

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

FOR PUBLICATION
February 3, 2011

v

LARRY STEVEN KING,

Defendant-Appellee.

No. 294682
Shiawassee Circuit Court
LC No. 09-008600-FH

Before: SAWYER, P.J., and FITZGERALD and SAAD, JJ.

FITZGERALD, J. (*dissenting*).

I respectfully dissent.

The police had received an anonymous tip that defendant was growing marijuana in his back yard. The police then drove to the defendant's neighbor's driveway. The police, using binoculars, were able to observe marijuana plants growing in a dog kennel in defendant's back yard. The dog kennel was made of six-foot high chain link fence covered with black shrink wrap. The police were able to see into the kennel where a section of shrink wrap had been detached. The police then approached defendant's home, knocked on the door, and asked if defendant had a medical marijuana card. Defendant produced his card. The police then asked if defendant would allow them to see the plants. Defendant went back inside the house to obtain the key to the lock on the kennel. He then went with officers around the house, and opened the lock on the kennel. The officers then asked if he had more marijuana in the home. Defendant stated that he did, but that the officers would need a search warrant. The police then obtained a search warrant. Six Marijuana plants, processed marijuana, and plants in various states of processing were found inside the home.

Defendant moved to dismiss the charges of manufacturing marijuana pursuant to the Michigan Medical Marijuana Act (MMMA),¹ MCL 333.26421 *et seq.* The MMMA was passed by referendum on November 4, 2008, and went into effect soon thereafter. The MMMA declares

¹ Although the statute spells it "marihuana," unless used in a direct quote, I have spelled it throughout as "marijuana" as that is the more commonly used spelling.

that, in “chang[ing] state law,” the act was designed to “have the practical effect of protecting from arrest the vast majority of seriously ill people who have a medical need to use marihuana.” MCL 333.26422(b). The MMMA further declares that the laws of certain other states “do not penalize the medical use and cultivation of marihuana. Michigan joins in this effort for the health and welfare of its citizens.” MCL 333.26423(c). Such declarations reveal the intent that the MMMA be used not as a sword against those who have a medical need to use marihuana, but rather as a shield.

MCL 333.26424(a) of the MMMA allows a qualifying patient who has been issued and possesses a registry identification card to possess 2.5 ounces of marijuana and to cultivate 12 marijuana plants (if the patient has not designated a primary care giver) and not be subject to arrest or prosecution for possession of the marijuana or for growing the plants. Specifically, subsection 4(a) states:

A qualifying patient who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business of occupational or professional licensing board or bureau, for the medical use of marihuana in accordance with this act, provided that the qualifying patient possesses an amount of marihuana that does not exceed 2.5 ounces of usable marihuana, and, if the qualifying patient has not specified that a primary caregiver will be allowed under state law to cultivate marihuana for the qualifying patient, 12 marihuana plants kept in an *enclosed, locked facility*.

There is no dispute that defendant is a qualifying patient in possession of a valid registry card.² The prosecution argues that defendant was not entitled to the protection of this statutory section because he was not growing his marijuana plants in “an enclosed, locked facility.” In particular, the prosecution asserts that the dog kennel in defendant’s backyard was not an “enclosed, locked facility” because it lacked a roof or a top and was movable. Additionally, the prosecution asserts that defendant’s house was not an “enclosed, locked facility” because the back door lacked a lock.

The narrow issue before this Court is the interpretation of the term “enclosed, locked facility” as used in MCL 333.26423(c) of the MMMA. Questions of statutory interpretation are reviewed de novo. *People v Feezel*, 486 Mich 184, 205; 783 NW2d 67 (2010).

The purpose of statutory construction is to discern and give effect to the intent of the Legislature. *Feezel*, 486 Mich at 205. The MMMA was enacted as a result of an initiative adopted by the voters. The words of an initiative law are given their ordinary and customary meaning as would have been understood by the voters. In the absence of a statutorily provided definition, a statutory term will be given its ordinary meaning. *People v Peals*, 476 Mich 636,

² The prosecution does not dispute that defendant was entitled to possess 2.5 ounces of marijuana.

641; 720 NW2d 196 (2006). The ordinary meaning of a term may be discerned by consideration of dictionary definitions. *People v Perkins*, 473 Mich 626, 639; 703 NW2d 448 (2005). This Court presumes that the meaning as plainly expressed in the statute is what was intended. *People v Redden*, ___ Mich App ___; ___ NW2d ___ (2010), slip op at 6-7.

The MMMA defines “enclosed, locked facility” as follows:

“Enclosed, locked facility” means a closet, room, or other enclosed area equipped with locks or other security devices that permit access only by a registered primary caregiver or registered qualifying patient. [MCL 333.26423(c).]

