

STATE OF MICHIGAN

SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

Supreme Court  
No. 135247

-vs-

Court of Appeals  
No. 279776

BRIAN LAMORAND,  
Defendant-Appellant,

Macomb Circuit  
No. 06-2343-FH

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135247  
PLAE SUPPL

**PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF IN RESPONSE TO  
DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL**

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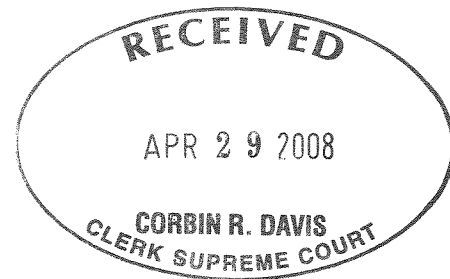
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**ISSUE PRESENTED**

**ISSUE**

**DID THE TRIAL COURT ABUSE ITS DISCRETION IN DENYING THE DEFENDANT'S MOTION TO WITHDRAW HIS GUILTY PLEA MADE PRIOR TO SENTENCING, WHEN THE DEFENDANT FAILED TO ESTABLISH A FAIR AND JUST REASON FOR THE WITHDRAWAL OF HIS GUILTY PLEA AND WITHDRAWAL OF THE DEFENDANT'S GUILTY PLEA WOULD HAVE SUBSTANTIALLY PREJUDICED THE PROSECUTION?**

**Plaintiff-Appellee's Answer: "No".**

**Defendant-Appellant's Answer: "Yes".**

## **FACTS**

The Plaintiff-Appellee's Supplemental Brief is filed pursuant to the Court's Order, dated March 20, 2008, setting this matter for oral argument on the Defendant-Appellant's application for leave. The Defendant seeks leave to appeal the Court of Appeals' denial of his application for leave to appeal claiming that the trial court erred in denying his motion to withdraw his guilty plea prior to sentencing. The Court's Order directed the parties to address the following:

- (1) Whether requiring a defendant to plead guilty in order to preserve the right of his family members to benefit from plea bargains is coercive;
- (2) Whether the Defendant's claims of innocence together with the claims of coercion, brought before sentencing, provide sufficient reasons under the standard of review for plea withdrawal before sentencing to support a grant of his motion;
- (3) Whether an evidentiary hearing is required to explore this matter; and,
- (4) Whether, if the Defendant is allowed to withdraw his plea, the prosecution will be prejudiced, and if so, in what matter.

## ISSUE

**DID THE TRIAL COURT ABUSE ITS DISCRETION IN DENYING THE DEFENDANT'S MOTION TO WITHDRAW HIS GUILTY PLEA MADE PRIOR TO SENTENCING, WHEN THE DEFENDANT FAILED TO ESTABLISH A FAIR AND JUST REASON FOR THE WITHDRAWAL OF HIS GUILTY PLEA AND WITHDRAWAL OF THE DEFENDANT'S GUILTY PLEA WOULD HAVE SUBSTANTIALLY PREJUDICED THE PROSECUTION?**

## STANDARD OF REVIEW

A trial court's denial of a motion to withdraw a guilty plea is reviewed for abuse of discretion. *People v Osaghae*, 460 Mich 529; 596 NW2d 911 (1999).

## ARGUMENT

The trial court properly denied the Defendant's motion to withdraw his guilty plea because the Defendant's motion failed to establish a fair and just reason for withdrawal of his guilty plea and withdrawal would have substantially prejudiced the prosecution.

The Defendant pled guilty pursuant to a plea agreement to the charge of Maintaining a Drug House.<sup>1</sup> The plea was accepted by the trial court but before sentencing the Defendant moved to withdraw his plea. The trial court denied the Defendant's motion and sentenced the Defendant. The Defendant sought leave to appeal the trial court's denial of his motion to withdraw his plea but his application was denied by the

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<sup>1</sup> MCL § 333.7405(1)(d).

Court of Appeals. The Defendant now seeks leave of the Court to appeal the Court of Appeals denial of his application for leave. Pursuant to *MCR* 7.302(G)(1) the Court set the granting of the Defendant's application for oral argument and asked the parties to address the following questions:

- (1) Whether requiring a defendant to plead guilty in order to preserve the right of his family members to benefit from plea bargains is coercive;
- (2) Whether the Defendant's claims of innocence together with the claims of coercion, brought before sentencing, provide sufficient reasons under the standard of review for plea withdrawal before sentencing to support a grant of his motion;
- (3) Whether an evidentiary hearing is required to explore this matter; and,
- (4) Whether, if the Defendant is allowed to withdraw his plea, the prosecution will be prejudiced, and if so, in what matter.

The People's supplement brief will address each of the Court's questions, beginning with the Court's last question first.

