

**STATE OF MICHIGAN
IN THE COURT OF APPEALS**

(ON APPEAL FROM THE OAKLAND COUNTY CIRCUIT COURT)

**PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,**

**Court of Appeals Case No. 309822
Lower Court Case No. 2010-234351-FH**

-v-

**ANGELA JEAN FRANCE,
Defendant-Appellee.**

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DEFENDANT-APPELLEE'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

Issue I:

WHETHER THE LOWER COURT PROPERLY EXERCISED ITS DISCRETION, BOTH IN GRANTING RECONSIDERATION, AND IN DISMISSING THE CASE AGAINST THE ACCUSED, AFTER CONDUCTING AN EVIDENTIARY HEARING PURSUANT TO THE MMMA WHERE THE ACCUSED OFFERED EVIDENCE ESTABLISHING THE ELEMENTS OF THE AFFIRMATIVE DEFENSE PROVIDED IN §8 OF THE ACT AND WHERE THE PROSECUTION HAD AMPLE OPPORTUNITY TO INTRODUCE EVIDENCE TO REBUT DEFENDANT'S ASSERTION OF THIS AFFIRMATIVE DEFENSE.

The Appellant answers, "no".

Defendant-Appellee answers, "yes".

The trial court would answer, "yes."

Issue II:

WHETHER THE TRIAL COURT PROPERLY RECONSIDERED, SUA SPONTE, ITS ORDER DENYING DEFENDANT'S MOTION FOR DISMISSAL, AND PROPERLY DISMISSED THE MARIJUANA DELIVERY CHARGE ON THE BASIS OF THE RULE OF LENITY BECAUSE, AT THE TIME THE LOWER COURT ISSUED ITS DECISION, THIS COURT'S PRIOR DECISIONS ON THE ISSUE WERE CONTRADICTORY AND THESE CONFLICTS HAD NOT YET BEEN RESOLVED BY THE SUPREME COURT'S *KOLANEK* DECISION.

The Appellant answers, "no".

Defendant-Appellee answers, "yes".

The trial court would answer, "yes."

**APPELLEE'S CONCURRENCE IN THE APPELLANT'S
STATEMENT OF APPELLATE JURISDICTION**

The Defendant-Appellee concurs with the Appellant's stated basis of this Court's jurisdiction to the extent that the Oakland County Prosecutor filed a timely claim of appeal from the lower court's final order in this case pursuant to MCR 7.202(6)(b)(1) and MCR 7.203(A)(1).

COUNTER-STATEMENT OF FACTS

Appellee, Angela France, essentially adopts the statement of facts set forth in Appellant's brief on appeal as it accurately summarizes the relevant trial testimony, trial court rulings, and procedural history of this case. Appellee France sets forth this counter-statement of facts in order to emphasize some of the more important facts necessary in order to properly address the issues raised in the prosecutor's brief on appeal.

The Oakland County Prosecutor filed an appeal of right from the lower court's March 14, 2012 opinion and order, issued by Oakland Circuit Court Judge Daniel P. O'Brien, dismissing Angela France's one-count charge of manufacturing marijuana. On appeal, the prosecutor argues that the trial court erred when it *sua sponte* reconsidered an earlier order denying Defendant's motion to dismiss and ultimately dismissed the case referencing §4 of the Michigan Medical Marijuana Act¹ when the Defendant possessed 20 plants [3 mature flowering plants and 17 seedlings] and did not keep them in an enclosed, locked facility; and that the trial court, upon finding that the Defendant did not have to comply with §4 to assert the affirmative defense set forth in §8 of the Act, erred in dismissing the case on the basis of lenity (ambiguity) rather than determining whether the Defendant met the requirements of §8 of the Act.²

The other pertinent facts for this Court to consider in deciding the issues presented on appeal in this case are the following.

¹ MCL 333.26424; the Michigan Medical Marijuana Act is referred to herein as the MMMA, or the Act.

² MCL 333.26428

On or about September 9, 2010, the Defendant, Angela France, was charged with one count of possession with intent to manufacture marijuana contrary to the controlled substance provisions of the Public Health Code³. The Defendant filed a motion to dismiss in circuit court based on the affirmative defense allowed under §8 of the MMMA. The court conducted an evidentiary hearing on August 3, 2011, and a continued evidentiary hearing on October 19, 2011.

A Married Couple & A Husband's Health Issues.

