# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>July 28, 2011 |
| v | No. 295950<br>Washtenaw Circuit Court |
| SOLOMON RAFEAL ABRAMS,<br><br>Defendant-Appellant. | LC No. 08-001642-FH |

Before: SERVITTO, P.J., and GLEICHER and SHAPIRO, JJ.

PER CURIAM.

After a bench trial, the trial court convicted defendant of possession with intent to deliver less than five kilograms or 20 plants of marijuana. MCL 333.7401(2)(d)(iii). We affirm, and decide this appeal without oral argument in conformity with MCR 7.214(E).

Defendant acknowledged at trial that he had attempted to send a package containing marijuana to his mother in Florida. He maintained that he had intended to give his mother the marijuana as a gift to help her with pain relief. Defendant theorized that because he did not expect remuneration and engaged in no conduct furthering commercial distribution, the trial court should have considered an affirmative defense premised on MCL 333.7410(7), which provides:

> A person who distributes marihuana without remuneration and not to further commercial distribution and who does not violate subsection (1) is guilty of a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than $1,000.00, or both, unless the distribution is in accordance with the federal law or the law of this state.

Alternatively, defendant claimed that the trial court should have found him guilty of the misdemeanor in MCL 333.7410(7), which constituted a lesser included offense embodied within the crime charged in MCL 333.7401(2)(d)(iii).

Whether MCL 333.7410(7) presents a defense to MCL 333.7401(2)(d)(iii) or provides the basis for a lesser included offense comprises a question of law that we review de novo. *People v Hill*, 486 Mich 658, 665-666; 786 NW2d 601 (2010). The prosecutor charged defendant with *possession* with intent to deliver marijuana under MCL 333.7401. The misdemeanor marijuana *distribution* described in MCL 333.7410(7) simply cannot constitute an

affirmative defense to the *possession* charge levied in this case pursuant to MCL 333.7401.[1] Where one merely possesses marijuana, even if intending to distribute it, but no "distribution" has taken place, we conclude that a defense cannot be grounded on a statute that applies only to "distribution." Consequently, the trial court did not err to the extent that it declined to consider MCL 333.7410(7) as an affirmative defense to the instant possession with intent to distribute charge under MCL 333.7401.

The misdemeanor in MCL 333.7410(7) also does not comprise a lesser included offense of possession with intent to distribute marijuana. In *People v Smith*, 478 Mich 64, 69; 731 NW2d 411 (2007), our Supreme Court summarized as follows the legal principles governing whether one offense is a lesser included offense of another:

> MCL 768.32(1) provides:
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> > "Except as provided in subsection (2), upon an indictment for an offense, consisting of different degrees, as prescribed in this chapter, the jury, or the judge in a trial without a jury, may find the accused not guilty of the offense in the degree charged in the indictment and may find the accused person guilty of a degree of that offense inferior to that charged in the indictment, or of an attempt to commit that offense."
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> In [*People v Cornell*, 466 Mich 335, 354; 646 NW2d 127 (2002)], this Court approved of the following explanation of the word "inferior" in MCL 768.32(1):
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> > "We believe that the word 'inferior' in the statute does not refer to inferiority in the penalty associated with the offense, but, rather, to *the absence of an element that distinguishes the charged offense from the lesser offense. The controlling factor is whether the lesser offense can be proved by the same facts that are used to establish the charged offense*." [Internal quotation omitted, emphasis added.]
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> This Court then held that an "inferior" offense under MCL 768.32(1) is limited to necessarily included lesser offenses. *Cornell*, [466 Mich] at 353-354. In conclusion, we held:
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> > "[A] requested instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." [*Id*. at 357.]

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[1] We need not address whether MCL 333.7410(7) could amount to an affirmative defense in a different context.

Here, MCL 333.7410(7) and the possession with intent to distribute charge pursuant to MCL 333.7401(2)(d)(iii) plainly do not share the same elements. As reflected in CJI 2d 12.3, the elements of possessing a controlled substance with intent to deliver include that (1) "the defendant knowingly possessed" the specified quantity of marijuana without legal authorization, (2) the defendant knew "the substance possessed was" marijuana, and (3) "the defendant intended to deliver this substance to someone else." By contrast, to prove the misdemeanor in MCL 333.7410(7), the prosecution would have to show, among other requirements, that the defendant distributed marijuana. Distribution is not an element of the charge in this case under MCL 333.7401(2)(d)(iii). Because the elements of MCL 333.7410(7) are not "completely subsumed" in the instant charge delineated by MCL 333.7401(2)(d)(iii), it cannot qualify as a lesser included offense. *Smith*, 478 Mich at 71. Stated differently, because a defendant can possibly commit the crime of possessing marijuana with the intent to deliver it without committing the distribution offense set forth in MCL 333.7410(7), MCL 333.7410(7) is not a lesser included offense of MCL 333.7401(2)(d)(iii). *Id*. We thus conclude that the trial court did not err to the extent that it declined to consider defendant's guilt under MCL 333.7410(7).

Affirmed.

/s/ Deborah A. Servitto
/s/ Elizabeth L. Gleicher