacture, and delivery of marijuana remain punishable offenses under Michigan law. Rather, the MMMA's protections are limited to individuals suffering from serious or debilitating medical conditions or symptoms, to the extent that the individuals' marijuana use "is carried out in accordance with the provisions of [the MMMA]." [*People v Kolanek*, 491 Mich 382, 393-394; 817 NW2d 528 (2013) (footnote citations omitted).]

A. § 4 IMMUNITY

Defendant argues that the trial court erred when it determined that he had not established his right to immunity under § 4 of the MMMA, MCL 333.26424, which provides in pertinent part:

> (a) A qualifying patient who has been issued and possesses a registry identification card is not 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 a combined total of 2.5 ounces of usable marihuana and usable marihuana equivalents, and, if the qualifying patient has not specified that a primary caregiver will be allowed under state law to cultivate marihuana for the qualifying patient, 12 marihuana plants kept in an enclosed, locked facility. Any incidental amount of seeds, stalks, and unusable roots shall also be allowed under state law and shall not be included in this amount. . . .
>
> (b) A primary caregiver who has been issued and possesses a registry identification card is not 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 assisting a qualifying patient to whom he or she is connected through the department's registration process with the medical use of marihuana in accordance with this act. . . . This subsection applies only if the primary caregiver possesses marihuana in forms and amounts that do not exceed any of the following:

(1) For each qualifying patient to whom he or she is connected through the department's registration process, a combined total of 2.5 ounces of usable marihuana and usable marihuana equivalents.

(2) For each registered qualifying patient who has specified that the primary caregiver will be allowed under state law to cultivate marihuana for the qualifying patient, 12 marihuana plants kept in an enclosed, locked facility.

(3) Any incidental amount of seeds, stalks, and unusable roots.

(c) For purposes of determining usable marihuana equivalency, the following shall be considered equivalent to 1 ounce of usable marihuana:

(1) 16 ounces of marihuana-infused product if in a solid form.

(2) 7 grams of marihuana-infused product if in a gaseous form.

(3) 36 fluid ounces of marihuana-infused product if in a liquid form.

In *People v Hartwick*, 498 Mich 192, 201-203; 870 NW2d 37 (2015), the Court set forth the procedures, both at the trial court level and the appellate level, for considering whether a defendant is entitled to § 4 immunity:

(1) entitlement to § 4 immunity is a question of law to be decided by the trial court before trial;

(2) the trial court must resolve factual disputes relating to § 4 immunity, and such factual findings are reviewed on appeal for clear error;

(3) the trial court's legal determinations under the MMMA are reviewed de novo on appeal;

(4) a defendant may claim immunity under § 4 for each charged offense if the defendant shows by a preponderance of the evidence that, at the time of the charged offense, the defendant

(i) possessed a valid registry identification card,

(ii) complied with the requisite volume limitations of § 4(a) and § 4(b),

(iii) stored any marijuana plants in an enclosed, locked facility, and

(iv) was engaged in the medical use of marijuana;

(5) the burden of proving § 4 immunity is separate and distinct for each charged offense;

* * *

> (11) the trial court must ultimately weigh the evidence to determine if the defendant has met the requisite burden of proof as to all the elements of § 4 immunity.

At issue here is section (4) of the outlined procedure and, specifically, whether defendant had complied with the volume limitations set forth in MCL 333.26424(a) and (b*)*. *Hartwick* provides a summary of the applicable standards:

> When a primary caregiver is connected with one or more qualifying patients, the amount of usable marijuana and the number of plants is calculated in the aggregate—2.5 ounces of usable marijuana and 12 marijuana plants for each qualifying patient, including the caregiver if he or she is also a registered qualifying patient acting as his or her own caregiver. When a qualifying patient cultivates his or her own marijuana for medical use and is not connected with a caregiver, the patient is limited to 2.5 ounces of usable marijuana and 12 marijuana plants. A qualifying patient or primary caregiver in possession of more marijuana than allowed under § 4(a) and § 4(b) at the time of the charged offense cannot satisfy the second element of immunity. [*Hartwick*, 498 Mich at 218-219.]