Defendant, Angela France, is married with five children. Defendant's husband, Daniel France, testified at an evidentiary hearing in this case that he and Angela had been married for 7-years. [EH I at p. 31] The couple lives with their children in a home located at 6877 Fox Lane, Waterford, MI. The France family physician, Dr. Dean Moscovic, an internal medicine and family care physician, has treated the family at his practice, the Clarkston Medical Group, since 2005. [EH I at pp. 9, 11]

Specifically, Dr. Moscovic has treated Daniel for major medical issues related to orthopedic and spine injuries stemming from a multiple trauma motor vehicle accident. [EH I at p. 11] Daniel suffers from chronic back pain, degenerative disk disease, osteoarthritis and chronic sinusitis. Id. As a result of his orthopedic injuries and multiple surgeries, Daniel has experienced major pain management issues for the past 6-years. [EH I at p. 12] Dr. Moscovic has prescribed a variety of medications over the past several years, in an effort to manage Daniel's pain. These medications have included: Percocet, Oxycodone, and OxyContin. [EH I at p. 12] These medications, being strong narcotics, can often lead to side effects that include

³ MCL 333.7401(2)(d)(iii).

upset stomach, nausea, constipation, grogginess, sleepiness, digestive problems, and dependency. [EH I at p. 13]

In 2010, Daniel asked his physician about medical marijuana and discussed the possibility of using pot for his pain management. [EH I at p. 14] Since medical marijuana had become a treatment option for patients in Michigan with the adoption of the citizen initiative in 2008, Dr. Moscovic educated himself on the topic by reading studies on the use of medical marijuana published in peer review journals. [EH I at p. 21] After several discussions and consultations, Dr. Moscovic authorized a certification for Daniel to try medical marijuana to see if it would offer him a palliative benefit. [EH I at p. 14] Daniel's physician certification record was signed on or about March 2010. [EH I at p. 15] Out of approximately 7,000 annual patient visits, Dr. Moscovic has signed only five or six certifications authorizing patient use of medical marijuana. [EH I at p. 14]

When Daniel received his medical marijuana certification, his wife Angela applied for and received a valid caregiver card allowing her to grow medical marijuana for her husband. Angela started the first crop from approximately 12 seeds, of which only one plant survived to reach the flowering stage. [EH I at pp. 36-37] Angela utilized the master bedroom and attached master bathroom in the France marital home to grow the marijuana plants. She needed a space that allowed for a vegetative stage of 24-hour light (the bathroom) and a space allowing for the flowering stage with light cycles every 12-hours (the bedroom). [EH I at p. 34] The only access to the bedroom and bathroom was via the bedroom door, which Angela and Daniel kept locked. [EH I at p. 35]

The single surviving plant from Ms. France's first attempt at growing medicinal marijuana produced approximately one ounce of usable [i.e. smokeable] plant material. [EH I

at p. 38] Daniel testified at the hearing that his preferred method of utilizing the marijuana is to either make hash or oil from the usable leaves and flowers that he can then eat [instead of smoke] by spreading it on apples. [EH I at p. 39] Two to three grams of hash can be produced from one ounce of marijuana leaf and flower. [EH I at p. 41] Mr. France testified that 2-3 grams of hash would provide him with 3-4 days of medicinal benefit. [EH I at p. 41]

Daniel ingested medicinal marijuana only at night, resulting in the ability to wean himself off of several night-time prescription medicines. [EH I at p. 43] Whenever Daniel ran out of medicinal marijuana, he would need to take more prescription medications in order to manage his chronic pain. [EH I at p. 43]

The Police Come to “Knock and Talk”.

By September 2010, Angela France had cultivated her second crop of medicinal marijuana for her husband’s use. [EH I at p. 36] This time, three plants survived to reach the mature flowering and harvest stage. [EH I at p. 41] Additional small, immature plants, approximately 1-3 inches in height, were in the vegetative (non-harvesting) stage. [EH I at p. 44] These immature plants would not be ready for harvest (medicinally usable) for about three more months. Id. The three mature plants would have yielded about 15 to 20 grams of usable medicinal hash or oil. [EH I at p. 45] Daniel estimated that 15-20 grams of hash would meet his medicinal needs for only 2-weeks to a month, at best. Id. He was going to run out of medicine before the small plants in the vegetative stage would be ready for his harvest and use. Id.

On or about September 9, 2010, the Oakland County Narcotic Enforcement Team [NET] received an anonymous complaint alleging that Daniel France was selling marijuana from his residence. [EH I at p. 82] Three NET detectives and a uniformed officer from the

Waterford Township Police Department arrived at the Defendant's home at approximately 1:30 pm to investigate the complaint. [EH I at p. 83] Detective Roger Wechter knocked on the front door and spoke with the Defendant's son, who then called his mother on the telephone to inform her that the police were at the home. Id.

Angela France arrived home shortly thereafter, and Detective Wechter advised her of the marijuana trafficking complaint pertaining to her husband. Angela informed Detective Wechter that she was a registered caregiver for her husband, a medical marijuana patient; she gave the officers oral and written consent to search her home. [EH I at p. 85]

Further, Angela told the detectives the location of the plants in the master bedroom and master bathroom; she said these plants were for her husband's medicinal use [EH I at p. 93] and that her husband was not selling marijuana but that he had recently shown some people the grow operation. [EH I at p. 95]

The officers searched the France residence. They found 3 mature plants in the master bedroom and 17 immature plants in the adjacent master bathroom. [EH I at p. 91] Detective Wechter did not recall seeing a lock on the bedroom door. [EH I at p. 92] Daniel France testified that when he left for work the morning of the police-search, he had locked the bedroom door. [EH I at p. 36]

Procedural Summary

The Single-Count Charge.

