STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff/Appellant,

v

File No. 10-28194-AR
HON. PHILIP E. RODGERS, JR.

RODNEY LEE KOON,

Defendant/Appellee.
_____/

Jennifer Tang-Anderson (P54337)
Attorney for Plaintiff/Appellant

James M. Hunt (P24243)
Attorney for Defendant/Appellee

DECISION AND ORDER
AFFIRMING TRIAL COURT RULING

A trial, pertaining to the above-captioned case, was scheduled for hearing in the 86th District Court on September 2, 2010. On this date, the trial court ruled that the Michigan Medical Marijuana Act, codified at MCL § 333.26421 *et seq*. (hereinafter "MMMA"), takes precedence over MCL § 257.625(8), the statute prohibiting an individual from operating a motor vehicle with a Schedule I Controlled Substance in his/her body.[1]

The court held that the Plaintiff must prove the Defendant, a registered, "qualifying patient" under the MMMA, drove *while impaired* due to his consumption of marijuana.[2] Thus, Plaintiff's requested jury instruction, listing the elements of operating a motor vehicle with the bodily presence of a controlled substance as a per se violation, was denied.

On September 27, 2010, Plaintiff requested leave to appeal the September 2, 2010 decision denying her requested jury instruction. This Court issued an Order Granting Leave to Appeal and Establishing Briefing Schedule on September 28, 2010.

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[1] See generally MCL § 333.7212 and MCL § 333.7214.
[2] See MCL § 333.26423.

STATEMENT OF FACTS

This case arose out of a traffic stop that occurred at approximately 6:30 p.m. on February 3, 2010. While driving his vehicle on Garfield Road the Defendant was stopped for speeding. When the Defendant was frisked, no weapons were located, however, the officer did discover a pipe, the type commonly used for smoking marijuana, in Defendant's pocket. The Defendant acknowledged that he had smoked marijuana between 12 p.m. and 1 p.m. that day and further informed the officer that he possessed an MMMA registry identification card. Defendant was arrested for operating a motor vehicle while impaired by a Schedule I Controlled Substance. A testing of Defendant's blood revealed 10ng/ml of THC and 61 ng/ml of TCH-COOH.[3, 4, 5]

ARGUMENT

Defendant was charged under the statutory provision that would permit Plaintiff to offer the bodily presence of a Schedule I drug while driving as being a sufficient basis for conviction. Plaintiff argues that in a prosecution for operating with the presence of a controlled substance proof of impairment from the controlled substance is *not* required.

Defendant contends that an analysis of the MMMA and the holding established in *People v Feezel* requires the Plaintiff to demonstrate that his driving was impaired by his consumption of marijuana.[6]

ANALYSES

I. THC AND THC METABOLITES

In *People v Feezel*, decided June 8, 2010 by the Michigan Supreme Court, the Court held that the definition of 'marijuana' articulated at MCL § 333.7212(1)(c) does not include the marijuana metabolite 11-carboxy-THC and thus, 11-carboxy-THC is not a Schedule I controlled substance.[7] *Feezel* partially rejected the holding established in *People v Derror*,

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[3] TCH-COOH is the main secondary metabolite of marijuana/cannabis-based drugs. Drug metabolites refer to substances produced by the metabolism after a drug is ingested.

[4] 'THC-COOH' is also referred to as 11-nor-9-carboxy-THC, 11-nor-carboxy-delta-9-tetrahydrocannabinol, 11-COOH-TCH, TCH-COOH, TCH-11-oic acid, 11-carboxy-tetrahydrocannabinol, and 11-carboxy-TCH.

[5] A nanogram, one billionth of a gram, is what laboratories rely on to measure residual levels of drugs and/or metabolites in blood, urine, hair and/or saliva. Generally, 50 nanograms of TCH metabolites per milliliter is considered a presumptive positive by most toxicology laboratories.

[6] *People v Feezel*, 486 Mich 184 (2010).