Here, because defendant was both a qualified patient and a registered caregiver for four patients, he was allowed to cultivate up to 60 plants and possess up to 12.5 ounces, or approximately 354.369 grams, of usable marijuana under the MMMA. This Court has held "that for a cutting to achieve plant status, it must have readily observable evidence of root formation." *People v Ventura*, 316 Mich App 671, 676; 894 NW2d 108 (2016), citing *State v Schumacher*, 136 Idaho 509; 37 P3d 6 (Idaho App, 2001). Feger testified at the motion hearing that he could visually see that 84 of the 102 marijuana plants seized had readily observable root formation. While defendant posited during his cross-examination of Feger that 48 of his plants lacked visible root formation, he did not present any evidence at the hearing to support this assertion; defendant did not testify as a witness.

Further, the marijuana recovered from defendant's residence weighed approximately 13.5 pounds, or 216 ounces, roughly 17 times the legally permitted amount of marijuana. The question, however, is whether the marijuana found in defendant's grow room can be considered "usable marijuana." The MMMA defines "usable marihuana" as "the dried leaves and flowers of the marihuana plant, and any mixture or preparation thereof, but does not include the seeds, stalks, and roots of the plant." MCL 333.26423(k); see also *People v Carruthers*, 301 Mich App 590, 600; 837 NW2d 16 (2013). Feger testified that, based on his training and experience and the sheer amount of marijuana recovered at defendant's residence, had he "de-stemmed" the marijuana and only weighed the "usable marijuana," it still would have weighed more than 12.5 ounces. The trial court noted:

> And the testimony I've heard today was that there was approximately thirteen pounds. The Officer said it was usable marijuana. When you cross examined the Officer, he wasn't able to indicate how dry it was, if there was water, if there were stems, things like that. But the point is, it looks like under the

> law you had the right to have twelve point five ounces of usable marijuana. The testimony is we're talking like thirteen pounds. . . .
>
> Now when I look at the fact that the Defendant has the burden of proving by a preponderance of the evidence that the volume limitations were met, I can't find in your favor that you've complied with those based on the testimony I heard.

Because the trial court was only presented with the testimony of one witness, who testified that more than 60 plants and more than 12.5 ounces of usable marijuana was found at defendant's residence, the court did not abuse its discretion in concluding that defendant exceeded the number of plants and the amount of usable marijuana allowed by the MMMA. See *Bylsma*, 493 Mich at 26. Further, even if defendant's statements as his own counsel were considered evidence, the trial court did not clearly err by resolving the factual dispute in the prosecution's favor. See *Hartwick*, 498 Mich at 201.

A defendant is entitled to a presumption under § 4(d) that he was engaged in the medical use of marijuana if he establishes, among other prerequisites, that he "complied with the requisite volume limitations of § 4(a) and § 4(b)." *Hartwick*, 498 Mich at 202-203. Defendant's failure to establish his compliance with the volume limitations of the MMMA makes it impossible for him to claim immunity under § 4 of the MMMA.[4]

B. § 8 AFFIRMATIVE DEFENSE

Defendant also argues that the trial court erred by declining to instruct the jury regarding § 8 of the MMMA, MCL 333.26428(a), which details an affirmative defense to a marijuana-related offense that can be used by patients or primary caregivers even if they are not registered with the state. See *Hartwick*, 498 Mich at 226. In *Hartwick*, our Supreme Court explained that the affirmative defense of § 8 can be reduced to three basic elements:

> (1) The existence of a bona fide physician-patient relationship,
>
> (2) in which the physician completes a full assessment of the patient's medical history and current medical condition, and
>
> (3) from which results the physician's professional opinion that the patient has a debilitating medical condition and will likely benefit from the medical use of marijuana to treat the debilitating medical condition.
>
> Each of these elements must be proved in order to establish the imprimatur of the physician-patient relationship required under § 8(a)(1) of the MMMA. . . . [*Hartwick*, 498 Mich at 229.]

[4] Because defendant did not establish compliance with the volume restrictions, we need not consider whether he satisfied the requirement that the marijuana be kept in an "enclosed, locked facility."