Defendant, Angela France, was charged with one count of possession with intent to deliver/manufacture of marijuana.⁴ Defendant France was bound over to the Oakland County

⁴ MCL 333.7401(2)(d)(iii)

Circuit Court; she filed a motion to dismiss based on the affirmative defense provided by §8 of the Act.⁵ The conduct at issue in this matter occurred on or about September 9, 2010.

Pre-Hearing Motions.

On March 2, 2011, the circuit court heard Defendant's motion to request an evidentiary hearing on the medical marijuana affirmative defense. The court granted Defendant's request. On April 13, 2011, the court reconvened on the matter after having adjourned the scheduled evidentiary hearing. Counsel for the prosecution and defense discussed the facts in dispute for the evidentiary hearing, including the relevance of whether the master bedroom was considered an enclosed locked facility within the scope of the Section 8 affirmative defense contained in the MMMA. The lower court made no findings, nor did the court make any rulings at the conclusion of the evidentiary hearing.

On April 27, 2011, the Court reconvened on a Defense Motion Re: Evidentiary Hearing and Motion to Dismiss. Defense counsel presented the question of whether defendant, under §8 of the MMMA, is required to provide proof that her marijuana was within a locked closed facility as required by Section 4 of the Act. [4/27/11 MT at p. 4] Defense Counsel argued that §4 and §8 are two separate sections of the Act; that a registered patient (or caregiver) must abide by the limitations set forth in Section 4 (i.e. 12 plants, 2.5 ounces, contained in a closed locked facility) in order to invoke the statutory immunity. Alternatively, defense counsel asserted that both registered and nonregistered patients or caregivers may avail themselves of the affirmative defense provided in §8 of the Act. [4/27/11 MT at p. 4]

⁵ MCL 333.26428

The Oakland County Prosecutor asserted that §4 and §8 are interdependent; that when a registered patient or caregiver possesses more than 12 plants, they have the burden of demonstrating that the plants were kept in an enclosed locked facility as part of their §8 burden establishing the affirmative defense; and that the trial court should follow this Court's *People v King* decision of February 3, 2011.⁶ [4/27/11 MT at pp. 15, 16]

The circuit court denied Defendant's motion without prejudice for want of evidence on the record, as the evidentiary hearing had not yet occurred. [4/27/11 MT at p. 48] The trial court also ruled that it was bound by this Court's *King* decision; and that whether Ms. France grew the marijuana in an enclosed locked facility was the appropriate inquiry. [4/27/11 MT at p. 50] Further, the lower court adopted both the People's and the Defendant's arguments that a hearing be conducted, as expressly provided in the Act, to determine whether the quantity possessed by Ms. France was reasonably necessary for the palliative medication of her patient and husband, and whether the marijuana produced was used for the sole purpose of treating her patient's chronic medical condition (required to establish the §8 affirmative defense). *Id.* *The Evidentiary Hearing Provided for in the Act.*

On August 3, 2011, the trial court began the evidentiary hearing. Several witnesses testified, including Dr. Mark Moscovic (the France family physician), Daniel France (Defendant's husband and medical marijuana "patient"), Justin Edin (a medical marijuana caregiver consultant), and NET Detective Roger Wechter. The hearing was continued on October 19, 2011, with the testimony of NET Detective Paul Kinal, NET Officer Keith Zarembski, and the re-examination of Detective Wechter. At the conclusion of this continued

⁶ *People v King*, 489 Mich App 503 (2011).

hearing, the Court granted the Prosecutor's request to brief the issues related to whether the *King* decision applied to the instant case, with the Prosecutor indicating, "in this case the law is constantly evolving." [10/19/11 EH at pp. 34 - 36]

Post Evidentiary Hearing Motions.