[7] *Id.*

which found that 11-carboxy-THC *was* a 'derivative' of marijuana under the Public Health Code and correspondingly a Schedule I controlled substance.[8]

The main active metabolite formed after cannabis consumption is 11-hydroxy-delta-9-tetrahydrocannabinaol or '11-OH-TCH.'[9] The 11-OH-THC metabolite, which retains psychoactive properties, is subsequently metabolized further into 11-nor-9-carboxy-TCH.[10] The presence of specific metabolites in blood and/or urine are indicative that a particular drug was previously consumed, however, not all metabolites are psychoactive.[11] TCH-COOH is not itself psychoactive, but has a long half-life and can remain in the body for several days or weeks depending on the individual's frequency of consumption.[12] Certain screening tests are able to distinguish between 11-OH-TCH and THC-COOH and can assist in determining how recently cannabis was consumed.[13] If only TCH-COOH is present, then the cannabis was likely used some time ago and any impairment in cognitive ability or motor function will have presumably dissipated, whereas if both 11-OH-TCH and COOH-TCH are present, it is assumed the cannabis was consumed more recently and motor impairment may still be present.[14]

The United States Department of Justice notes that when cannabis products are smoked, their effects are felt within minutes, peak in 10 to 30 minutes and may linger for 2 to 3 hours.[15] The Department further notes that the effects often depend on the user's experience and the activity of the drug itself.[16] While the effects of smoking cannabis may not be noticeable to an observer, "driving, occupation or household accidents may result from a distortion of time and

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[8] *People v Derror*, 475 Mich 316; 715 NW2d 822 (2006).
[9] Johnson & Jennison, *et al*., *Stability of delta 9-tetrahydrocannabinol (THC), 11-hydroxy-TCH, and 11-nor-9-carboxy-TCH in Blood and Plasma* (Journal of Analytical Toxicology, 1984).
[10] In order to distinguish between the two types of cannabis metabolites being discussed, the Court shall subsequently refer to 11-hydroxy-delta-9-tetrahydrocannabinaol as '11-OH-TCH' and 11-nor-9-carboxy-THC as 'THC-COOH.' See also *supra*, at FN 4.
[11] *Infra*, at FN 12.
[12] Huestis, Mitchell & Cone, *Detection Times of Marijuana Metabolites in Urine by Immunoassay and GC-MS* (Journal of Analytical Toxicology, 1995); Pope & Gruber, *et al*., *Neuropsychological Performance in Long-Term Cannabis Users* (Archives of General Psychiatry, 2001); Dietz & Glaz-Sandberg, *et al*., *The Urinary Disposition of Intravenously Administered 11-nor-9-carboxy-delta-9-tetrahydrocannabinol in Humans* (Therapeutic Drug Monitoring, 2007).
[13] Huestis & Henningfield, *et al*., *Blood Cannabinoids: Models for the Prediction of Time of Marijuana Exposure from Plasma Concentrations of delta-9-tetrahydrocannabinol (THC) and 11-nor-9-carboxy-delta 9-tetrahydrocannabinol (TCH-COOH)* (Journal of Analytical Toxicology, 1992); Huestis & Elsohly, *et al*., *Estimating Time of Last Oral Ingestion of Cannabis from Plasma TCH and THC-COOH Concentrations* (Therapeutic Drug Monitoring, 2006).
[14] *Id*.
[15] <http://www.justice.gov/dea/pubs/abuse/7-pot.htm> (accessed October 27, 2010).
[16] *Id*.

space relationships and impaired motor coordination."[17] TCH, resulting from the consumption of cannabis, produces alterations in motor behavior, perception, cognition, memory and learning.[18] According to the National Highway Traffic Safety Administration:

> It is difficult to establish a relationship between a person's TCH blood or plasma concentration and performance impairing effects. Concentrations of parent drug and metabolite are very dependent on pattern of use as well as dose. THC concentrations typically peak during the act of smoking, while peak 11-OH-THC concentrations occur approximately 9-23 minutes after the start of smoking. Significant THC concentrations (7 to 18 ng/mL) are noted following even a single puff or hit of a marijuana cigarette. Plasma THC concentrations generally fall below 5 ng/mL less than 3 hours after smoking. Chronic users can have mean plasma levels of THC-COOH of 45 ng/mL, 12 hours after use; corresponding THC levels are, however, less than 1 ng/mL. It is possible for a person to be affected by marijuana use with concentrations of THC in their blood below the limit of detection of the method. Mathematical models have been developed to estimate the time of marijuana exposure within a 95% confidence interval. Knowing the elapsed time from marijuana exposure can then be used to predict impairment in concurrent cognitive and psychomotor effects.[19]

