

PREPARED BY THE COURT:

STATE OF NEW JERSEY
vs.
EDWARD FORCHION,
Defendant

: SUPERIOR COURT OF NEW JERSEY
: BURLINGTON COUNTY-LAW DIVISION
: CRIMINAL ACTION
: INDICTMENT 10-08-0866
:
: MEMORANDUM OF LAW &
: ORDERS:
: 1. DENYING DEFENDANT'S
: MOTION TO DISMISS
: 2. SCHEDULING MATTER

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For the State

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On August 31, 2010, a Burlington County Grand Jury indicted Defendant Edward Forchion on charges of third degree Possession of a Controlled Dangerous Substance (marijuana) With Intent to Distribute and fourth degree Possession of a Controlled Dangerous Substance (marijuana). Defendant now moves to dismiss the indictment, asserting that recent passage of the New Jersey Compassionate Use Medical Marijuana Act preempts criminal classification of marijuana as a Schedule I narcotic proscribed by law.

FACTUAL BACKGROUND

On April 1, 2010, at approximately 10:15 P.M., Trooper K. Rayhon of the New Jersey State Police was on patrol and driving in a marked police cruiser on Route 38 in Mount Holly Township. As he approached the intersection of Route 38 and Savory Way, he observed a black 2001 Pontiac bearing New Jersey Registration YVC47U, which began to drive through the intersection against a red light. The vehicle came to a stop after all four tires had crossed the solid white line at the intersection. When the traffic light turned green, Rayhon drove behind the Pontiac and initiated a motor vehicle stop.

Rayhon exited his cruiser and approached the Pontiac on its passenger side. He then requested driving credentials from the defendant, the vehicle's sole occupant. Defendant then asked the trooper if he could "cut him a break." He claimed to owe outstanding child support payments, and he admitted that he did not possess a valid driver's license. Defendant did, however, produce a valid California identification card, as well as the vehicle's rental agreement. The rental agreement listed Chanel Forchion as the lessee-driver. Defendant explained that Chanel Forchion was his daughter and that she rented the vehicle for him because he did not possess a valid license.

While Trooper Rayhon was standing outside the vehicle, he noticed a cracked windshield, as well as a multi-colored marijuana pipe in plain view on the floor of the vehicle behind the driver's seat. He also smelled a strong odor of burnt marijuana emanating from the car. After the defendant handed the marijuana pipe to him, Rayhon ordered defendant to exit the vehicle and arrested him for possession of marijuana paraphernalia. The defendant was then

handcuffed, *Mirandized*, and searched incident to the arrest. The search revealed \$2,059 in cash in his right front pants pocket.

At the time of arrest, Forchion claimed to be famous. Rayhon did not recognize him or his name, so the defendant identified himself as the "New Jersey Weedman." Defendant also continued his plea for leniency. A record check revealed Forchion's New Jersey driver's license was suspended, and there were active arrest warrants for a municipal offense and failure to pay child support. Rayhon requested defendant's consent to search the black Pontiac; the request was denied. Accordingly, Rayhon had the defendant's vehicle towed to the New Jersey State Police barracks in Bordentown, transported the defendant to the barracks, and began the process of obtaining a search warrant for the vehicle. When informed that a search warrant was pending, defendant admitted that he possessed a pound of marijuana inside a duffel bag in the vehicle's trunk.

At approximately 1:30 a.m. the following morning, Rayhon applied to Judge John L. Call, Jr., for a search warrant covering the Pontiac. The application was granted, and a subsequent search revealed one large, vacuum-sealed bag in the vehicle's trunk and one small, plastic baggie containing suspected raw marijuana. Testing confirmed just over one pound of marijuana was found in the car.

DEFENDANT'S CONTENTIONS

Essentially, defendant advances two arguments: (1) that recent passage of the New Jersey Compassionate Use Medical Marijuana Act preempts marijuana as a controlled dangerous Substance proscribed by law and (2) that criminalization of marijuana inhibits his religious freedom as a practicing Rastafarian.

LEGAL ANALYSIS

Defendant's Burden on Motion to Dismiss.

Defendants seeking to dismiss their indictments bear an onerous burden of proof. State v. Francis, 191 N.J. 571, 587 (2007). Indictments that have been returned by a suitable grand jury are presumptively valid. State v. Engel, 249 N.J. Super. 336, 359 (1991). Trial courts should exercise their discretion to dismiss an indictment only upon the “clearest and plainest” grounds and only when the indictment was “palpably defective.” State v. N.J. Trade Waste Assoc., 96 N.J. 8, 19 (1984).