On January 25, 2012, the trial court issued a ruling from the bench relative to the applicability of this Court's *King* decision to the issues present in the instant case. Judge O'Brien held that *King* still applied; that the marijuana was not stored in an enclosed locked facility; the Defendant possessed more than 12 plants; there was a lack of compliance with §4; and these findings deprived the Ms. France of the right to assert the affirmative defense set forth in §8 of the Act. [1/25/12 MT at pp. 20,21] The lower court also ruled that the affirmative defense would be barred at trial and the rule of lenity does not apply. [1/25/12 at p. 21]⁷

Next, on February 1, 2012, the lower court invited the parties to this matter back on the record where Judge O'Brien, *sua sponte*, reconsidered his previous order denying Defendant's motion to dismiss. The Court invited the prosecutor and defense counsel to provide oral and then written argument on the issue. [2/1/12 MT at p. 3] The prosecutor accepted Judge O'Brien's suggestion to brief the issue, stating, "I do believe the Court can do a motion for reconsideration, *sua sponte*, and, obviously I have no quarrel with that..." [2/1/12 MT at pp. 4, 5] The prosecutor did not object to the procedure proposed by the trial court. Likewise, defense counsel also assented to the lower court's procedural suggestion to brief the issue of whether the rule of lenity applies to the matter at bar [2/1/12 MT at p. 5] and further clarified

⁷ Note: At this point in time, the Michigan Supreme Court had just heard oral argument in the *Kolanek* and *King* cases, on January 12, 2012.

with the lower court that, if the rule of lenity applies then the case would be dismissed, provided the rule of lenity provides for such a concept. [2/1/12 MT at p. 6] Again, the prosecutor did not object to the proposed procedure. [2/1/12 MT at p. 7]

Ms. France's defense counsel filed a motion for reconsideration on 02/21/2012 under MCR 2.119(F), asserting that the prosecution in this case should be barred through the operation of the rule of lenity, for failure to give proper notice of the prohibited conduct. The reconsideration motion also raised a Due Process argument under the United States Constitution on the basis that the citizens of Michigan, in enacting the MMMA through their initiative powers under the Michigan Constitution, "have not made it clear that a caregiver such as Ms. France is to be punished under the law for her medical use of marijuana in her role as a caregiver." [Defendant's motion for reconsideration, p. 3] Ms. France asserted on reconsideration that the Act was ambiguous to the extent that a person of "average intelligence" could not ascertain the nature of potentially criminal conduct when reading the immunity of §4 in conjunction with the affirmative defenses and other provisions contained in sections 7 and 8. *Id.*

In response, the prosecutor argued that lenity did not apply on the basis that this Court's ruling in the *King* case, *supra*, was binding on Ms. France.⁸

The lower court reconvened for its ruling on the reconsideration of Defendant's motion to dismiss on March 14, 2012. The lower court found that the rule of lenity did apply to the Act, and that the MMMA was ambiguous as to how §4 and §8 coexist, ruling from the bench:

⁸ Note: When the trial court entertained these "lenity" arguments, and ultimately ruled on the issue in mid-March 2012, the Michigan Supreme Court was still over two months away from releasing its controlling decision in *Kolanek*.

The Court declares, therefore, the rule of lenity [sic] is applicable to this cause of action, that the Medical Marijuana Act must be considered in conjunction with the prosecuted statute or the statute for which the defendant is prosecuted and the Court having evaluated the Medical Marijuana Act, even the limited perspective of possessing more than 12 plants or in an enclosed locked facility, one cannot just look at those and say that's it, I agree with the defense that those words refer back and forth to different subsections that the rule, that the Medical Marijuana Act is unclear and, under the rule of lenity [sic], the Court finds it appropriate to dismiss the case, by virtue of the unclarity and that will be the ruling of the Court. [3/14/12 MT at pp. 12, 13]

From the subsequent written order following this bench ruling, the Oakland County Prosecutor now appeals as a matter of right.

ARGUMENT I

THE LOWER COURT PROPERLY EXERCISED ITS DISCRETION, BOTH IN GRANTING RECONSIDERATION, AND IN DISMISSING THE CASE AGAINST THE ACCUSED, AFTER CONDUCTING AN EVIDENTIARY HEARING PURSUANT TO THE MMMA WHERE THE ACCUSED OFFERED EVIDENCE ESTABLISHING THE ELEMENTS OF THE AFFIRMATIVE DEFENSE PROVIDED IN §8 OF THE ACT AND WHERE THE PROSECUTION HAD AMPLE OPPORTUNITY TO INTRODUCE EVIDENCE TO REBUT DEFENDANT'S ASSERTION OF THIS AFFIRMATIVE DEFENSE.

Standard of Review.

This Court reviews a trial court's decision on a motion to dismiss charges for an abuse of discretion.⁹ This issue also presents a question of statutory interpretation; interpretation of the MMMA in general, and section 8 of the Act specifically. Issues of statutory interpretation are reviewed by this Court *de novo*.¹⁰ Generally, the primary objective in construing a statute is to ascertain and give effect to the Legislature's intent, or in this case, the intent of the people in passing the medical marijuana initiative.¹¹

⁹ *People v Kevorkian*, 248 Mich App 373, 383 (2001).

¹⁰ *People v Stone Transport, Inc*, 241 Mich App 49, 50 (2000).

¹¹ *People v Williams*, 475 Mich 245, 250 (2006).

Legal Analysis.