Hartwick further commented that "[t]hose patients and primary caregivers who are not registered may still be entitled to § 8 protections if they can show that their use of marijuana was for a medical purpose—to treat or alleviate a serious or debilitating medical condition or its symptoms." *Id*. at 236.

The affirmative defense of § 8 is available, if all other requirements are met, regardless of the amount of marijuana possessed. Section 8 simply requires that the amount possessed be "not more than was reasonably necessary to ensure the uninterrupted availability of marihuana" to "treat or alleviate" the "serious or debilitating medical condition or [its] symptoms." MCL 333.26428(2). The inquiry also does not focus on "usable marihuana," and instead offers a blanket affirmative defense "to any prosecution involving marihuana. . . ." MCL 333.26428(a).

"[T]he § 8 defense cannot be asserted for the first time at trial, but must be raised in a pretrial motion for an evidentiary hearing." *Kolanek*, 491 Mich at 410. Defendant never made such a motion. He was therefore not entitled to assert a § 8 defense at trial or to a jury instruction regarding the affirmative defense.

Given defendant's failure to assert the defense before trial, the prosecution filed a motion in limine to preclude defendant from referencing his patient or caregiver status under the MMMA. The trial court gratuitously indicated that it would allow defendant the opportunity to present medical marijuana-related evidence at trial despite his failure to assert the defense, but that the jury would not be given instructions regarding a § 8 affirmative defense. Defendant argues that had the jury instruction been available, he would have presented witnesses to support his claim of a § 8 affirmative defense.

The record shows, however, that defendant not only failed to assert the defense before trial, but he also failed to "[o]vercom[e] th[e] initial hurdle of presenting prima facie evidence of each element" of § 8, which is "clearly more onerous" than establishing an entitlement to immunity under § 4. *Hartwick*, 498 Mich at 228. Even on appeal, defendant fails to identify the witnesses he would have called in support of his defense, fails to explain how he would have proven that his patients underwent a "full assessment" by a physician, and instead relies on his assertion that he grows a single crop of marijuana to explain that 13½ pounds of marijuana was "reasonably necessary to ensure uninterrupted availability" of the drug for his patients. *Hartwick*, 498 Mich at 229; MCL 333.26428(a). For all of these reasons, defendant failed to show that he could have presented evidence that would have entitled him to present this affirmative defense. The fact the trial court allowed defendant to present any evidence that the use of the marijuana was for medical purposes was essentially a gift to defendant, and defendant is not entitled to reversal on this ground. See *Kolanek*, 491 Mich at 413 ("Because no reasonable jury could have concluded that Kolanek is entitled to the defense as a matter of law, he is precluded from presenting evidence of this defense at trial.")

IV. SUFFICIENCY OF THE EVIDENCE

Defendant also argues that there was insufficient evidence to support his conviction of delivery of marijuana, MCL 333.7401(2)(d)(*iii*). We disagree.

"The sufficient evidence requirement is a part of every criminal defendant's due process rights." *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748, amended on other grounds 441 Mich 1201 (1992). "[W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *Id*. at 515-516, citing *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979).

As the Michigan Supreme Court noted in *Kolanek*, 491 Mich at 394:

> The MMMA does *not* create a general right for individuals to use and possess marijuana in Michigan. Possession, manufacture, and delivery of marijuana remain punishable offenses under Michigan law. Rather, the MMMA's protections are limited to individuals suffering from serious or debilitating medical conditions or symptoms, to the extent that the individuals' marijuana use "is carried out in accordance with the provisions of [the MMMA]." [Footnote and citations omitted.]

MCL 333.7041(1) prohibits, inter alia, the delivery of controlled substances. MCL 333.7401(2)(d)(*iii*) provides criminal penalties for delivery of more than 5 kilograms but less than 45 kilograms, or more than 20 plants but less than 200 plants. The elements of delivery of marijuana are that (1) the defendant delivered a controlled substance, (2) the controlled substance was marijuana or contained marijuana, (3) the defendant knew that he was delivering marijuana, and (4) the relevant amount of marijuana to determine the appropriate penalty. *People v Williams*, 294 Mich App 461, 470; 811 NW2d 88 (2011).