In *Feezel*, the Michigan Supreme Court concluded that TCH-COOH is **not** a Schedule I controlled substance under MCL § 333.7212 and therefore, a person cannot be prosecuted under MCL § 257.625(8) for operating a motor vehicle with any amount of THC-COOH in his or her system. *Feezel* overruled the holding in *People v Derror* which held that TCH-COOH was a "derivative" of marijuana and correspondingly a Schedule I controlled substance.[20]

Pursuant to MCL § 600.2955a(2)(b) which states:

> Impaired ability to function due to the influence of intoxicating liquor or a controlled substance means that, as a result of an individual drinking, ingesting, smoking, or otherwise consuming intoxicating liquor or a controlled substance, the individual's senses are impaired to the point that the ability to react is diminished from what it would be had the individual not consumed liquor or a controlled substance.

With regard to alcohol, an individual is *legally presumed* to have an impaired ability to function if his or her blood alcohol content is .08 grams or more per 100 milliliters of blood.[21]

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[17] *Id.*
[18] <http://www.nhtsa.gov/people/injury/research/job185drugs/cannabis.htm> (accessed October 27, 2010).
[19] *Id.*
[20] *Derror*, *supra*.
[21] See MCL § 257.625(1)(b)

The Defendant correctly notes that, unlike alcohol, there is no statutorily specified amount of THC in an individual's blood that would indicate his or her presumptive impairment under the law. Defendant claims that a positive test result for THC occurred because the Michigan State Police use 1ng/ml as their "cutoff" amount. Further, Defendant posits that the 10 ng/ml found in his blood is "lower than any cutoff for testing by this Court which would typically test negative for anything under 50 ng/ml."

With regard to drug testing, the Michigan State Police (MSP) tests both the 'limit of detection' (LOD), the smallest amount of drug that is detectable in an individual's body, and the 'limit of quantitation' (LOQ), the smallest amount of drug that protocol requires reporting.[22] The MSP LOD for THC is ~ 0.5 ng/ml and the LOQ is 1ng/ml.[23] Test results are considered negative if an individual's blood has less than 1 ng/ml of THC.[24] The MSP test locates THC and THC-COOH, but not 11-OH-THC.[25]

Conversely, the 13th Circuit employs a private laboratory, Alere Toxicology Services®, for its drug testing. The Alere® test determines what drugs an individual has consumed and the drug's quantitative value in ng/ml. Drugs (e.g. amphetamines, barbiturates, benzodiazepines, opiates, etc.) are tested at specified threshold or 'cut-off' levels.[26] A comparison of the screening level amounts, confirmation level amounts and any quantitative amount of drugs found in an individual determines whether the test results are positive or negative.[27] Defendant states that the 10 ng/ml of THC in his blood does not meet the cut-off threshold for this Court and was only indicated because the State Police Forensic Science Division uses 1 ng/ml as the cut-off amount. Defendant's claim is patently incorrect.

The 50 ng/ml threshold for this Court refers to the amount of *marijuana metabolite* in an individual's blood, not the amount of THC. The screening level for marijuana metabolite is 50 ng/ml, with a confirmation level of 15 ng/ml. The State Police measured 61 ng/ml of marijuana metabolite in the Defendant's blood which is clearly above the threshold amount.

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[22] See Exhibit 1
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] The threshold or 'cut-off' level is equivalent to the MSP LOQ.
[27] Alere's® screening level amount is equivalent to the MSP LOD and the quantitative amount refers to the actual amount of drug in ng/ml found in an individual's body.

In *Feezel*, the Court interpreted the law to preclude the marijuana metabolite, THC-COOH, as a derivative of marijuana.[28] Accordingly, the THC-COOH metabolite does not meet the Legislature's definition of 'marijuana' and cannot be construed as a Schedule I controlled substance.[29] Consequently, a person cannot be prosecuted under MCL § 257.625(8) for operating a motor vehicle with any amount of THC-COOH in his or her system.[30] However, the 10 ng/ml of THC found in Defendant's blood does constitute the presence of a Schedule I controlled substance under Michigan law. If Defendant's blood had only tested positive for THC-COOH, he could avoid prosecution under MCL § 257.625(8) pursuant to the holding in *Feezel*. Nevertheless, in addition to the marijuana metabolite, Defendant's blood test also indicated THC which violates MCL § 257.625(8) and potentially subjects the Defendant to prosecution.

