

COA Opinion: Assertion of “medical marijuana” defense is barred because the marijuana was not kept in an enclosed, locked facility.

9. November 2011 By Gaetan Gerville-Reache

In *People v. Danto*, No. 302986 [consolidated with No. 303525, and *People v. Nater*, Nos. 302991 and 303064], the Michigan Court of Appeals reversed the trial court’s pretrial evidentiary ruling barring the admission of evidence of other acts committed by defendants, finding that the evidence of prior bad acts was introduced for a proper purpose under MRE 404(b), and did not unfairly prejudice the defendants. It also upheld the trial court’s order granting the prosecution’s motion to preclude assertion of the Michigan Medical Marijuana Act (MMMA), MCL 333.23241 *et seq.* as an affirmative defense and to preclude reference to the MMMA at trial. Judge Elizabeth L. Gleicher filed a [dissenting opinion](#), disagreeing with the majority’s conclusion that the defense may not assert the MMMA affirmative defense and reference the MMMA at trial, where the prosecution may introduce evidence using the term medical marijuana.

In *People v. Danto*, the prosecution moved to admit evidence that on the same day that Danto and Nater’s residence was searched, police officers executed a search warrant at a café in which marijuana was sold and smoked. Danto was found at the café with marijuana packaged for sale, among other paraphernalia. The residential search turned up evidence of large amounts of marijuana in the living room. The Court of Appeals found that the proper purposes of the evidence under MRE 404(b) included establishing knowledge of and control over the marijuana found in his residence arising out of the constructive possession element of the possession with intent to distribute. The evidence found at the café would tend to make it more likely than not that Danto knew the substance in the living room was marijuana and that he controlled it. Further, the prosecution also identified the intent to distribute the marijuana by Danto’s packaging of the marijuana for sale and possession of other accoutrements of drug trafficking at the café, tending to increase the likelihood that he intended to distribute the marijuana found at his residence. The Court of Appeals found that the evidence was not unfairly prejudicial, reversing the trial court’s finding that the prejudicial effect substantially outweighed the probative value of the evidence.

In *People v. Nater*, the prosecution moved to admit evidence that Nater had sold marijuana to undercover officers three times in approximately one month prior to the execution of the search warrant on his shared residence. The Court of Appeals reversed the trial court’s ruling and found that the other-acts evidence had been offered for the proper purposes of establishing Nater’s knowledge and control over the marijuana found in his home, and the evidence was relevant to the proper purpose of establishing Nater’s intent to distribute the marijuana found in his home.

Defendants’ second argument for reversal was that the trial court erred in relying on *People v. King*, _ Mich. App. _; _ NW2d _ (2011), *lv gtd* 489 Mich. 957 (2011), to preclude defendants from raising a defense under Section 8 of the MMMA and from mentioning medical marijuana at trial because *King* conflicts with two prior decisions of this Court, *People v. Redden* and *People v. Kolanek*. In *King*, the majority held that “because defendant did not comply with § 4 [that marijuana be kept in an enclosed, locked facility], 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.” The Court of Appeals determined that *King* was neither in conflict with *Redden*, because the *Redden* court declined to address the issue of an enclosed, locked facility, nor *Kolanek*, because the *Kolanek* court did not eliminate the defendant’s burden of production under § 8 of the MMMA. Because defendants had not met their burdens of production to establish that the marijuana was kept in an enclosed, locked facility, the trial court’s order precluding assertion of the MMMA affirmative defense and references was not erroneous.

The Court of Appeals in *People v. Danto* also ruled that contrary to defendant’s argument, § 8(b) of the MMMA does not create an automatic right to an evidentiary hearing upon the filing of a motion to dismiss, but merely requires a dismissal of marijuana charges if defendant can establish the elements of the defense at an evidentiary hearing.