Here, defendant does not challenge the fact that he delivered marijuana, that he knew that he was delivering marijuana, or the amount of marijuana delivered. Rather, defendant maintains that he only intended to deliver marijuana to his clients, and that his registration as a caregiver under the MMMA negates the intent element of delivery of a controlled substance. However, "delivery of a controlled substance is a general intent crime." *People v Mass*, 464 Mich 615, 627; 628 NW2d 540 (2001).[5] Defendant's conviction thus did not require that he possessed a specific criminal intent beyond the intent to do the physical act of delivering marijuana. See *People v Maleski*, 220 Mich App 518, 522; 560 NW2d 71 (1996), superseded by statute in part on other grounds by MCL 768.37. Defendant admitted that he intended to deliver marijuana to his clients. His delivery of marijuana was therefore a "punishable offense[] under Michigan law." *Kolanek*, 491 Mich at 394.

[5] Defendant cites *People v Danto*, 294 Mich App 596, 601; 822 NW2d 600 (2011), for the proposition that possession *with intent to deliver* marijuana (a crime with which defendant was not charged) is a specific intent crime. *Danto* is clear, however, that the specific intent necessary is the intent to deliver a controlled substance. Defendant admitted to such an intent. Nothing in *Danto* indicates that the intent element of delivery of marijuana means the intent to deliver marijuana in violation of the MMMA.

V. PROBABLE CAUSE FOR SEARCH WARRANT

Defendant also argues that the affidavit used to obtain a warrant to search his residence was not supported by probable cause. We disagree. "[A]ppellate scrutiny of a magistrate's decision [to issue a search warrant] involves neither de novo review nor application of an abuse of discretion standard." *People v Martin*, 271 Mich App 280, 297; 721 NW2d 815 (2006), quoting *People v Russo*, 439 Mich 584; 487 NW2d 698 (1992). This is because "[a] magistrate's determination of probable cause should be paid great deference by reviewing courts." *People v Keller*, 479 Mich 467, 474; 739 NW2d 505 (2007) (citations and quotation marks omitted). A reviewing court's duty "is simply to ensure that the magistrate had a substantial basis for conclud[ing] that probable cause existed." *Id*. at 475 (citations and quotation marks omitted). This Court reviews for clear error a trial court's findings of fact in a suppression hearing, but it reviews de novo a trial court's interpretation of the law or application of a constitutional provision. *Martin*, 271 Mich App at 297. A finding of fact is clearly erroneous if, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made. *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008).

Probable clause must exist to justify a search before a magistrate issues a search warrant. US Const, Am IV; Const 1963, art 1, § 11; MCL 780.654(1); *People v Waclawkski*, 286 Mich App 634, 697-698; 780 NW2d 321 (2009). "Probable cause to issue a search warrant exists if there is a substantial basis for inferring a fair probability that evidence of a crime exists in the stated place." *People v Brown*, 297 Mich App 670, 675; 825 NW2d 91 (2012), citing *People v Kazmierczak*, 461 Mich 411, 417–418; 605 NW2d 667 (2000). A finding of probable cause must be based on "facts presented to the issuing magistrate by oath or affirmation," and "[w]hen probable cause is averred in an affidavit, the affidavit must contain facts within the knowledge of the affiant rather than mere conclusions or beliefs" *Waclawski*, 286 Mich App at 698. "The affiant may not draw his or her own inferences, but rather must state matters that justify the drawing of them." *Martin*, 271 Mich App at 298. It is important to note that "the affiant's experience is relevant to the establishment of probable cause." *Waclawski*, 286 Mich App at 698, citing *People v Darwich*, 226 Mich App 635; 575 NW2d 44 (1997). A magistrate's finding of probable cause must be based on all of the facts related in the affidavit. MCL 780.653; *People v Keller*, 479 Mich 467, 482; 739 NW2d 505 (2007). "When reviewing a search warrant affidavit, we must read it in a 'common sense and realistic manner,' not a crabbed or hypertechnical manner." *People v Mullen*, 282 Mich App 14, 27; 762 NW2d 170 (2008), quoting *People v Whitfield*, 461 Mich 441; 607 NW2d 61 (2000).