The grand jury is not the final adjudicator of guilt and is not required to weigh evidence from both sides of the issue. State v. Hogan, 144 N.J. 216 at 235, 236 (1996). In fact, it is to consider the evidence presented in the light most favorable to the State. State v. Morrison, 188 N.J. 2, 13 (2006). The grand jury also may consider not only the evidence presented by the prosecutor, but any reasonable inferences that can be drawn from the evidence. State v. N.J. Trade Waste Assoc., 96 N.J. 8, 19 (1984). Moreover, a prosecutor is only required to present exculpatory evidence in the State’s possession to a grand jury when it “directly negates the guilt of the accused and is clearly exculpatory.” State v. Hogan, 144 N.J. at 237.

Further, the grand jury’s role is limited to determining whether the State has established a *prima facie* case that a crime was committed and that the Defendant committed it. Id. at 236. “A trial court, however, should not disturb an indictment if there is some evidence establishing each element of the crime to make out a *prima facie* case.” Morrison, 188 N.J. at 12. As such, the court should weigh the evidence in a light most favorable to the State and determine if “a grand jury could reasonably believe that a crime occurred and that the defendant committed it.” Id. at 13. Courts, therefore, allow the grand jury to consider evidence from a variety of sources. State

v. Ferrante, 111 N.J. Super. 299, 306 (1970). The evidence may be hearsay or may be given by unreliable witnesses. Id.; Hogan, 144 N.J. at 236. Thus, the competency of the evidence is irrelevant in determining whether to dismiss an indictment. State v. Ferrante, 111 N.J. Super 299, 206 (App. Div. 1970). It should also be noted that “[i]n seeking an indictment, the prosecutor’s sole evidential obligation is to present a *prima facie* case that the accused has committed a crime.” Hogan, 144 N.J. at 236.

***Effect of Compassionate Use Medical Marijuana Act
On Pre-existing Criminal Statutes***

Defendant first argues that the categorization of marijuana as a Schedule I drug under N.J.S.A. 24:21-2 violates his due process and equal protection rights, because a Schedule I drug is defined as one having the highest potential for abuse and having “no accepted medical use in treatment in the United States; or lacks accepted safety for use in treatment under medical supervision.” N.J.S.A. 24:21-5. Specifically, defendant argues that the recent passage of the New Jersey Compassionate Use Medical Marijuana Act (CUMMA), which recognizes a medical use for marijuana by those with a debilitating condition, pre-empts the criminal classification of marijuana as a Schedule I narcotic.

At the outset, the court notes that CUMMA was not in effect at the time that the alleged conduct occurred in this case. CUMMA was passed into law on January 18, 2010, but did not take effect until July 1, 2010 -- more than three months after the defendant’s arrest.

Moreover, defendant did not comply with any of the requirements for the medical use of marijuana under the act. . Apparently, the defendant is not afflicted with any of the debilitating medical conditions allowing the use of medicinal marijuana. *See* CUMMA Section C, N.J.S.A.

24:61-3. Defendant is not a registered and qualifying patient, nor did he possess a certified authorization for medical use of marijuana from a physician licensed in the State of New Jersey. See CUMMA Section C, N.J.S.A. 24:61-4 and -5. Finally, defendant possessed a quantity of marijuana that far exceeded the maximum allowed under CUMMA, which is only two ounces over a 30-day period of time. See CUMMA Section C, N.J.S.A. 24:61-10. In short, CUMMA was not in effect, and even if it were, Defendant failed to adhere to any of the requirements of the statute.

The authority to change the classification of marijuana from a Schedule I narcotic is left to the Director of the Division of Consumer Affairs in the Department of Law and Public Safety (Director). Beyond the definitions given to the director of what qualifies a particular substance for its respective schedule, the director must also consider the current state of federal law. Defendant argues that the federal government still classifies marijuana as a Schedule I narcotic. Accordingly, even if New Jersey were to implement a system to dispense marijuana for medical purposes, the state officials would be subject to prosecution under the federal Controlled Substances Act (CSA). The United States Supreme Court has already held that state medicinal marijuana laws violate the CSA and have rejected constitutional challenges to application of the CSA to states with those laws. See United States v. Oakland Cannabis Buyers' Co-op, 532 U.S. 483 (2001) (holding that a medical marijuana cooperative designed to distribute marijuana under California's medical marijuana law violated the CSA because there exists no "medical necessity" exception to the CSA). The fact that the director has not changed the status of marijuana from a Schedule I narcotic is not surprising. The director must consider the state of federal law, and presumably has given great weight to the CSA's authority.