Large portions of the Act are set out in Appellant's brief on appeal; they need not be wholly duplicated in this brief. The MMMA expressly provides for a specific procedure for the accused to test whether her charged conduct falls within the scope of the available affirmative defense set forth in section 8 of the Act, which states:

- (a) Except as provided in section 7, a patient and a patient's primary caregiver, if any, may assert the medical purpose for using marijuana as a defense to any prosecution involving marijuana, and this defense shall be presumed valid where the evidence shows that:
 - (1) A physician has stated that, in the physician's professional opinion, after having completed a full assessment of the patient's medical history and current medical condition made in the course of a bona fide physician-patient relationship, the patient is likely to receive therapeutic or palliative benefit from the medical use of marijuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition;
 - (2) The patient and the patient's primary caregiver, if any, were collectively in possession of the quantity of marijuana that was not more than was reasonably necessary to ensure the uninterrupted availability of marijuana for the purpose of treating or alleviating the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition; and
 - (3) The patient and the patient's primary caregiver, if any, were engaged in the acquisition, possession, cultivation, manufacture, use, delivery, transfer, or transportation of marijuana or paraphernalia relating to the use of marijuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition.
- (b) A person may assert the medical purpose for using marijuana in a motion to dismiss, and the charges shall be dismissed following an evidentiary hearing where the person shows the elements listed in subsection (a).

The Michigan Supreme Court held in *Kolenak* that:

A defendant is entitled to the dismissal of criminal charges under § 8 if, at the evidentiary hearing, the defendant establishes all the elements of the § 8 affirmative defense, which are (1) [a] physician has stated that, in the physician's professional opinion, after having completed a full assessment of the patient's

medical history and current medical condition made in the course of a bona fide physician-patient relationship, the patient is likely to receive therapeutic or palliative benefit from the medical use of marijuana.¹²

A “[q]ualifying patient” is defined as “a person who has been diagnosed by a physician as having a debilitating medical condition.”¹³

In the matter at bar, Appellant stipulated that a bona fide physician-patient relationship existed between Dr. Moscovic and Defendant’s husband and patient. Thus, the first element of a §8 affirmative defense was established through Dr. Moscovic’s testimony at the evidentiary hearing. [EH I at p. 15] Dr. Moscovic further testified that he had an on-going physician-patient relationship with Daniel France since 2005 and that he had treated Daniel for “quite a long time in regards to a lot of these pain issues that resulted, you know, from the orthopedic injuries and the subsequent multiple surgeries that he’s had.” EH I at p. 12] Dr. Moscovic described Daniel’s chronic pain as a “major issue.” Id.

The second element of the MMMA’s affirmative defense requires that the defendant only possess an amount of marijuana that is no more than “reasonably necessary for this purpose.”¹⁴ Thus, the prosecutor’s focus on the number of plants, and the locked or unlocked nature of the growing operation are misplaced in this analysis.

Daniel France testified at the evidentiary hearing that 15-20 grams of hash would meet his medicinal needs for approximately two weeks to one month, at most. [EH I at p. 45] At the time the police searched his residence, approximately three to four ounces of marijuana was available for harvest off of the three mature plants. Id. He was going to run out of medicine before the small plants in the vegetative stage would be ready for harvest and use. Id.

¹² *People v Kolanek*, 491 Mich 382, 415 (2012).

¹³ MCL 333.26423(h).

¹⁴ *Kolanek*, *supra*, at p. 415.

Justin Eden, the caregiver consultant, testified that Daniel France would run out of medicinal marijuana in one month. His testimony was based on viewing the photographic evidence of the mature and immature plants found at the France residence on the day of the police search. [EH I at p. 74] Photographic evidence of the mature and immature plants seized at the France residence was offered into evidence by the Prosecution during the evidentiary hearing. These photographs are attached to the Appellant's brief on appeal for this Court's consideration.

The third element required to establish the Act's affirmative defense is that the defendant's use was "to treat or alleviate the patient's serious or debilitating medical condition or symptoms...."¹⁵ Section § 7(b)(5) states that the MMMA "shall not permit any person to ... [u]se marijuana if that person does not have a serious or debilitating medical condition."¹⁶ Section 3, the definitional section of the MMMA, states in relevant part:

(a) "Debilitating medical condition" means 1 or more of the following:

- (1) Cancer, glaucoma, positive status for human immunodeficiency virus, acquired immune deficiency syndrome, hepatitis C, amyotrophic lateral sclerosis, Crohn's disease, agitation of Alzheimer's disease, nail patella, or the treatment of these conditions.
- (2) A chronic or debilitating disease or medical condition or its treatment that produces 1 or more of the following: cachexia or wasting syndrome; severe and chronic pain; severe nausea; seizures, including but not limited to those characteristic of epilepsy; or severe and persistent muscle spasms, including but not limited to those characteristic of multiple sclerosis.
- (3) Any other medical condition or its treatment approved by the department, as provided for in [MCL 333.26425(a)].