The search warrant in this case was supported by probable cause. Assertions made by Feger in his affidavit would have allowed the magistrate to conclude that there was a substantial basis to support the contention that evidence of a crime, specifically controlled substance offenses, would be found at defendant's residence. *Brown*, 297 Mich App at 675. According to the affidavit, and based on his training and expertise, Feger had viewed what he suspected to be a marijuana grow operation on defendant's property and had smelled what he knew to be marijuana. Feger averred that he pulled over a vehicle that had left defendant's residence, smelled marijuana, found marijuana in the car, and was told that it had come from defendant's address. When reading the information from the affidavit in its entirety and in a common sense manner, there is a "substantial basis for inferring a fair probability that evidence of a crime exist[ed]" at defendant's residence. *Brown*, 297 Mich App at 675.

Defendant argues that because he had an MMMA card, the search warrant should have included information that showed that he was operating outside the bounds of the MMMA, or that at least informed the magistrate that defendant was a registered caregiver. This Court has squarely rejected such requirements: "to establish probable cause, a search-warrant affidavit need not provide facts from which a magistrate could conclude that a suspect's marijuana-related activities are specifically not legal under the MMMA." *Brown*, 297 Mich App at 677.[6]

VI. FELON IN POSSESSION CONVICTIONS

Defendant argues that the predicate felony for his felon in possession convictions is not a "specified felony" that requires him to undertake affirmative action to restore his right to possess firearms and ammunition. In the alternative, defendant argues that his convictions must have fallen under the second clause of MCL 750.224f(10)(a), which is unconstitutional due to vagueness. We disagree.

We review de novo questions of statutory interpretation, *People v Gardner*, 482 Mich 41, 46; 753 NW2d 78 (2008), as well as challenges to a statute's constitutionality under the void-for-vagueness doctrine. *People v Vronko*, 228 Mich App 649, 651-652; 579 NW2d 136 (1998).

MCL 750.224f provides, in relevant part:

> (1) Except as provided in subsection (2), a person convicted of a felony shall not possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm in this state until the expiration of 3 years after all of the following circumstances exist:
>
> > (a) The person has paid all fines imposed for the violation.
> >
> > (b) The person has served all terms of imprisonment imposed for the violation.
> >
> > (c) The person has successfully completed all conditions of probation or parole imposed for the violation.
>
> (2) A person convicted of a specified felony shall not possess, use, transport, sell, purchase, carry, ship, receive or distribute a firearm in this state until all of the following circumstances exist:

[6] A footnote in *Brown* does caution police that "if [they] do have clear and uncontroverted evidence that a person is in full compliance with the MMMA, this evidence must be included as part of the affidavit because such a situation would not justify the issuance of a warrant." *Brown*, 297 Mich App at 677 n 5. The affidavit in this case, however, expressly noted facts suggesting that defendant was not in full compliance with the MMMA—namely, that marijuana from his MMMA grow operation had been given to non-patients.

(a) The expiration of 5 years after all of the following circumstances exist:

(i) The person has paid all fines imposed for the violation.

(ii) The person has served all terms of imprisonment imposed for the violation.

(iii) The person has successfully completed all conditions of probation or parole imposed for the violation.

(b) The person's right to possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm has been restored pursuant to [MCL 28.424].

* * *

(4) A person convicted of a specified felony shall not possess, use, transport, sell, purchase, carry, ship, receive or distribute ammunition in this state until all of the following circumstances exist:

(a) The expiration of 5 years after all of the following circumstances exist:

(i) The person has paid all fines imposed for the violation.

(ii) The person has served all terms of imprisonment imposed for the violation.

(iii) The person has successfully completed all conditions of probation or parole imposed for the violation.

(b) The person's right to possess, use, transport, sell, purchase, carry, ship, receive, or distribute ammunition has been restored pursuant to [MCL 28.424].

* * *

(9) As used in this section,

(b) "Felony" means a violation of a law of this state, or of another state, or of the Unites States that is punishable by imprisonment for 4 years or more, or an attempt to violate such a law.