Assuming *arguendo* that marijuana should be reclassified, it would most likely be reclassified under Schedule II. Pursuant to N.J.S.A. 24:21-6a, “[t]he Director shall place a substance in Schedule II if he finds that the substance: (1) has high potential for abuse; (2) has currently accepted medical use in treatment in the United States, or currently accepted medical use with severe restrictions; and (3) abuse may lead to severe psychic or physical dependence.” Because marijuana has an accepted medicinal purpose, it would seem to meet the criteria of a Schedule II drug.

Defendant argues that re-classification of marijuana should be seen only in the light of its acceptance as a medical benefit, ignoring the potential for its abuse leading to psychic or physical dependence, both of which are well-documented. Parenthetically, even if marijuana were to be reclassified as a Schedule II narcotic, its reclassification would have no effect upon the criminal penalties associated with its unauthorized use. Possession of marijuana is already less severely punished than other Schedule I substances. For example, possession of heroin in any amount over five ounces is a first-degree crime. N.J.S.A. 2C:35-5b (1). On the other hand, possession of marijuana does not become a first-degree crime unless the defendant has at least twenty-five *pounds*. N.J.S.A. 2C:35-5b(10). In the end, whether marijuana is classified as a Schedule I or a Schedule II narcotic is of no moment and would have no effect upon the penalties associated with its possession.

The defendant’s contention that the Legislature intended to decriminalize the use and sale of marijuana is baseless. A review of N.J.S.A. 24:24-6I reveals no indication of any intent to amend any substantive crime enumerated under Chapter 35 of the Criminal Code. However, supplemental legislation, N.J.S.A. 2C:35-18, provides:

§ 2C:35-18. Exemption, burden of proof

- a. If conduct is authorized by the provisions of P.L.1970, c.226 (C.24:21-1 et seq.) or P.L.2009, c.307 (C.24:61-1 et al.), *that authorization shall, subject to the provisions of this section, constitute an exemption from criminal liability under this chapter or chapter 36*, and the absence of such authorization shall not be construed to be an element of any offense in this chapter or chapter 36. *It is an affirmative defense to any criminal action arising under this chapter or chapter 36 that the defendant is the authorized holder of an appropriate registration, permit or order form or is otherwise exempted or excepted from criminal liability by virtue of any provision of P.L.1970, c.226 (C.24:21-1 et seq.) or P.L.2009, c.307 (C.24:61-1 et al.)*. The affirmative defense established herein shall be proved by the defendant by a preponderance of the evidence. It shall not be necessary for the State to negate any exemption set forth in this act or in any provision of Title 24 of the Revised Statutes in any complaint, information, indictment or other pleading or in any trial, hearing or other proceeding under this act. (Emphasis added).

In essence, the law does not contemplate that the illegal use and sale marijuana should no longer be punished as a criminal act. It merely states that the presence of a permit or authorization to use marijuana for medicinal purposes is an affirmative defense to any prosecution which may arise from its use. The Legislature's clear intent was that the use of marijuana be proscribed by the criminal code, its use permitted only in certain medically authorized circumstances.

Marijuana and Defendant's Religious Freedom

Defendant asserts the criminalization of marijuana use inhibits his religious freedom as a practicing Rastafarian. Defendant relies on the Religious Freedom Restoration Act (RFRA), the First Amendment of the United States Constitution, and Article I, Paragraph Four of the New Jersey Constitution as support for this notion.

Defendant contends that N.J.S.A. 2C:35-5A (1) and 2C:35-5B(10) are unconstitutional because they violate the terms of RFRA, 42 U.S.C.A. §§ 2000bb-2000bb4 (1994). Case law is to the contrary. The RFRA has been held to be unconstitutional as applied to the states. City of Boerne v. Flores, 521 U.S. 507 (1997). Recently, the Eight Circuit Court of Appeals reiterated that RFRA's definition of "government" has been amended to no longer include state governments. Olsen v. Mukasey, 541 F.3d 827 (8th Cir. 2008). The Olsen court dismissed the petitioner's RFRA claim, similar to the one presented here, holding that an Iowa criminal statute at issue was not subject to RFRA. Similarly, N.J.S.A. 2C:35-5, a state law, is not subject to RFRA.

