NOT FINAL UNTIL TIME EXPIRES FOR REHEARING, AND IF FILED, DETERMINED

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA, IN AND FOR PASCO COUNTY
APPELLATE DIVISION

CHARLES AUGUSTUS MERRITT, II,
Appellant,

v.

STATE OF FLORIDA,
Appellee.
_____/

UCN: 512019AP000043APAXWS
Appeal No.: 19-AP-43
Lower No.: 18-MM-5988

On appeal from Pasco County Court,
Honorable Anne Wansboro,

Christopher DeLaughter, Esq.,
for Appellant.

Jennifer E. Counts,
Assistant State Attorney,
for Appellee.

ORDER AND OPINION

Because the trial court correctly found that Appellant's pretrial Motion to Dismiss pursuant to the medical marijuana amendment, Article X, Section 29(a)(1), Florida Constitution, was legally insufficient on its face, the trial court did not err in denying the motion. Accordingly, the judgment and sentence are affirmed. Because this issue warrants affirmance by itself, this Court does not address the remaining issues.

STATEMENT OF THE CASE AND FACTS

Appellant was arrested for battery. During the search incident to arrest, law enforcement found marijuana in leaf form inside a device used for smoking marijuana. Appellant was charged by Information with possession of marijuana and possession of

paraphernalia (but not battery). Appellant filed "Defense's Amended Motion to Dismiss under Immunity from Medical Marijuana Amendment."[1]

The Amended Motion to Dismiss

In his amended motion, Appellant argued that (1) the version of section 381.986(1)(j)(2), Florida Statutes (2018), in effect at the time of his arrest was an unconstitutional violation of Section X, Article 29, of the Florida Constitution because it banned smoking marijuana for medical purposes, and (2) because he had a "medical marijuana card,"[2] he was a qualifying patient within the meaning of Article X, Section 29, and was therefore immune from criminal prosecution.

The motion stated that Article X, Section 29, is an amendment to the Florida Constitution that legalized medical marijuana and set definitions and requirements to be followed in order for doctors to prescribe, dispensaries to dispense, and patients and caregivers to possess and use medical marijuana. The motion noted that in 2017, the Florida Legislature amended section 381.986, Florida Statutes, to supplement Article X, Section 29. The amended statute expressly excluded smoking marijuana from the definition of "medical use." *See* §§ 381.986(1)(j)(2) (excluding smoking marijuana from the definition of "medical use"); (12)(d) (providing that marijuana used or possessed that was not for a "medical use" was a violation of section 893.13, Fla. Stat. (2018)).

Appellant's motion asserted that as a result, People United for Medical Marijuana, Inc. filed an action for declaratory judgment and injunctive relief in Leon County Circuit Court. The Leon County trial court found that the smoking ban violated Article X, Section 29, and was therefore unconstitutional. *People United for Med. Marijuana v. Fla. Dep't of Health*, Case No. 37-2017-CA-001394 (Fla. 2d Cir. Ct. March 25, 2018). The Department of Health appealed to the First District Court of Appeal. While not directly referenced in Appellant's motion, this Court notes that the First District reversed the Leon County trial court's post-judgment order lifting an automatic stay of the trial court ruling, writing that People United was unlikely to win on the merits. *See Fla. Dep't of Health v. People United for Med. Marijuana*, 250 So. 3d 825 (Fla. 1st DCA 2018).

[1] This was Appellant's second medical marijuana motion to dismiss. However, Appellant does not appeal from the order denying the first motion and it is not relevant to the resolution of this appeal.

[2] "Medical marijuana card" is the colloquial term for the "identification card" defined in Article X, Section 29(b)(3), Florida Constitution.

However, Appellant's motion correctly noted that neither the First District nor any other Florida appellate court has ruled on whether the 2018 version of section 381.986(1)(j)(2) was unconstitutional for excluding smoking marijuana from the definition of "medical use," thus rendering it illegal under section 893.13. The motion asserted that this is because Governor Desantis ordered the Department of Health to drop the case and the Florida Legislature amended section 381.986 to permit the smoking of medical marijuana. *See* § 381.986(1)(j), Fla. Stat. (2019).

