



MICHIGAN STATE POLICE LEGAL UPDATE

No. 89

September 8, 2011

This update is published by the Michigan State Police, Office of the Director, Legal Resource and Education Unit. Questions and comments may be directed to MSPLegal@michigan.gov. Past editions can be found at www.michigan.gov/msp-legal.

CRIMINAL LAW

The Michigan Medical Marihuana Act does not permit the sale of marihuana

In *State v. McQueen*, the defendants owned and operated a medical marihuana dispensary. One of the defendants was a registered patient and a registered caregiver and the other defendant was a registered caregiver. Members of the dispensary were either registered patients or registered primary caregivers. Members were able to store marihuana at the dispensary inside lockers they rented from the dispensary. The stored marihuana was available for purchase to other members of the dispensary. The dispensary charged a service fee for each sale.

In July 2010, the Isabella County Prosecuting Attorney filed a complaint to shut down the dispensary alleging the operation of the dispensary was a public nuisance because it was operated in violation of the provisions of the [Michigan Medical Marihuana Act](#) (MMMA) and the [Public Health Code](#) (PHC). The defendants argued the MMMA authorizes patient-to-patient sales of marihuana. The trial court concluded the dispensary was in compliance with the MMMA and denied the complaint. The prosecutor appealed.

The Michigan Court of Appeals stated the MMMA does not legalize the possession, use, or delivery of marihuana; rather, the MMMA sets forth very limited circumstances in which persons involved in marihuana use, and who are thereby violating the PHC, may avoid criminal liability.

The Court concluded the MMMA does not authorize marihuana dispensaries and the MMMA does not permit the sale of marihuana. The Court reasoned the "delivery" and "transfer" of marihuana allowed under the definition of "medical use" contained in the MMMA is not equivalent to

sale of marihuana. Sale consists of delivery or transfer *plus* the receipt of compensation which is not allowed under any provision of the MMMA.

The Court ruled that, because the defendants' operation of the dispensary was not in accordance with the MMMA and was in violation of the PHC, the dispensary was a public nuisance for which the prosecutor could obtain an order to stop the nuisance and prohibit the defendants from continuing to operate the dispensary.

The Michigan Medical Marihuana Act requires the physician's statement occur before the illegal conduct in order for the affirmative defense to apply and in order for the person to be immune from arrest, prosecution, or penalty

As discussed in [MSP Legal Update No. 69](#), the medical purpose for using marihuana may be asserted as an affirmative defense to any prosecution involving marihuana. [MCL 333.26428\(b\)](#) requires dismissal of charges if a person proves the following:

1. A physician has stated the patient is likely to receive a medical benefit from marihuana use;
2. The person did not possess more marihuana than reasonably necessary to ensure the uninterrupted availability for treating a patient; and
3. The possession, manufacture, or delivery was done for the purpose of treating the patient.

In *People v. Reed*, undercover officers observed marihuana plants growing at the defendant's residence. The defendant suffered from chronic back pain. Prior to officers observing the marihuana, the defendant had not obtained certification from a physician stating the defendant was likely to receive benefit from the medical use of marihuana. After the marihuana was observed, but before the defendant was arrested, the defendant obtained written

certification and he also obtained a registry identification card. Ten days after receiving the registry identification card, the defendant was arrested and charged with the manufacture of marihuana. The defendant filed a motion to dismiss the charges based on the affirmative defense section of the MMMA, [MCL 333.26428\(b\)](#), and [MCL 333.26424\(a\)](#). The trial court denied the motion.

Previously, in the case of *People v. Kolanek*, the Court held the physician's statement required in order to assert the affirmative defense had to occur prior to arrest. In *Kolanek*, the discovery of the crime and the arrest were simultaneous. The *Kolanek* Court stated it was reasonable to assume the affirmative defense contained in the MMMA was intended to protect those who had an actual medical basis for marihuana use recognized by a physician prior to the marijuana use and was not intended to provide an after-the-fact exemption for otherwise illegal conduct.

Following the same rationale used in *Kolanek*, the Court held for the affirmative defense section of the MMMA to apply, the physician's statement must occur before the illegal conduct. In this case, the defendant did not obtain the physician's statement until after the illegal conduct (manufacturing marihuana) had occurred; therefore, the affirmative defense did not apply. In other words, a person must obtain a physician's statement before violating the PHC.

The Court also held the defendant was not immune from prosecution under [MCL 333.26424\(a\)](#), which prohibits the arrest or prosecution of a patient who has been issued and possesses a registry identification card for the medical use of marihuana in accordance with the MMMA. The Court reasoned the defendant was not immune from arrest, prosecution, or penalty because the defendant had not been issued a registry identification card at the time he engaged in the cultivation of marihuana.

When questioning suspects regarding incidents involving marihuana where the suspect does not have a registry identification card, officers are encouraged to inquire as to whether the suspect has

seen a physician regarding the medical use of marihuana and whether the doctor has stated the suspect is likely to receive a medical benefit from marihuana use. Officers should document in their report that such questions were asked, the suspect's answers, the name of the physician, if any, and the date the suspect sought the physician's opinion.

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CRIMINAL LAW AND PROCEDURE MANUAL

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The manual is published by [Kendall Hunt Publishing Co.](#) Copies may be ordered by calling Kendall Hunt Customer Service at (800) 228-0810, or through their [online catalog](#) (search by title or ISBN: 978-0-7575-8710-8).