STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	FOR PUBLICATION June 7, 2011 9:05 a.m.
v	No. 300641 Kalamazoo Circuit Court
TED ALLEN ANDERSON, Defendant-Appellant.	LC No. 2010-000024-FH

Before: HOEKSTRA, P.J., and MURRAY and M. J. KELLY, JJ.

PER CURIAM.

In his delayed application for leave to appeal, defendant raises two alleged errors on the part of the trial court relative to the denial of his motion to dismiss. First, he argues that the trial court erred in *requiring* him to produce expert testimony in support of his defense to the charges, and second, that he should not have been precluded from raising his statutory defense at trial even though the trial court rejected the defense as factually unsupported after a pre-trial evidentiary hearing. As set forth below, we agree with, and therefore adopt as a unanimous opinion of this Court, sections I., II. A., and II. C. 3. of Judge KELLY'S concurring opinion. That is, we agree with Judge KELLY'S analysis and conclusion of defendant's second argument, i.e., that under these facts the trial court correctly forbade defendant from raising his defense at trial, but we provide an alternative explanation for why defendant cannot prevail on his first argument. Consequently, for the reasons stated below and partially in Judge KELLY'S opinion, we affirm.

As we noted, defendant's first argument is that the trial court erred in requiring him to produce expert testimony to establish his defense under MCL 333.26428.[1] This argument cannot be sustained, however, because the factual underpinning is incorrect. As the prosecution notes in its brief on appeal, the trial court did not *require* defendant to produce an expert in order to prevail on his defense. Instead, as the trial court's opinion makes clear, the trial court indicated

[1] Although our concurring colleague would decide this issue on an alternative ground, we opt for deciding the issue raised by defendant and briefed by the parties. *Bradley v Saranac Bd of Ed*, 455 Mich 285, 302-303; 565 NW2d 650 (1997); *Paramount Pictures Corp v Miskinis*, 418 Mich 708, 730-731; 344 NW2d 788 (1984).

that an expert would have been able to provide *relevant* testimony. But, in denying defendant's motion, the court considered both defendant's testimony and the testimony of his family physician, but rejected both as either not being credible (defendant) or not being qualified to testify on the subject (defendant's physician). In the end, however, the court held that in the absence of relevant expert testimony and any other credible testimony supporting the defense, defendant could not establish a defense:

> The record is devoid of any explanation why growing marihuana outdoors in the open and having marihuana in amounts well in excess of the presumptive limit was reasonably necessary to treat defendant's back pain. The court holds that expert testimony is relevant on this issue. This is not something a lay person would know. MRE 702. The defendant's opinion on what he had for self-treatment is not creditable [sic]. The court finds on the proofs presented that his family doctor was not qualified to offer an opinion on this questions [sic] because there is no evidence she has experience working with patients for whom she has recommended marihuana, including experience with dosage. Her opinion is unpersuasive. There is no other evidence on this issue except the presumption within the Act. See MRE 301. Because the court has concluded the amount of marihuana exceeds the amount reasonably necessary, it need not resolve whether in fact the defendant otherwise has met the requirement for a Section 8 defense, or to what extent expert testimony is relevant to the other two requirements of Section 8.

We see nothing in this opinion where the trial court ruled as a matter of law that defendant's motion was being denied because of the absence of an expert that was qualified to testify about the amount of marijuana reasonably necessary for defendant's medical condition. Rather, the trial court analyzed the other evidence presented by defendant, i.e., his testimony and that of his physician, and after rejecting that evidence as well recognizing a lack of expert testimony, denied defendant's motion. Hence, defendant's assertion that the trial court required him to produce an expert was incorrect, and as that was the basis for his argument, he cannot prevail.[2]

Affirmed.

/s/ Joel P. Hoekstra
/s/ Christopher M. Murray

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[2] In essence, defendant has presented a hypothetical issue, as the trial court never held an expert was required. We generally refrain from deciding hypothetical issues. *People v Turner*, 123 Mich App 600, 604; 332 NW2d 626 (1983).