¹⁵ *Id.*

¹⁶ MCL 333.26427(b)(5).

Dr. Moscovic testified that in 2010 he had several discussions with Defendant's husband, Daniel France, regarding medical marijuana and its potential to help with Daniel's pain management. [EH I at p. 14] Daniel testified that he only used the medicinal marijuana at night and that by doing so, he could reduce his dependency on prescription pain medications that he would typically take in the evenings. [EH I at p. 43] Dr. Moscovic testified that he treated Daniel France for major medical issues related to orthopedic and spine injuries stemming from a multiple trauma motor vehicle accident. [EH I at p. 11] Daniel suffers from chronic back pain, degenerative disk disease, osteoarthritis and chronic sinusitis. *Id.* As a result of his orthopedic injuries and multiple surgeries, Daniel has experienced major pain management issues for the past six years. [EH I at p. 12]

Defendant concedes that application of the affirmative defense in this case is complicated by the fact that her patient, Daniel France, is not a co-defendant in this proceeding. Rather, Daniel France, the person for whom Defendant acquired her medical marijuana care provider card, is her husband, sharing both her residence, her bedroom, and the actual grow facility at issue in this case. Under these circumstances, Defendant was able to establish all the above elements to the statutory affirmative defense thus, no question of fact regarding the applicability of the defense. Further, since none of the circumstances in § 7(b) of the Act were present in this case, the Defendant is entitled to dismissal of the criminal charges.

The prosecutor had more than ample opportunity to: (1) cross-examine each witness, including Daniel France, Dr. Moscovic, and Justin Eden, (2) introduce evidence at the evidentiary hearing to rebut defendant's claims on the three prongs of Section 8, and (3) call their own witnesses. To argue on appeal that they did not have the opportunity to rebut the defendant's claims is simply inaccurate and should not factor into this Court's analysis. The

prosecutor had the opportunity to present rebuttal testimony at the evidentiary hearing that the lower court afforded the parties in this case as it attempted to sort out the competing claims as to whether Ms. France complied with the requirements of the affirmative defense provisions of the Act.

This Court does not disturb a lower court ruling on appeal, even if the lower court exhibits flawed rationale, so long as it reaches the correct result in the case.¹⁷ In the case at bar, Appellee recognizes that the *Kolenak* decision was not available to the lower court at the time of its decision, not only to reconsider the dismissal of the marijuana distribution charge against the accused, but also at the time of the ultimate dismissal of the charge. Therefore, the lower court can be said to have reached the correct result in the case, even if the lower court's decision was based on an incorrect rationale or basis.

ARGUMENT II

THE TRIAL COURT PROPERLY RECONSIDERED, *SUA SPONTE*, ITS ORDER DENYING DEFENDANT'S MOTION FOR DISMISSAL, AND PROPERLY DISMISSED THE MARIJUANA DELIVERY CHARGE ON THE BASIS OF THE RULE OF LENITY BECAUSE, AT THE TIME THE LOWER COURT ISSUED ITS DECISION, THIS COURT'S PRIOR DECISIONS ON THE ISSUE WERE CONTRADICTORY AND THESE CONFLICTS HAD NOT YET BEEN RESOLVED BY THE SUPREME COURT'S *KOLANEK* DECISION.

Standards of Review.

Motion for Reconsideration. This Court reviews a lower court's decision on a motion for reconsideration under MCR 2.119(F) pursuant the abuse of discretion standard.¹⁸

Motion to Dismiss. Likewise, the lower court's decision in granting Ms. France's motion to dismiss the charges against her is reviewed by this Court pursuant to the abuse of discretion

¹⁷ *People v Bauder*, 269 Mich App 174, 187 (2005).

¹⁸ *People v Walters*, 266 Mich App 341, 350 (2005).

standard.¹⁹ The lower court's underlying decision as to matters of statutory interpretation, however, although they may lead to granting a motion to dismiss as here, are reviewed *de novo* by this Court.²⁰

Legal Analysis

MCR § 2.119 (F) governs motions for reconsideration and sets out a 3-part standard for granting or denying a motion for reconsideration:

- (1) A motion for reconsideration of the decision on a motion must be served and filed not later than 21 days after entry of an order deciding the motion (unless another rule provides a different procedure for reconsideration of a decision);
- (2) Not response to the motion may be filed, and there is no oral argument, unless the court otherwise directs;
- (3) Generally, and without restricting the discretion of the court, a motion for reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.

