Order

Michigan Supreme Court
Lansing, Michigan

April 19, 2024

Elizabeth T. Clement,
Chief Justice

166422

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Megan K. Cavanagh
Elizabeth M. Welch
Kyra H. Bolden,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

v

SC: 166422
COA: 361377
Tuscola CC: 21-015450-FH

SHAALN M. KEJBOU,
Defendant-Appellee.

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On order of the Court, the application for leave to appeal the October 5, 2023 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

WELCH, J. (*concurring*).

While I agree with our decision to deny leave to appeal, I write separately to note my agreement with Judge REDFORD that it is questionable whether the voters intended to remove felony penalties for the conduct alleged to have occurred in this case when they adopted the Michigan Regulation and Taxation of Marihuana Act (MRTMA), MCL 333.27951 *et seq.*, which legalized the cultivation and use of recreational marijuana by individuals who are at least 21 years old.

Among other things, the MRTMA allows a person who is at least 21 years of age to possess for personal use 2.5 ounces of marijuana (with up to 15 grams being marijuana concentrate), to possess for personal use within a person's residence up to 10 ounces of marijuana, and to cultivate for personal use within a person's residence up to 12 marijuana plants. See MCL 333.27955(a) and (b). The MRTMA also laid the foundation for a legal commercial marijuana cultivation, processing, and distribution industry that is subject to regulatory oversight and licensing requirements. See, e.g., MCL 333.27957 to 333.27961. First-time violations of the MRTMA possession and cultivation limitations for unlicensed individuals are generally civil infractions, see MCL 333.27965(1) to (3), but MCL 333.27965(4) provides that if someone possesses more than 5 ounces of marijuana (outside the home) or cultivates more than 24 marijuana plants without a license, they are guilty of

a misdemeanor.[1] The language of the MRTMA applies to anyone growing marijuana plants. Thus, there is no difference if someone without a license grows 25 plants or 2,000 plants—both are misdemeanors.

In this case, defendant was allegedly growing more than 1,100 plants in a fenced outdoor space in Tuscola County.[2] After receiving a tip, police investigated and determined that defendant was growing numerous marijuana plants outdoors and without a license. As a result, law enforcement obtained a search warrant for defendant's property and discovered more than 1,156 plants and a gun. Relevant here, defendant was charged with a felony under MCL 333.7401(2)(d)(*i*) (a provision of the Public Health Code that makes the possession or manufacture of 45 kilograms or 200 marijuana plants or more a felony punishable by up to 15 years in prison and $10,000,000 in fines) and possessing a firearm while committing a felony. Defendant moved to have his charges dismissed, arguing that the alleged crime was a misdemeanor and that MCL 333.7401 was no longer valid as applied to marijuana given the voters' approval of the MRTMA. The circuit court agreed, quashing the bindover, and the Court of Appeals affirmed. The prosecution appealed to this Court.

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[1] MCL 333.27965(4) states, in part:

> [*A*] *person who* possesses more than twice the amount of marihuana allowed by section 5 [MCL 333.27955], *cultivates more than twice the amount of marihuana allowed by section 5*, or delivers without receiving any remuneration to a person who is at least 21 years of age more than twice the amount of marihuana allowed by section 5, *shall be responsible for a misdemeanor, but shall not be subject to imprisonment unless the violation was habitual, willful, and for a commercial purpose or the violation involved violence*. [Emphasis added.]

[2] While Michigan statistics appear to be lacking, a survey of marijuana production practices in California reported that an average marijuana plant grown outdoors in California yielded about "2.51 lb per plant (range 0.02 to 10 lb per plant, $n = 46$)[.]" Wilson et al, *First Known Survey of Cannabis Production Practices in California*, California Agriculture 72(3), p 121 (September 12, 2019), available at <https://calag.ucanr.edu/archive/?article=ca.2019a0015> (accessed April 12, 2024) [https://perma.cc/J4DV-MVNN]. Converting those data points to ounces provides for an average of 40.16 ounces per plant with a range of 0.32 ounces to 160 ounces. So, for context, even if one assumes that outdoor cultivation in Michigan produces an average of merely 8 ounces per plant, the defendant here was alleged to possess more than 1,100 plants—or approximately 8,800 ounces of marijuana.

The unlicensed marijuana grow operation at issue here went far beyond the bounds of the amount a person would grow for personal use or what is permitted by the MRTMA. But the language in MCL 333.27965(4) means that nothing more than a civil infraction or misdemeanor prosecution is permitted, *even when the cultivation occurs at a commercial scale and the finished product is intended for the illicit market*. While the MRTMA allows for a misdemeanor charge and imprisonment if the grow operation was habitual, willful, and for a commercial purpose or the violation involved violence, felony charges are not permitted—even if the accused's purpose is to grow marijuana to be sold illegally.

