

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

FOR PUBLICATION
February 3, 2011
9:00 a.m.

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.

SAAD, J.

The prosecutor appeals the trial court’s order that dismissed two counts against defendant for the manufacture of a controlled substance – marijuana, MCL 333.7401(2)(d)(iii). For the reasons set forth below, we reverse and remand for further proceedings consistent with this opinion.

I. NATURE OF THE CASE

Defendant, who was arrested for illegally growing marijuana, possesses a registry identification card under the Medical Marihuana Act (MMA), MCL 333.26421 *et seq.*, and claims that he is entitled to the limited protections of the MMA because he complied with its statutory provisions. The trial court ruled that the charges against defendant must be dismissed because he satisfied the elements of the affirmative defense outlined in § 8 of the MMA. MCL 333.26428. Though defendant timely raised a § 8 defense, he did not fulfill the requirements of § 8. Clearly, by its reference to § 7, § 8 required defendant to comply with other applicable sections of the MMA, which includes the growing requirements set forth in § 4. MCL 333.26427; 333.26424. Furthermore, as a registered cardholder, defendant must comply with the growing provisions of § 4. MCL 333.26424(a). Also, defendant maintains, and the trial court erroneously ruled, that defendant complied with § 4 by growing the marijuana in an “enclosed, locked facility.” We disagree that defendant adhered to the requirements of § 4 of the MMA and therefore hold that defendant is not entitled to the benefit of the protections of the MMA. The trial court abused its discretion when it dismissed the charges against him.

II. FACTS

The Michigan State Police received an anonymous tip that someone was growing marijuana in the backyard of a house at 710 Grace Street in Owosso. On May 13, 2009,

Detective Sergeant Brian Fox and Deputy Jed Eisenberger drove to the address and saw a chain-link dog kennel behind the house. Though the sides of the kennel were covered with black plastic, some areas of the kennel were uncovered and, using binoculars, Deputy Eisenberger could see marijuana plants growing inside.

Detective Fox and Deputy Eisenberger went to the door of the house and spoke to defendant, who produced a medical marijuana card that was issued on April 20, 2009. The officers asked defendant to show them the marijuana plants and defendant unlocked a chain lock on the kennel. The kennel was six feet tall, but had an open top and was not anchored to the ground. Defendant disclosed that he had more marijuana plants inside the house. After they obtained a search warrant, the officers found marijuana plants growing inside defendant's unlocked living room closet.

As noted, defendant was charged with two counts of manufacturing marijuana. After the prosecutor presented his proofs at the preliminary examination, defendant moved to dismiss the charges under the affirmative defense section MMA. The district court denied defendant's motion and bound defendant over for trial. In the circuit court, defendant filed a motion to quash the bindover or to suppress evidence obtained during the search. He also sought to dismiss the charges on various grounds. Among other arguments, defendant maintained that the search warrant was invalid because it was based on hearsay. Defendant also sought to assert an affirmative defense under the MMA. In response, the prosecutor argued that the search warrant was valid and that defendant failed to comply with the MMA because he did not keep the marijuana in an enclosed, locked facility pursuant to MCL 333.26424(a).

The trial court issued an opinion and order on September 30, 2009. The court ruled that, because defendant had a medical marijuana registry identification card and kept "a legal quantity" of marijuana in an enclosed, locked facility, there was no probable cause to support the issuance of the search warrant for his home. Nonetheless, the court ruled that the evidence seized during the search should not be suppressed because the officers acted in good faith reliance on the warrant. However, the court held that the officers should not have seized the marijuana because defendant complied with the requirements of the MMA. For the same reason, the court ruled that defendant was entitled to assert an affirmative defense under the MMA and it granted defendant's motion to dismiss the charges.

III. ANALYSIS

"We review a trial court's decision to grant or deny a motion to dismiss charges for an abuse of discretion." *People v Kevorkian*, 248 Mich App 373, 383; 639 NW2d 291 (2001). The prosecution contends that the trial court incorrectly interpreted the meaning of "enclosed, locked facility" under MMA subsections MCL 333.26424(a) and MCL 333.26423(c) and that it erred when it ruled that defendant complied with the statute. We review questions of statutory interpretation de novo. *People v Feezel*, 486 Mich 184, 205; 783 NW2d 67 (2010). "When interpreting statutes, our goal is to give effect to the intent of the Legislature by reviewing the plain language of the statute." *People v Perkins*, 473 Mich 626, 630; 703 NW2d 448 (2005).