**1. Allowing the Defendant to withdraw his guilty plea will cause substantial prejudice to the prosecutor.**

The last question raised in the Court's order for argument on the Defendant's application is whether the prosecution will be prejudiced if the Defendant is allowed to withdraw his guilty plea. Under *MCR* 6.310(B)(1), a plea "may not be withdrawn if withdrawal of the plea would substantially prejudice the prosecutor because of reliance on the plea."

The People submit that the most important consideration for the Court in this case is the substantial prejudice to the prosecution that would result if the Defendant were allowed to withdraw his plea.

In order to understand the substantial prejudice caused by withdrawal of the Defendant's plea, the Court must begin with an examination of the facts. Substantial prejudice can result if the prosecutor's ability to prosecute is somehow hampered by the delay. *People v Spencer*, 192 Mich App 146, 151; 480 NW2d 308 (1991). The charge against the Defendant arose from a fire at the Defendant's home. In the process of extinguishing the fire firemen observed marijuana plants growing in the basement. When Officer Brooks of the Clinton Township Police talked to the Defendant's stepfather, David Cunningham, the following discussion occurred:

"David stated that "They" are growing a little down there. I asked David who he is referring to as "They". He said he was referring to his step sons Michael, Brian and Roger."<sup>2</sup>

Thus, the evidence showed that the Defendant, according to his driver's license, was living at the home, and, according to his stepfather, was growing marihuana in the basement with his two brothers.<sup>3</sup>

Knowing those facts the Court can see that, while the prosecution may have had difficulty proving beyond a reasonable doubt that the Defendant was growing the marijuana, the prosecution could convict the Defendant's stepfather of aiding and abetting by his own admission.

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<sup>2</sup> See Officer Brooks report attached to the People's supplemental brief.

Given those facts the prosecutor could persuade the Defendant and his brothers to agree to a plea bargain so their stepfather could avoid a felony conviction. That would have been a fair resolution considering the fact that the stepfather was not actually growing the marihuana but merely acquiesced in to his home being used to commit the crime. Once the stepfather pled guilty to Maintaining a Drug House however, the prosecutor no longer had that leverage over the Defendant. The stepfather could without impunity claim that he was growing the marihuana and the brothers were not in any way involved. As a result, the prosecutor would be forced to dismiss any charges against the brothers and could not prosecute the stepfather for growing the marihuana because he already pled guilty to the lesser offense of Maintaining a Drug House.

Additionally, now that two years have past since the crime the prosecutor will find it extremely difficult to prove the Defendant's involvement in growing the marihuana. The Defendant has indicated that he has people prepared to say that he was not residing in his stepfather's home at the time of the crime. While it is not necessary to prove that the Defendant lived in the home in order to convict the Defendant, it would make the prosecutor's case more difficult to prove if the Defendant was

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<sup>3</sup> The Defendant was originally charged with the manufacture of marihuana.

not living there.<sup>4</sup> Two years after the fact it would be extremely difficult to disprove that the Defendant was not living in the home or to otherwise prove that the Defendant was involved in growing the marihuana. Thus, considering the passage of time and the loss of potential witnesses, the prosecutor's ability to prosecute the Defendant would be significantly hampered. Therefore, the prosecution would be substantially prejudiced if the Defendant were allowed to withdraw his plea.

**2. Requiring a defendant to plead guilty in order to preserve the right of his family members to benefit from plea bargains is not coercive.**

The Court has also asked the question of whether requiring a defendant to plead guilty in order to preserve the right of his family members to benefit from plea bargains is coercive. The People admit that requiring a defendant to plead guilty in order to preserve the right of his family members to benefit from plea bargains may appear coercive. That fact however, does not vitiate a guilty plea. All guilty pleas force a defendant to face a coercive choice – plead guilty or go to trial. The Court has made it clear that a promise of leniency for a relative does not in itself amount to coercion so as to make a guilty plea involuntary as a matter of law. *People v James*, 393 Mich 807, 808; 225 NW2d 520, (1975). The rules and procedures for accepting guilty pleas make every attempt to assure that a defendant is not coerced into pleading

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<sup>4</sup> Even if the Defendant was not living in the home he would still be guilty of growing the marijuana if he planted the seeds, or watered the plants, or done anything else to further their growth.

guilty. It is for that reason, as Justice Corrigan points out in the Court's order for argument, "Courts have held that a [d]efendant's claim of coercion should not be accorded greater weight than his statement at the time of the plea." [Quoting *People v Roy*, 131 Mich App 611, 613 (1983)]. Court's Order, page 4. To allow the Defendant to withdraw his plea in this case would create an exception to that rule. As Judge Beasley opined in his dissent in *People v Walker*:

"Any time a plea bargain involved special consideration for a family member or relative, defendant would require that the trial judge make two findings of voluntariness, one at a special hearing and one at the plea taking as is already required by court rule." *People v Walker*, 75 Mich App 552, 554; 255 NW2d 658 (1977).