Clearly, the outdoor dog kennel could only qualify as an enclosed, locked facility under the term “other enclosed area.” MCL 333.26423(c) does not define the word “enclosed.” Random House Webster’s College Dictionary contains the following definition of “enclose”: “1. to close in on all sides; shut in. 2. to surround, as with a fence; *to enclose land*. 3. to insert in the same envelope, package, etc.: to enclose a check. 4. to contain or hold.” *The Random House Webster’s College Dictionary* (1997). Under this definition, the dog kennel in this case would fall under the definition of “other enclosed area.” The chain link walls of the kennel were six feet high and the area surrounded by the chain link walls was closed in on all sides. Like a fence that surrounds land (as in the dictionary example above), the kennel did not have a top, but, by dictionary definition, a top is not required to “enclose” something.”³ Defendant covered the walls of the kennel with black shrink-wrap in an attempt to conceal the contents of the enclosure. Additionally, the kennel was equipped with a lock, and defendant maintained the key to the lock, thereby satisfying the additional requirement that the “other enclosed area” be equipped with locks or other security devices that permit access only by a registered primary caregiver or registered qualifying patient. MCL 333.26423(c). Thus, in my view, the dog kennel qualifies as an “enclosed, locked facility.”

The prosecution further argues that defendant’s house was not an “enclosed, locked facility” because the back door did not have a lock. MCL 333.26423(c) provides that such a facility be equipped with “locks” or “other security devices.” The term “other security devices” is not defined in the MMMA. The dictionary defines a device” as “1. A thing made for a particular purpose, esp. a mechanical electronic invention or contrivance.” *The Random House Webster’s College Dictionary* (1997). Given that the statutory definition of an “enclosed, locked facility” allows for not only locks, but also “other security devices” to be used, the term “locked” should be broadly interpreted. Indeed, it appears from the use of the term “other security devices” that the intent is that the facility be “secure.”

Here, Michigan State Police Detective Sergeant Brian Fox presented testimony at the preliminary examination that the back door of defendant’s home did not have a knob and that he did not “think” that defendant was able “to lock or to keep the house secure.” However, the lack

³ Contrary to the prosecution’s suggestion, nothing in the statutory definition of “enclosed, locked facility” prevents the facility from being movable.

of a knob on the back door does not necessarily mean that defendant's house was not secure. As the statutory definition makes clear, the door could have been secured by other devices. Some other "contrivance for securing or fastening" would satisfy the statute. Although Fox testified that he did not see a board that kept the door closed from the inside, that does not mean that there lacked a mechanism to keep the door secure. In my view, in the absence of evidence that persons other than defendant had access to or actually entered the home, defendant's home satisfies the definition of "enclosed, locked facility."

Furthermore, the definition of "enclosed, locked facility" reveals the people's intent that the marijuana being cultivated be accessible only by a registered primary caregiver or registered qualifying patient. In other words, the concern is that the marijuana being cultivated not be accessible by anyone other than a registered primary caregiver or registered qualifying patient. As previously noted, the declared intent of the MMMA "to protect from arrest the vast majority of seriously ill people who have a medical need to use marihuana." Rather than having a rigid definition of "other enclosed area" and "locked" or "other security device," the true key to determining whether defendant's dog kennel and home were "enclosed, locked facilities" for purposes of the MMMA is to determine whether access to the marijuana in the dog kennel and the house was permitted "only by a primary care giver or registered qualifying patient." MCL 333.26423(c).

The evidence in the record indicates that the dog kennel where defendant was growing marijuana was located in his backyard. The walls of the kennel were made of six feet high chain link fence wrapped in black plastic. Parts of the black plastic had blown open allowing Fox and another deputy to see defendant's marijuana from the street with the use of binoculars. The kennel was locked and Fox and the deputy were only able to access it after defendant obtained a key for the lock from his house. The prosecution made no allegations that anyone attempted to steal defendant's marijuana plants. Rather, the prosecution argued that access to the marijuana plants was not limited to defendant because someone could move the kennel or climb over the six-foot walls to access the marijuana plants. However, the evidence presented at the preliminary examination revealed that defendant had to obtain a key to gain access to the marijuana. No evidence was presented that anyone had tried to move the kennel or climb over the kennel to obtain the marijuana. In fact, no evidence was presented that anyone other than defendant had access to the marijuana. The prosecution's argument is premised solely on a set of hypothetical facts.

Similarly with defendant's house, we need not find a rigid definition for "locked" which requires the use of a key. Instead, the determination to be made is whether access to the marijuana in defendant's house was limited to defendant. Defendant refused to allow Fox and the other officer access to his house. The police obtained access to the house only by securing a search warrant. No evidence was presented that anyone other than defendant had access to the house. I would conclude that defendant was growing marijuana in accordance with the provisions of the MMMA. The evidence from the preliminary examination reveals that access to both the kennel and the house was limited to defendant, which is sufficient for purposes of MCL 333.26424.

I find it worthy to note that this is not a case involving an individual who was trying to flout the clear prohibitions of the Public Health Code and engage in recreational use of

marijuana. This is a case involving an individual who went through the necessary procedure to become a qualifying patient who has been issued a valid registry identification card. The MMMA's susceptibility to multiple interpretations should not result in the use of the act as a sword, rather than a shield, under the circumstances of this case.

I would affirm the learned circuit judge's dismissal of the charges against defendant.

/s/ E. Thomas Fitzgerald