Again, the prosecutor charged defendant with violating Michigan's controlled substances act by growing marijuana, but defendant maintains that he is entitled to the protections from

prosecution laid out in the recently-enacted MMA. By passing statutes that criminalize the possession, use, and manufacture of controlled substances, including marijuana, our state and federal Legislatures have determined that such substances are harmful and prohibited.¹ As Judge O’Connell observed in his concurrence in *People v Redden*, ___ Mich App ___; ___ NW2d ___ (2010) (O’CONNELL, J, concurring):

[T]he [MMA] does not create any sort of affirmative *right* under state law to use or possess marijuana. That drug remains a Schedule 1 substance under the Public Health Code, MCL 333.7212(1)(c), meaning that “the substance has a high potential for abuse and has no accepted medical use in treatment in the United States or lacks accepted safety for use in treatment under medical supervision,” MCL 333.7211. The [MMA] does not repeal any drug laws contained in the Public Health Code, and all persons under this state’s jurisdiction remain subject

¹ The statute at issue here, MCL 333.7401, provides, in relevant part:

(1) Except as authorized by this article, a person shall not manufacture, create, deliver, or possess with intent to manufacture, create, or deliver a controlled substance, a prescription form, or a counterfeit prescription form. A practitioner licensed by the administrator under this article shall not dispense, prescribe, or administer a controlled substance for other than legitimate and professionally recognized therapeutic or scientific purposes or outside the scope of practice of the practitioner, licensee, or applicant.

(2) A person who violates this section as to:

(d) Marihuana or a mixture containing marihuana is guilty of a felony punishable as follows:

(iii) If the amount is less than 5 kilograms or fewer than 20 plants, by imprisonment for not more than 4 years or a fine of not more than \$20,000.00, or both.

to them. Accordingly, mere possession of marijuana remains a misdemeanor offense, MCL 333.7403(2)(d), and the manufacture of marijuana remains a felony, MCL 333.7401(2)(d).

By its terms, the MMA does not abrogate state criminal prohibitions on the manufacture of marijuana. Rather, the MMA “merely provides a procedure through which seriously ill individuals using marijuana for its palliative effects can be identified and protected from prosecution under state law.” *Redden*, ___ Mich App ___ (O’CONNELL, J, concurring). Although these individuals continue to violate the Public Health Code by using marijuana, the MMA sets forth narrow circumstances under which they can avoid criminal liability. In other words, the MMA constitutes a determination by the people of this state that there should exist a very limited, highly restricted exception to the statutory proscription against the manufacture and use of marijuana in Michigan. As such, the MMA grants narrowly tailored protections to qualified persons as defined in the act if the marijuana is grown and used for certain narrowly defined medical purposes. Further, the growing of marijuana is tightly constrained by specific provisions that mandate how, where, for what purpose, and how much marijuana may be grown.

Section 8 of the MMA provides a defendant with an opportunity to assert a defense to the controlled substance laws if the conditions set forth in § 8 are followed. MCL 333.26428. Moreover, § 8 incorporates by reference other provisions of the MMA with which a defendant must comply. Section 8 specifically states that a patient may assert a medical purpose defense to any marijuana prosecution, “[e]xcept as provided in Section 7” Section 7(a) provides that “[t]he medical use of marihuana is allowed under state law *to the extent that it is carried out in accordance with the provisions of this act.*” (Emphasis added.) In *Redden*, this Court held that the statute permits an unregistered patient to assert the affirmative defense under § 8 if he or she meets the requirements of § 8. *Redden*, ___ Mich App ___. We hold that § 8 permits a “registered qualifying patient” to raise an affirmative defense under § 8, just as an unregistered defendant may under *Redden*. We further hold that the express reference to § 7 and § 7(a)’s statement that medical use of marijuana must be carried out in accordance with the provisions of the MMA, requires defendant to comply with the growing provisions in § 4. And, in any case, § 4 applies to defendant because he grew marijuana under a claim that he is a qualifying patient in possession of a registry identification card.² We hold that, because defendant did not comply with § 4, he also failed to meet the requirements of § 8 and therefore, he is not entitled to the affirmative defense in § 8 and he is not entitled to dismissal of the charges.

Section 4, MCL 333.26424(a) provides, in relevant part:

A qualifying patient who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any

² This holding is supported by the ballot proposal itself, Proposal 08-1, which stated that certain registered patients would be permitted to cultivate marijuana within certain restrictions. The proposal specifically provided that the law would “[p]ermit registered individuals to grow limited amounts of marijuana for qualifying patients in an enclosed, locked facility.”

manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or 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.

The MMA 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).]