The People submit that the Court should not carve out an exception to the rule merely because the claim of coercion involves a promise of leniency to a family member.

The People further submit that the promise of leniency was not made more coercive by the fact that the prosecutor made it an all or nothing proposition. Under circumstances such as those in this case the prosecutor has no choice but to require that all the defendants accept the plea offer at the same time. Otherwise, once one defendant accepts the plea he can take the blame for all the other defendants. The Court should note that in this case the only brother to admit to actually growing the marijuana was Roger Lamorand. The People find that interesting because Roger Lamorand was the only one of the three

brothers young enough to qualify for HYTA<sup>5</sup> status. Thus, it appears that all the brothers benefited by the plea bargain. The older brothers pled to a lesser offense, and while the younger brother pled guilty to a felony, that conviction would eventually be removed from his record.

**3. The Defendant's claims of innocence together with the claims of coercion, brought before sentencing, did not provide sufficient reasons under the standard of review for plea withdrawal before sentencing to support a grant of his motion.**

The Court next asks whether the Defendant's claims of innocence together with the claims of coercion, brought before sentencing, provided sufficient reasons under the standard of review for plea withdrawal before sentencing to support a grant of his motion. As the Court knows, at one time a defendant's motion to withdraw his guilty plea made before sentencing was to be granted with "great liberality." See, *People v Zaleski*, 375 Mich 71, 79; 133 NW2d 175 (1965). A subsequent change in the court rule however, placed a stricter requirement on a defendant seeking to withdraw his guilty plea before sentencing. Under *MCR 6.310(B)(1)*, a defendant's motion to withdraw his plea before sentencing may be granted only in the interest of justice and if withdrawal would not substantially prejudice the prosecution. Under that rule the burden is first on the defendant to establish a fair and just reason for withdrawal of the plea. *People v Jackson*, 203 Mich App 607, 611-612; 513 NW2d 206 (1994). In this case there are two reasons why the Defendant's claims of

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<sup>5</sup> Holmes Youthful Trainee Act; *MCL* § 762.11.

innocence together with his claims of coercion did not establish a fair and just reason for withdrawal of his plea.

First, the Defendant's claims did not establish a fair and just reason because the law does not support his claims of coercion. As previously stated, a promise of leniency for a relative does not in itself amount to coercion so as to make a guilty plea involuntary as a matter of law. Secondly, the Defendant's claims of innocence did not establish a fair and just reason because the Defendant never claimed that he was innocent. In support of his motion to withdraw his guilty plea the Defendant never claimed that he was not involved in growing the marihuana, he merely claimed that he was not living in the home at the time. Not living in the home is not the same as being innocent, since the Defendant could have participated in growing the marihuana even if he were not living at the home. As the People have pointed out, the Defendant's stepfather told the police that the brothers, Michael, Brian, and Roger were growing the marihuana. Thus, the Defendant's claim that he was not living at the home did not establish a fair and just reason for withdrawal of the Defendant's plea. Since the Defendant did not establish a fair and just reason for withdrawal of his plea, the withdrawal of the plea would not be in the interest of justice.

**4. An evidentiary hearing is not required to explore this matter.**

Lastly, the Court asks whether an evidentiary hearing is required to explore this matter. The People submit that an evidentiary hearing is

not required. Since all the other defendants have pled out and served their sentences, the chances are good that they would totally exonerate the Defendant. The Defendant's stepfather, in all probability, would explain that Officer Brooks made a mistake regarding his statement that all the brothers were involved in growing the marihuana. Thus, the People believe that an evidentiary hearing would not assist the Court in determining whether the Defendant should be allowed to withdraw his plea.

**RELIEF REQUESTED**

The Plaintiff-Appellee prays that the Court **deny** the Defendant-Appellant's Application for Leave to Appeal.

Respectfully submitted,

Eric J. Smith P46186  
Prosecuting Attorney  
Macomb County, Michigan

Robert Berlin P27824  
Chief Appellate Attorney  
By:



Richard Goodman P34395  
Assistant Prosecuting Attorney

DATED: April 28, 2008.

## **ATTACHMENTS**

CHARTER TOWNSHIP OF CLINT POLICE DEPARTMENT  
GENERAL INCIDENT REPORT

CIDENT NO.

06-6656

NATURE OF INCIDENT <b>MANUFACTURING MARIJUANA</b>		DATE 2-18-06	DAY SAT	MILITARY TIME 1712
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HOW REC'D R	OFFICER BROOKS 221	ADDRESS OF OCCURRENCE AND BUSINESS NAME 35618 RUTHERFORD
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DATE 2-18-06	DAY SAT	MILITARY TIME 1712
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NAME	DOB	R/S	ROLE	ADDRESS	TELEPHONE
DAVID BOYD CUNNINGHAM	6-4-57	WM	SUS	35618 RUTHERFORD	RES. 792-2720 BUS.
BRIAN ALLEN LAMORAND	12-23-78	WM	SUS	35618 RUTHERFORD	RES. 792-2720 BUS.
ROGER PAUL LAMORAND JR.	5-20-84	WM	SUS	35618 RUTHERFORD	RES. 792-2720 BUS.
FIREFIGHTER KOKKA		/	PER	CTFD ENGINE 1	RES. BUS.