The statement of purpose for the MRTMA sets forth the primary reasons for the initiative legislation:

> The purpose of this act is to make marihuana legal under state and local law for adults 21 years of age or older, to make industrial hemp legal under state and local law, and to control the commercial production and distribution of marihuana under a system that licenses, regulates, and taxes the businesses involved. The intent is to prevent arrest and penalty for personal possession and cultivation of marihuana by adults 21 years of age or older; remove the commercial production and distribution of marihuana from the illicit market; prevent revenue generated from commerce in marihuana from going to criminal enterprises or gangs; prevent the distribution of marihuana to persons under 21 years of age; prevent the diversion of marihuana to illicit markets; ensure the safety of marihuana and marihuana-infused products; and ensure security of marihuana establishments. To the fullest extent possible, this act shall be interpreted in accordance with the purpose and intent set forth in this section. [MCL 333.27952]

Thus, while a primary motivation of the MRTMA was to eliminate harsh criminal penalties for individual users of marijuana, another motivation was the creation of a regulated legal market for marijuana production and use. It seems doubtful that Michigan voters supporting Proposal 18-1 in 2018 would have presumed or believed that large-scale illicit grow operations would be immune from felony prosecution. In fact, it seems likely that most voters would have assumed the opposite, given the statement of purpose.

The plain meaning of MCL 333.27965(4) appears to leave regulators and law enforcement in a difficult position. Maintenance of a regulated legal market requires tools for dissuading and penalizing bad actors, especially when the bad actors historically may have had affiliations with drug cartels or other criminal organizations. But regulators can only regulate the activities of individuals and companies participating in the legal marijuana market. Combating the illicit market remains the province of law enforcement. It is difficult to fathom how mere civil infraction and misdemeanor penalties are effective tools to combat illegal large-scale commercial production and distribution operations in

Michigan. While illicitly cultivated marijuana plants can be seized and destroyed, the fines for illegal commercial activities are minimal when compared to the potential street value of illegally grown marijuana,[3] and misdemeanor convictions permit only short-term incarceration.

Of course, the very operations legalized by the MRTMA, licensed marijuana growers and retailers, are harmed when illegally grown marijuana can flood the market. Regulated growers and retail operators have strict laws they must follow and in fact are themselves subject to substantial fines, business closure, and license revocation if they fail to comply with the regulatory requirements.[4] The Court of Appeals aptly noted this predicament, stating that while the unavailability of felony charges for those in defendant's situation was likely unintended, it was required by the "plain and unambiguous language of the MRTMA and controlling caselaw regarding statutory interpretation" and explaining that while the outcome "may be viewed [as] unjust by those businesses that legitimately operate within the parameters of the MRTMA," the remedy did not lie with the courts. *People v Kejbou*, ___ Mich App ___, ___ n 9 (2023) (Docket No. 361377), slip op at 9 n 9.

Did the voters really intend for the regulated growers in our state to be subject to harsher penalties than those who grow marijuana at a commercial scale illicitly, outside the regulated system? Certainly, the companies operating in the regulated system have an interest in ensuring that everyone follows the same rules given the significant costs to operate in the regulated market.

Like Judge REDFORD, I believe the Legislature may wish to consider amending the MRTMA to address the penalties under MCL 333.27965(4) as applied to individuals who

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[3] It is also notable that the maximum misdemeanor and civil infraction fines are substantially lower than the potential for hundreds of thousands of dollars in fines the actors within the regulated marijuana market can face for failure to comply with existing regulations. See, e.g., Michigan Department of Licensing and Regulatory Affairs, *Cannabis Regulatory Agency Issues $212,000 Fine and 30-Day Suspension of Vassar Licensee*, January 25, 2024, available at <https://www.michigan.gov/lara/news-releases/2024/01/25/cannabis-regulatory-agency-issues-fine> (accessed April 12, 2024) [https://perma.cc/E8AM-CZCB].

[4] Licensed marijuana growers pay thousands of dollars in annual licensing fees before beginning business and substantial more in other costs and fees. See Mich Admin Code, R 420.7. Licensed marijuana businesses are required to report theft or loss of marijuana products to law enforcement within 24 hours, Mich Admin Code, R 420.804, and violations of state marijuana industry rules and regulations can lead to the forfeiture of business property, limitations on an existing license, denial or revocation of a license, monetary fines, and orders to cease operations, Mich Admin Code, R 420.805 and 420.806.

seek to unlawfully cultivate marijuana at a commercial scale without seeking licensing approval or otherwise complying with existing regulations. But given that the law is clear, I concur in this Court's denial of leave to appeal.

CLEMENT, C.J., and BOLDEN, J., join the statement of WELCH, J.