As argued in the Defendant's brief on the motion for reconsideration, the palpable error standard of this court rule has been refined by case law. The palpable error standard offers non-mandatory guidance to a court by suggesting when it may be appropriate to grant a party's motion for reconsideration.²¹ If a ruling is erroneous, it is common sense to have a rule in place to allow the court to correct its own error before the parties are forced to expend time, effort, and funds in the pursuit of appellate relief. This Court has held: "[r]ather, MCR 2.119(F) (3) 'allows the court considerable discretion in granting reconsideration to correct mistakes, to preserve judicial

¹⁹ *People v Kevorkian*, 248 Mich App 373, 384 (2001)

²⁰ *Id.*, and *People v Bylsma*, 294 Mich App 219, 226 (2011).

²¹ *People v Walters*, 266 Mich App 341, 350 (2005).

economy, and to minimize costs to the parties.”²² Further, this Court has expressly recognized the “second look” option utilized by Judge O’Brien in this case, holding that “[i]f a trial court wants to give a second chance to a motion it has previously denied, it has every right to do so, and this court rule [MCR 2.119(F)(3)] does nothing to prevent this exercise of discretion.”²³ The rule allows the court considerable discretion in granting reconsideration to correct mistakes, to preserve judicial economy, and to minimize costs to the parties.²⁴

In the instant matter, the Appellee maintains that Judge O’Brien’s *sua sponte* reconsideration ultimately resulted in a correction of an earlier erroneous ruling, and thus a finding that is now supported by the Michigan Supreme Court.

1. The Prosecutor’s assertion that the lower court erred when it dismissed the case on the basis of lenity is not persuasive to the extent that, at the time this case was dismissed, the MMMA had been variously interpreted by contradictory panels of this Court.

Defense Counsel argued that the prosecution of Angela France is barred by the rule of lenity, for failure to give fair notice of the prohibited conduct. The due process clauses of the Michigan and United States Constitutions require that laws must provide sufficient guidelines to allow any ordinary person to determine whether the person’s conduct is proscribed by the law. “No one may be required at peril of life, liberty or property to speculate as to the meaning of the penal statutes.”²⁵ Michigan courts construe criminal statutes strictly in favor of defendants under the rule of lenity.²⁶ “The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of

²² *Bakian v Nat’l City Bank*, 269 Mich App 708, 714 (2006), quoting *Kokx v Bylenga*, 241 Mich App 655, 659 (2000).

²³ *Smith v Sinai Hosp of Detroit*, 152 Mich App 716, 723 (1986).

²⁴ *Bers v Bers*, 161 Mich App 457, 462 (1987).

²⁵ *Lanzetta v New Jersey*, 306 US 451, 453 (1939).

²⁶ *People v Gilbert*, 414 Mich 191, 211 (1982); and *People v Rutledge*, 250 Mich App 1, 5 (2002).

individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department.”²⁷ “This policy embodies the instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should.”²⁸ When a court is confronted with ambiguity in a criminal statute, ultimately, “the tie must go to the defendant.”²⁹

Defense counsel argued that the rule of lenity barred the prosecution because, based on the plain meaning of section 7 and section 8 of the MMMA, a regular citizen would not be aware that compliance with section 4 would be necessary to assert a section 8 defense. At the time that Circuit Court Judge O’Brien reconsidered his initial denial of Defendant’s Motion to Dismiss (2/1/2012), case law governing sections 4 and 8 was not clear as to how the law should be applied. The Court of Appeals had delivered contradictory rulings pertaining to whether adherence to section 4 impacted a defendant’s ability to raise a section 8 affirmative defense.

The Michigan Court of Appeals with their decision in *People v Redden*, published September 14, 2010, initially indicated that the statute should be read as:

Adherence to section 4 provides protection that differs from that of section 8. Because of the differing levels of protection in sections 4 and 8, the plain language of the statute establishes that section 8 is applicable for a patient who does not satisfy section 4.”³⁰

In fact, “the plain language of section 8 does not place any restriction on defendants’ raising of the affirmative defense.”³¹ On this basis alone, the prosecutor’s argument fails.

As early as 2010, the ambiguous nature of the MMMA was identified and discussed in *Redden*. Judge O’Connell, in his concurring opinion, attempted to address the issue, stating:

²⁷ *United States v Wiltberger*, 18 US 76, 95 (1820).

²⁸ *United States v Bass*, 404 US 336, 348 (1971).

²⁹ *United States v Santos*, 553 US 507, 514 (2008).

³⁰ *People v Redden*, 290 Mich App 65, 81 (2010).

³¹ *Id* at 79.