DOMESTIC	INJURY	VOR	VICTIM TYPE	SCENE CODE	LARCENY CODE	TOOL OR WEAPON CODE 1	TOOL OR WEAPON CODE 2	ARSON CODE	ABANDON Y	ABANDON N	MOBILE Y	MOBILE IN
/	/	/	6	9	/	/	/	/	/	/	/	/

VEHICLE CODE	VEHICLE TYPE	STOLEN LOCAL	STOLEN OTHER	RECOVERED LOCAL	RECOVERED OTHER	YR.	MAKE	MODEL	COLOR
/	/	/	/	/	/	/	/	/	/

VIN	LIC. YR.	LIC. ST.	LICENSE NO.	TOW CO.
/	/	/	/	/

PROPERTY CODE	PROPERTY CLASS	ESTIMATED VALUE \$	ESTIMATED DAMAGE \$	POINT OF ENTRY	METHOD OF ENTRY	WEATHER/LIGHT CONDITIONS
E	L	/	/	/	/	CLEAR - DAYLIGHT

SUSPECT 4: MICHAEL SCOTT TOOMAN, WM, 10-2-72. 35618 RUTHERFORD. CTPD BENCH WARRANT FTA FOR PROHIBITED PARKING 05-31536. NO APPEARANCE REQ \$196 BOND PAYS FINES AND COSTS.

SUSPECT 5: MARY LOUELLA CUNNINGHAM, WF, 4-28-49. 35618 RUTHERFORD. FRASER BENCH WARRANT FOR CONTEMPT OF COURT. OCA: 01-009883. FTA SNOW ORD VIOLATION. NO APPEARANCE REQ \$116 BOND PAYS FINES AND COSTS.

SOURCE: RADIO RUN.

CIRCUMSTANCE: WRITER WAS DISPATCHED TO 35618 RUTHERFORD AT 1517 HRS TO ASSIST CTFD FOR A BASEMENT FIRE (06-6643). WRITER CLEARED THE SCENE AND WAS LATER DISPATCHED AGAIN TO 35618 RUTHERFORD WITH THE COMPLAINT BY CTFD ENGINE 1 PERSONNEL WHO FOUND WHAT THEY BELIEVED WERE MARIJUANA PLANTS IN THE BASEMENT. UPON ARRIVAL WRITER OBSERVED APPROXIMATELY 10 GREEN LEAFY PLANTS WHICH RESEMBLED THAT OF MARIJUANA. THEY WERE LOCATED UNDER THE BASEMENT STAIRS AT THE SE CORNER OF THE RESIDENCE. OFFICER BURNS RESPONDED TO THE SCENE AND TOOK POSSESSION OF THE PLANTS SEE HIS SUPPLEMENTAL REPORT. WRITER MET WITH THE HOMEOWNER DAVID CUNNINGHAM AND ADVISED HIM OF WHY OFFICERS RESPONDED TO THE SCENE AGAIN. DAVID STATED THAT "THEY" ARE GROWING A LITTLE DOWN THERE. I ASKED DAVID WHO HE IS REFERRING TO AS "THEY." HE SAID HE WAS REFERRING TO HIS STEP SONS MICHAEL, BRIAN AND ROGER. THE LISTED SUSPECTS WERE ID'ED BY MICHIGAN DRIVERS LICENSE. THEY WERE CHECKED THROUGH LIEN AFTER CLEARING THE SCENE WITH MICHAEL TOOMAN HAVING THE CTPD WARRANT AND MARY CUNNINGHAM HAVING THE FRASER WARRANT. PER DISPATCHER CHEUNG FRASER ADVISED THEY WOULD NOT PICKUP CUNNINGHAM ON THEIR WARRANT. THE LISTED SUSPECTS WERE RELEASED FROM THE SCENE AND ADVISED OF THE PENDING CHARGES.

PRIMARY CLASS	SEQ. CLASS	STATUS	REPORTING OFFICER'S SIGNATURE & I.D. #	OTHER OFFICERS AT SCENE
			<i>[Signature]</i> 221	SGT. HURLEY OFC BONNER, OFC MERTES, OFC BURNS

REVIEWED BY	CASE ASSIGNED TO:	I.D. #	ASSOCIATED INCIDENT 1	ASSOCIATED INCIDENT 2
<i>[Signature]</i>	Keith.		06-6643	

**COPY**

06-6656