II. MMMA

The Defendant argues that the mere presence of marijuana in his body while driving, by itself, is an insufficient basis for conviction because he possesses an MMMA registry identification card. The Defendant claims that the State of Michigan authorized him as an MMMA participant and therefore, the presence of marijuana in his system is not prohibited pursuant to MCL § 333.26424(a), which states:

> A qualifying participant 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...for the medical use of marihuana.

Paragraph (e) of MCL § 333.26427 states "All other acts and parts of acts inconsistent with this act do not apply to the medical use of marihuana as provided for by this act," therefore, Defendant alleges that the MMMA supersedes the provisions of MCL § 257.625 *et seq*. as they apply to marijuana as a Schedule I controlled substance. However, the MMMA further clarifies the scope of the act and prohibits any person from operating, navigating, or being in actual physical control of any motor vehicle *while under the influence of marijuana*.[31]

Defendant posits that the legal standard used to prosecute drivers impaired by alcohol is not applicable when prosecuting "qualifying patients" under the MMMA who drive with the

[28] *Feezel, supra*.
[29] *Id*.
[30] *Id*.
[31] MCL § 333.26427(b)(4) (Emphasis added)

presence of marijuana in their body.[32] The Defendant argues that the language in the MMMA, prohibiting operation of a motor vehicle while "under the influence of marihuana," requires a higher standard for prosecution.[33] Defendant contends that because there is currently no statutorily specified amount of THC that would legally and presumptively indicate a driver's impairment, unlike with alcohol, the prosecution is required to prove that the presence of THC in his body impaired his ability to function.

While the cases of *People v Schaefer* and *People v Derror* discuss the legal standard applicable when an individual drives while intoxicated or with the presence of a Schedule I controlled substance in their body and causes death, the Supreme Court's fundamental reasoning remains pertinent to the case at hand.[34, 35]

In *Schaefer*, the defendant was convicted of operating a motor vehicle under the influence of liquor causing death and negligent homicide. The Court overruled *People v Lardie* and found that operating a motor vehicle while under the influence of liquor and causing death does not require proof that the defendant's intoxicated driving was a substantial cause of the victims death.[36] With regard to the defendant's due process argument, the Court stated that "the culpable act which the Legislature wishes to prevent is the one in which a person becomes intoxicated and then decides to drive.[37, 38] The Legislature essentially has presumed that driving while intoxicated is gross negligence as a matter of law," elaborating that in criminal law, 'gross negligence' is not merely an elevated or enhanced form of ordinary negligence.[39] Gross negligence means 'wantonness and disregard of the consequences which may ensue and indifference to the rights of others.[40] Gross negligence is equivalent to criminal intent.[41]

In addition to addressing the status of THC-COOH under the Public Health Code, the *Derror* Court clarified *Schaefer* and held that, in a prosecution under MCL § 257.625(8), a

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[32] MCL § 333.26423(h)
[33] *Supra*, at FN 31.
[34] *People v Schaefer*, 473 Mich 418; 703 NW2d 774 (2005).
[35] *Derror, supra.*
[36] See generally *People v Lardie*, 452 Mich 231; 551 NW2d 656 (1996).
[37] *Schaefer, supra* at 429.
[38] With regard to this analysis, the Court finds that intoxication, referring primarily the effects experienced after consumption of alcohol, is substantially similar to the physical and mental effects an individual experiences while under the influence of a controlled substance. Thus, 'under the influence of a controlled substance' may be reasonably substituted when the term intoxication is used.
[39] *Schaefer, supra* at 438.
[40] *Id.*
[41] *Id.*

prosecutor is not required to prove beyond a reasonable doubt that the defendant knew that he or she might be intoxicated and need only prove that the defendant had any amount of a Schedule I controlled substance in his or her body.[42] The Court found that MCL § 257.625(8) does not require a substance have pharmacological properties to constitute a Schedule I controlled substance, nor does the statute require that an individual be impaired while driving, but instead punishes solely based on the operation of a motor vehicle with any amount of Schedule I controlled substance in the body.[43] *Derror* also noted that it is undisputed that THC itself begins to break down and leave the bloodstream shortly after entering the body, but that its effects can last long after it is no longer detectible in the blood.[44]

The Legislature has the ability to criminalize activities that are not themselves necessarily dangerous or illegal, but may criminalize said activities because they are closely related to those which are dangerous and illegal.[45] *Derror* states:

> MCL § 257.625(8) prohibits the operation of a motor vehicle with any amount of a schedule I controlled substance in the body. In essence, the statute prohibits a person from driving after smoking marijuana. It is irrelevant that a person might not be able to drive long after any possible impairment from ingesting marijuana has worn off. The Legislature's prohibition of the operation of a motor vehicle with any amount of marijuana…in the body provides more than adequate notice regarding the prohibited conduct. The corollary of this prohibition is that once the schedule I substance is no longer in the body, one can resume driving. The statute's stated objective is to prevent persons from driving with any amount of a schedule I controlled substance in the body, whether or not the substance is still influencing them.[46]

Feezel reaffirms portions of *Schaefer* and *Derror*, holding that in prosecutions involving a violation of MCL § 257.625(8) based on marijuana/THC (but excluding the metabolite THC-COOH) the prosecution is not required to prove beyond a reasonable doubt that a defendant knew he or she might be intoxicated/impaired because the statute does not require intoxication or impairment. Further, the *Feezel* Court specifically stated, "We do not…imply that the legalization of marijuana for a limited medical purpose is 'equated with an intent to allow its lawful consumption in conjunction with driving' or that marijuana itself should no longer be on

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[42] *Derror*, *supra* at 320.
[43] *Id*. at 329-330.
[44] *Id*. at 339.
[45] *Id*.
[46] *Id*. at 336-338.

the list of schedule I controlled substances."[47] Justice Young wrote separately, observing that legalization of the use of marijuana for a limited medical purpose cannot be equated with an intent to allow its lawful consumption in conjunction with driving and that it is clear that the MMMA is intended to operate in harmony with existing controlled substances laws, not in place of them.[48] However, while the Defendant argues that a plain reading of the MMMA only prohibits him from operating a motor vehicle while *under the influence* of marijuana, MCL § 257.625(8) prohibits operating a motor vehicle with *any* amount of a Schedule I controlled substance in his or her body.

When this Court reads the plain language of the MMMA, it appears that the MMMA does indeed supersede MCL § 257.625(8) with regard to a qualifying patient using marijuana. MCL 333.26427(7)(e) states that, "All other acts and parts of acts inconsistent with this act do not apply to the medical use of marihuana as provided for by this act." An individual who possesses a registry identification card is permitted to consume marijuana for therapeutic and palliative benefit. Current Michigan law allows a qualifying patient and any other person to operate a vehicle with THC-COOH metabolites in his or her body. However, qualifying patients and all other drivers are strictly prohibited from operating any type of motorized vehicle while under the influence of marijuana. Indeed, drivers other than qualifying patients clearly cannot operate a motor vehicle with any amount of THC in their body.[49, 50]

The prohibition in MCL § 257.625(8), on driving with any amount of TCH in one's body is inconsistent with qualifying patients being allowed to consume marijuana, but prohibited from driving under its influence. The *Derror* Court identified this inconsistency when it held that the stated objective of MCL § 257.625(8) "is to prevent persons from driving with any amount of a Schedule I controlled substance in the body, whether or not the substance is still influencing them.[51] The People, therefore, must provide evidence that consumption of marijuana impaired the Defendant's ability to operate a vehicle the same as would an ordinary, careful, and prudent driver.

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[47] *Feezel*, *supra* at 215.
[48] *Id*. at 223-224.
[49] *Id*.
[50] *Derror*, *supra*.
[51] *Supra*, at FN 46.

CONCLUSION

This Court affirms the finding of the 86th District Court. Since the Defendant is a registered medical marijuana patient, the Plaintiff is prohibited from using the standard jury instruction indicating that the bodily presence of a Schedule I controlled substance is a per se violation of MCL § 257.625(8). The MMMA, which supersedes MCL § 257.625 *et seq*., states that qualified patients are proscribed from operating a motor vehicle "while under the influence of marijuana."[52] Therefore, evidence of impairment is a necessary requirement. The Plaintiff has not alleged the Defendant's ability to drive was impaired by the presence of THC in his body, nor that the Defendant's actions and mannerisms at that time indicated a visible or substantial impairment with regard to his driving. The specific circumstances of this case require evidence of Defendant's impairment.

IT IS SO ORDERED.

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HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: _____

[52] *Supra*, at FN 31.