(10) As used in subsection (2) and (4), "specified felony" means a felony in which 1 or more of the following circumstances exist:

(i) An element of that felony is the use, attempted use, or threatened use of physical force against the person or property of another, or that by its nature, involves a substantial risk that physical force against the person or

> the property of another may be used in the course of committing the offense.
>
> (ii) An element of that felony is the unlawful manufacture, possession, importation, exportation, distribution, or dispensing of a controlled substance.
>
> (iii) An element of that felony is the unlawful possession or distribution of a firearm.
>
> (iv) An element of that felony is the unlawful use of an explosive.
>
> (v) The felony is burglary of an occupied dwelling, or breaking and entering an occupied dwelling, or arson.

This Court has squarely rejected both arguments advanced by defendant. "This Court has previously determined that breaking and entering a building in violation of MCL 750.110 is a specified felony within the meaning of MCL 750.224f." *People v Pierce*, 272 Mich App 394, 398; 725 NW2d 691 (2006), citing *Tuggle v Dep't of State Police*, 269 Mich App 657; 712 NW2d 750 (2005). Furthermore, *Pierce* held that the defendant could not establish that the definition of "specified felony" found in MCL 750.224f(6)(*i*) (now MCL 750.224f(10)(a)[7]) was vague as applied to the defendant because "[b]reaking and entering is a crime that clearly fits within the language" of MCL 750.224f. *Id*. at 399. In light of *Pierce*'s determination that violation of MCL 750.110 is a specified felony and that MCL 750.224f is not vague as applied to a defendant who has committed such a violation, *Pierce*, 272 Mich App at 398, defendant's argument must fail.

Pierce is binding on this Court. See MCR 7.215(C)(2), (J). We therefore decline defendant's request to examine the constitutionality of MCL 750.224f(10)(a) in light of *Johnson v United States*, ___ US ___; 135 S Ct 2551; 192 L Ed 2d 569 (2015). We note, however, that the clause at issue in *Johnson* contained far more imprecise language than the clause at issue here; in fact, *Johnson* suggested that a clause that used a qualitative standard such as 'substantial risk' as found in MCL 750.224f(10)(a) would pass constitutional muster. See *id*., citing *Nash v United States*, 229 US 373; 33 S Ct 780; 57 L Ed 2d 1232 (1913).

VII. SENTENCING DEPARTURE

Finally, defendant argues that his sentences on all convictions except felony-firearm constitute an unreasonable upward departure that was not supported by substantial and compelling reasons. We disagree, and we reject the assertion that the trial court was required to articulate a substantial and compelling reason for the sentences imposed.

[7] See 2014 PA 4 (amending MCL 750.224f).

Defendant's minimum sentencing range for the charges (except felony-firearm) was 0 to 11 months. MCL 769.34 provides in relevant part:

> (4) Intermediate sanctions shall be imposed under this chapter as follows:
>
> > (a) If the upper limit of the recommended minimum sentence range for a defendant determined under the sentencing guidelines set forth in chapter XVII is 18 months or less, the court shall impose an intermediate sanction unless the court states on the record a substantial and compelling reason to sentence the individual to the jurisdiction of the department of corrections. An intermediate sanction may include a jail term that does not exceed the upper limit of the recommended minimum sentence range or 12 months, whichever is less.

A prison sentence is not an intermediate sanction. See *People v Stauffer*, 465 Mich 633, 635; 640 NW2d 869 (2002). However, as our Supreme Court stated in *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015), "under Subsection (4)(a), a trial court may, but is no longer required to, impose an intermediate sanction if the upper limit of the recommended minimum sentence range is 18 months or less." *People v Schrauben*, 314 Mich App 181, 195; 886 NW2d 173 (2016). A trial court is also no longer required to "articulate substantial and compelling reasons to depart from an intermediate sanction." *Id*. at 194-195.

As in *Schrauben*, the trial court sentenced defendant "within the range authorized by law" and was not required to impose an intermediate sanction absent substantial and compelling reasons. *Id*. at 195-196. And defendant "does not dispute that his sentence was within the recommended minimum guidelines range, and does not argue that the trial court relied on inaccurate information or that there was an error in scoring the guidelines." *Id*. at 196. We therefore affirm defendant's sentence. *Id*.

Affirmed.

/s/ Mark T. Boonstra
/s/ Patrick M. Meter
/s/ Michael F. Gadola