Defendant's claim that the criminalization of marijuana violates his First Amendment right to practice his religion raises an issue previously decided by the United States Supreme Court in Employment Division, Department of Human Resources v. Smith, 494 U.S. 872 (1990). In Smith, the defendant was a member of the Native American Church who ingested peyote for sacramental purposes at a church ceremony. As a result, Smith's employer, a private drug rehabilitation organization, fired him. When he applied for unemployment compensation, the state agency denied his application because a state statute disqualified individuals who had been fired for work-related "misconduct." Id. at 874. Smith sued, arguing that the denial of unemployment compensation burdened his First Amendment right to exercise his religion freely. The Supreme Court declined to apply Sherbert v. Verner, 374 U.S. 398 (1963), which required laws that substantially burden the free exercise of religion to be supported by a compelling government interest, and instead adopted a "neutral rules of general applicability" test. 494 U.S. at 884. The Court held that neutral, generally applicable laws may be applied to religious practices, even when not supported by a compelling government interest. 494 U.S. at 884-85.

The parallels of Smith to this case are striking. Like Smith, defendant used a controlled substance in the practice of his religion, and New Jersey has a neutral, generally applicable law proscribing the importation of such controlled substance. Applying Smith, New Jersey may constitutionally prohibit defendant from possessing a controlled substance, even if doing so it substantially burdens his ability to practice his religion.

Defendant's Remaining Arguments.

Defendant argues that his actions are justified on the basis of medical necessity. This argument has already been entertained by New Jersey courts and rejected. See State v. Tate, 194 N.J. Super. 622 (Law Div.), *aff'd* 198 N.J. Super. 285 (App. Div. 1984), *rev'd on other grounds* 102 N.J. 64 (1986). In Tate, the court determined that the Legislature intended to preclude the medical necessity defense and denied its application to a "self-help" user of marijuana. Of course, as set forth above, CUMMA now allows an affirmative defense of *medically authorized* use of marijuana.

Defendant argues that the indictment should be dismissed because N.J.S.A. 2C:35-5 and 2C:35-10 are vague and overreaching, and therefore unconstitutional. Again, this argument is without merit because of the long history of New Jersey case law upholding the Comprehensive Drug Reform Act of 1987 in terms of both specificity and breadth. See *e.g.* State v. Maldonado, 137 N.J. 536 (1994), (holding that the imposition of strict liability on manufacturers and distributors of controlled dangerous substances when death results from ingestion of those substances is not unconstitutionally vague); State v. Morales, 224 N.J. Super. 72 (App. Div. 1987), (holding that N.J.S.A. 2C:35-7, which criminalizes possession of controlled dangerous substances with intent to distribute in a school zone, is not void for vagueness); State v.

Afonador, 134 N.J. 162 (1993) (upholding the constitutionality of the “drug kingpin” statute); and State v. Kittrell, 145 N.J. 112 (1996), (upholding the constitutionality of the statute which prohibits operating or maintaining a controlled dangerous substances production facility). Time and again, the Comprehensive Drug Reform Act of 1987 has been challenged as being overly broad or vague, but it has been consistently upheld by New Jersey courts.

Finally, defendant argues that the laws criminalizing marijuana use are racist in nature, and so his indictment should be dismissed in the interests of justice. However, defendant offers no evidence to support his claim that he has been unfairly targeted by New Jersey authorities. Accordingly, the argument is summarily rejected without further discussion.

.CONCLUSIONS

The New Jersey Compassionate Use of Medical Marijuana Act does not pre-empt New Jersey statutes prohibiting the use and sale of marijuana.

The Compassionate Use of Medical Marijuana Act was not in effect at the time of the offense set forth in the indictment.

New Jersey statutes prohibiting the use and sale of marijuana do not violate defendant’s constitutional rights.

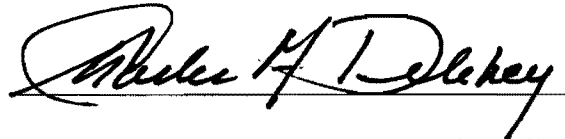
The New Jersey Comprehensive Reform Act is neither vague nor overreaching; it is constitutional.

The defendant has failed to prove that the Comprehensive Drug Reform Act is racist.

ORDERS

IT IS, therefore, on this 6th day of September, 2011, ORDERED that the defendant's motion to dismiss the indictment is denied.

IT IS FURTHER ORDERED that this matter is scheduled for trial on October 18, 2011.

A handwritten signature in black ink, appearing to read "Charles A. Delehey". The signature is written in a cursive style with a large initial "C".

Charles A. Delehey, J.S.C. (Ret./Recall)
