

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
July 28, 2011

v

SOLOMON RAFEAL ABRAMS,
Defendant-Appellant.

No. 295950
Washtenaw Circuit Court
LC No. 08-001642-FH

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

SHAPIRO, J. (*concurring*).

I agree with the majority that under *People v Cornell*, 466 Mich 335, 354; 646 NW2d 127 (2002), MCL 333.7410(7) does not set forth a lesser included offense to MCL 333.7401(2)(d). For one offense to be a lesser included offense of another, the greater offense must include an element not found in the lesser. *Id.* Although section 7410(7) requires non-remuneration, section 7401(2) does not require remuneration. Defendant asks that we conclude that if the lesser offense has a negative element, i.e., an affirmative lack of a particular factor (such as remuneration) as to which the greater offense is silent, then the lesser offense constitutes a necessarily included offense. While this argument has merit, I cannot say that it is consistent with *Cornell*.¹

¹ I disagree with the majority's view that the use of the word "distribution" in MCL 333.7410(7) as opposed to "possession with intent to deliver" under MCL 333.7401(2)(d), is relevant to our determination given the facts of this case. Defendant is charged with having left a package containing marijuana with an overnight shipping service for delivery to his mother. "Distribute" is defined in MCL 333.7105(5) as "to deliver other than by administering or dispensing". "Delivery" is defined in MCL 333.7105(1) as "the actual, constructive or attempted transfer from one person to another of a controlled substance". I fail to see any significant distinction between these words, at least under these facts, and I would reject the view that in adopting MCL 333.7410(7), the Legislature intended to provide for the availability of a misdemeanor penalty for an actual delivery, but not for possession with intent to deliver.

For the same reason, I must reject the claim that non-remuneration is an affirmative defense to MCL 333.7401(2). Had the Legislature wished to remove non-remunerative deliveries of marijuana from that provision, it certainly could have done so. Instead, it established MCL 333.7401(2) to apply to all deliveries, whether remunerative or not, and another solely for non-remunerative deliveries. I read this as leaving the charges for non-remunerative delivery within the discretion of the prosecutor and, in this case, there is no claim that the prosecution abused its discretion.

Our research does not reveal any cases of record in which the prosecution brought charges for non-remunerative delivery under MCL 333.7410(7). There could be a number of reasons for this, including that such cases have not been appealed. Alternatively, it may be that some prosecutors have a policy of always charging non-remunerative cases under the felony statute without considering whether to instead charge under the more specific misdemeanor for non-remunerative deliveries. This issue was not raised and we do not foreclose the argument that doing so constitutes an abuse of discretion, given that the Legislature decision to include MCL 333.7410(7) demonstrates its intention that prosecutors at least consider the misdemeanor charge where there is no evidence of present or intended remuneration.²

/s/ Douglas B. Shapiro

² Michigan's 1971 Controlled Substances Act, MCL 333.7101 *et seq.*, was modeled upon the Controlled Substances Act authored by the Uniform Laws Commission in 1970. Indeed, Michigan's 1971 enactment appears, with one exception, to be identical to that Uniform Act. The one exception was the addition to the Uniform Act of what is now MCL 333.7410(7). Thus, the Legislature specifically elected to modify the Uniform Act to define a misdemeanor for non-remunerative delivery of marijuana as, at least, an alternative to the felony charge contained within the Uniform Act and enacted as MCL 333.7401. While, under *Cornell*, this did not create a lesser included offense to the felony charge for marijuana delivery, it would be presumptuous of us to conclude that the Legislature took this unique action with the intent that the misdemeanor charge for non-remunerative deliveries simply be ignored by prosecutors and courts.