The problem, however, is that the MMMA is in-artfully drafted and, unfortunately, has created much confusion regarding the circumstances under which an individual may use marijuana without fear of prosecution. Some sections of the MMMA are in conflict with others, and many provisions in the MMMA are in conflict with other statutes, especially the Public Health Code.³²

In footnote 5 of his concurring opinion, Judge O'Connell further states:

I am reminded of a statement often attributed to the eighteenth-century British statesman Edmund Burke: 'All that is necessary for the triumph of evil is for good men to do nothing.' In this case, the "evil" at issue is the loss of liberty or property suffered by individuals, who honestly believe they are in compliance with the MMMA, at the hands of prosecutors and law enforcement officials who honestly believe that they are properly enforcing the clear provisions of the Public Health Code.³³

In contrast to the *Redden* decision, later in 2010 (published February 3, 2011) this Court in *People v King* determined that because Defendant failed to comply with the provisions of Section 4 regarding the 'enclosed, locked facility' he was precluded from asserting the Section 8 affirmative defense.³⁴ Then, this Court again published an opinion on September 27, 2011 in *People v Bylsma* that indicated, "because defendant did not comply with the requirements of §4(b), defendant is not entitled to assert the § 8 affirmative defense of medical purpose."³⁵

To say that the proverbial waters were muddied at the time that circuit court Judge O'Brien was contemplating whether to dismiss Defendant France's case, is an unfortunate understatement. In the many motion hearings that occurred both pre-evidentiary and post evidentiary hearing, it is obvious by reading the transcripts that all involved in the matter, Prosecution, Defense Counsel, and Judge O'Brien included, struggled with the fluctuating and

³² *Id* at 93.

³³ *Id* at 96.

³⁴ *People v King*, 291 Mich App 503 (2011).

³⁵ *People v Bylsma*, 294 Mich App 219 (2011).

seemingly ever changing case law surrounding the circumstances of sections 4 & 8 of the MMMA.

It is not surprising that the Michigan Supreme Court felt it necessary to grant leave in *King* (pertaining to the availability of the section 8 affirmative defense) in order to settle the confusion of the lower courts. The Supreme Court in deciding the issue of applicability and co-existence of section 4 and section 8 of the MMMA in *People v Kolanek*, found it necessary and instructive for everyone, lower courts as well as the general public, to include an Appendix designed to summarize their holdings “in light of the need for guidance regarding the medical use of marijuana in Michigan.”³⁶

Appellee contends that the ambiguity of application of the relevant portions of the MMMA justified Judge O’Brien in dismissing the matter based upon the rule of lenity at the time he made that decision. As set forth above, the lower court had any number of contradictory rulings of this Court from which to select and base his decision; not just the *King* decision which Judge O’Brien lighted upon. The common law rule of lenity was crafted for just such situations and was, in this case, properly executed by the lower court. The fact that the Michigan Supreme Court subsequently rectified the situation by publishing a seminal case does not in any way inject merit into the prosecutor’s arguments.

³⁶ *People v Kolanek*, 491 Mich 382, 414 (2012).

2. The Prosecutor's argument that the lower court erred when it *sua sponte* reconsidered the previous order denying Defendant's motion to dismiss, fails in light of the Michigan Supreme Court ruling in *People v Kolanek* which definitively concludes that the plain language of the MMMA does not require a defendant asserting the affirmative defense under § 8, also meet the requirements of § 4, reversing this Court's decision in the *King* case in this regard.

The Michigan Supreme Court granted leave in *People v King*³⁷ and *People v Kolanek*³⁸ to consider substantive and procedural aspects of the affirmative defense provided by Section 8 under the MMMA, which is set out in this brief in Argument I, *supra*. The crucial portion of the Section 8 affirmative defense that applies on all fours to this case states in relevant part:

Registered patients who do not qualify for immunity under § 4, as well as unregistered persons, are entitled to assert in a criminal prosecution the affirmative defense of medical use of marijuana under § 8 of the MMMA [MCL 333.26428].³⁹

Procedurally, the §8 affirmative defense cannot be asserted for the first time at trial, but must be raised in a pretrial motion for an evidentiary hearing.⁴⁰ *People v Kolanek*, in interpreting the Section 8 affirmative defense, also instructs that the certification by a physician must be obtained prior to alleged misconduct in order to provide the protection.⁴¹

This is what occurred in the case at bar. Ms. France is therefore entitled to the full protection afforded her under the affirmative defense to the Act. As plainly stated in section 8, she not only falls squarely within the scope of the defense, she is entitled to the statutory presumption that the defense is valid, which in turn qualifies her from dismissal of all criminal charges. Recognizing this, Judge O'Brien properly reconsidered his prior decision and correctly

³⁷ *People v King*, 291 Mich App 503 (2011).

³⁸ *People v Kolanek*, 291 Mich App 227 (2011).

³⁹ *People v Kolanek*, 491 Mich 382, 415 (2012).

⁴⁰ *Id* at 415.

⁴¹ *Id* at 416.

dismissed this case. His ruling in this regard must be affirmed on appeal if this Court is to provide any meaning whatsoever to the Act.

CONCLUSION and RELIEF REQUESTED

WHEREFORE, your Appellee requests this Honorable Court affirm the lower courts' decision in granting Defendant's motion for dismissal for the reasons set forth herein and based on the authority set forth in this brief on appeal.

Respectfully submitted,

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