We hold that the trial court incorrectly interpreted and applied the phrase “enclosed, locked facility.” As this Court recently opined in *Redden*:

This issue presents a question of statutory interpretation. We review issues of statutory interpretation de novo. *People v Stone Transport, Inc*, 241 Mich App 49, 50; 613 NW2d 737 (2000). Generally, the primary objective in construing a statute is to ascertain and give effect to the Legislature’s intent. *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006). The [MMA] 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.” *Welch Foods, Inc v Attorney General*, 213 Mich App 459, 461; 540 NW2d 693 (1995). We presume that the meaning as plainly expressed in the statute is what was intended. *Id.* This Court must avoid a construction that would render any part of a statute surplusage or nugatory, and “[w]e must consider both the plain meaning of the critical words or phrases as well as their placement and purpose in the statutory scheme.” *People v Williams*, 268 Mich App 416, 425-426; 707 NW2d 624 (2005).

As noted, the phrase “enclosed, locked facility” is defined by the MMA to mean “a closet, room, or other enclosed area equipped with locks or other security devices” MCL 333.26423(c). As described above, defendant grew several marijuana plants in his backyard, within a chain-link dog kennel that was only partially covered on the sides with black plastic. The kennel had a lock on the chain-link door, but had no fencing or other material over the top and it could be lifted off the ground. Defendant maintains that the kennel constitutes an “enclosed area” within the definition of “enclosed, locked facility” and, therefore, he complied with the statute. The trial court simply based its interpretation of “other enclosed area” on the

definition of “enclose” in Black’s Law Dictionary, and concluded, without analysis, that the kennel complied with this definition.³

The trial court’s interpretation and application of the phrase “enclosed, locked facility” is contrary to settled rules of statutory construction. The statutory reference to “other enclosed area” within the definition of “enclosed, locked facility” is a general phrase that follows the words “closet” and “room,” both of which have specific, limited meanings and which have the common characteristic of being stationery and closed on all sides. It would frustrate the intent of the MMA to read the definition of “enclosed, locked facility” to mean something akin to a moveable fence based simply on a dictionary definition when the enumerated examples that precede “other enclosed area” suggest a much greater level of protected confinement.

Our courts must give effect to the language in the statute and to elucidate the intent of the voters by considering not only the words themselves, but their placement and purpose in the statutory scheme. To that end, it is appropriate here to apply the doctrine of statutory construction *ejusdem generis*, which provides that “the scope of a broad general term following a series of items is construed as including ‘things of the same kind, class, character, or nature as those specifically enumerated’” *People v Thomas*, 263 Mich App 70, 76; 687 NW2d 598 (2004), quoting *Weakland v Toledo Engineering Co, Inc*, 467 Mich 344, 349; 656 NW2d 175 (2003), and *Huggett v Dep’t of Natural Resources*, 464 Mich 711, 718-719; 629 NW2d 915 (2001). Under the doctrine, “other enclosed area” would, thus, be limited to things of the same kind or character as a closet or room. An open, moveable, chain-link kennel is not of the same kind or character as a closet or room. We further observe that the examples given in the statutory definition are followed by the additional requirement that the closet, room or other enclosed area be equipped with locks or other security devices that permit access only by the registered caregiver or qualifying patient. In context, the clear purpose of specifying that the marijuana be kept within a secure facility to ensure that it is inaccessible to anyone other than a licensed grower or a qualifying patient, as defined in the MMA for the limited purpose set forth in the MMA. Moreover, these provisions are obviously meant to prevent access by the general public and, especially, juveniles. This reading of the MMA is consistent with its limited protections for a narrowly defined group of medical users of a controlled substance, the general cultivation and use of which remains illegal under both state and federal law. Reading the statute broadly as the trial court did to permit marijuana to be kept in the type of space used by defendant would, quite simply, undermine the plain language and purpose of the statutory provisions.

We further hold that, though the plants inside defendant’s home were kept in a closet, which is the type of enclosure specifically enumerated in the statute, it is undisputed that there was no lock on the closet door. The statute explicitly states that the enclosed area itself must have a lock or other security device to prevent access by anyone other than the person licensed to

³ Though, we observe that the trial court cited a definition that specifies enclosure on all sides, but nonetheless concluded that the open-top kennel satisfies the definition.

grow marijuana under the MMA. An unlocked closet would permit access by anyone else within the home and it appears that the home itself was not secured by locks on all of the doors. The trial court's conclusion that defendant acted as a "security device" for the marijuana growing inside his home is pure sophistry and belied by defense counsel's unsurprising admission at oral argument that, at times, defendant left the property, thus leaving the marijuana without a "security device" and accessible to someone other than defendant as the registered patient.

Because defendant failed to comply with the strict requirements in the MMA that he keep the marijuana in an "enclosed, locked facility," he is subject to prosecution under MCL 333.7401(2)(d)(iii), and the trial court abused its discretion by dismissing the charges against defendant.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Henry William Saad

/s/ David H. Sawyer