Appellant plainly recognized the possibility that on the date of his offense, the smoking exclusion version of section 381.986(1)(j)(2) applied to him because the motion argued that the trial court below should adopt the Leon County trial court's holding that the smoking exclusion was unconstitutional. Appellant argued that it would then follow that he was immune from criminal prosecution under Article X, Section 29, due to having a medical marijuana card in his possession. The motion noted that the Leon Circuit Court wrote that the smoking exclusion was unconstitutional because "it conflicts with the Florida Constitution and prohibits a use of medical marijuana that is permitted by the [constitutional] amendment: smoking in private." *People United for Med. Marijuana*, Case No. 37-2017-CA-001394 at *1.

Procedurally, the motion argued that it should be addressed under Florida Rule of Criminal Procedure 3.190(b) pursuant to *Dennis v. State*, 51 So. 3d 456, 464 (Fla. 2010) (finding that the proper procedure to assert Stand Your Ground immunity from criminal prosecution is a motion to dismiss under rule 3.190(b)). *Dennis* addressed a statutory immunity from criminal prosecution for justified use of force, the Stand Your Ground law. *See* § 776.032, Fla. Stat. (2019). Notably, Appellant's amended motion omitted a subsequent case that further clarified the procedure for pretrial Stand Your Ground immunity. *See Bretherick v. State*, 170 So. 3d 766 (Fla. 2015) (finding that a defendant has the burden to prove entitlement to immunity by a preponderance of the evidence), superseded by statute, *Love v. State*, 286 So. 3d 177, 180 (Fla. 2019).

The Hearing on the Amended Motion

The amended motion hearing was an evidentiary hearing. While not admitted into evidence, Appellant presented his patient identification card to both Appellee and the trial court. Appellant initially argued that immunity under Article X, Section 29, should be

treated similarly to the current version of Stand Your Ground and therefore Appellant need only establish a prima facie claim for immunity whereupon the burden shifts to Appellee to prove by a preponderance of the evidence (rather than Stand Your Ground's clear and convincing evidence standard) that Appellant is not entitled to immunity.

Appellee rebutted by arguing that the 2019 change to section 381.986(1)(j) removing the exclusion for smoking medical marijuana did not apply to Appellant because Appellant committed his offense in November of 2018 and the change in the law was substantive and therefore not retroactive to Appellant.

Appellant responded by arguing that he was seeking constitutional immunity and not statutory immunity and that the trial court should adopt the reasoning of the Leon County Circuit Court and hold the pre-2019 version of section 381.986(1)(j)(2) unconstitutional before proceeding to the immunity analysis.

The trial court noted that under Article X, Section 29(a)(1), it appeared that for a defendant to claim immunity as a "qualifying patient," he must establish (1) a diagnosis of a debilitating medical condition, (2) possession of a physician certification, and (3) possession of a patient identification card. The trial court initially found that Appellant had not established immunity. However, the trial court impliedly reconsidered by permitting Appellant to testify and hear additional argument after making that finding.

Appellant testified that he has post-traumatic stress disorder (PTSD) and cancer. When he attempted to testify to the physician certification based upon what his physician told him, Appellee objected on hearsay grounds. The trial court sustained the objection.

On cross-examination, Appellant testified that he obtained the pipe from "someone." He further testified that he possessed the leaf form of marijuana and that he did not know the person he texted to obtain it.

In closing, Appellant argued that he is only required to establish a prima facie claim for immunity by bare assertion. He argued that presentation of the patient identification card was sufficient to establish that prima facie claim. Appellant argued that as a result, the burden shifted to Appellee to rebut that presumption by presenting evidence of lack of entitlement to immunity such as a lack of a card, the absence of a medical condition, or the absence of a physician certification.

Appellee argued that Appellant presented information outside the corners of his motion therefore the motion should be denied.

Appellee also argued that regardless of Appellant's arguments, section 381.986(1)(j) defines the appropriate use of medical marijuana and that the additional restrictions of section 381.986 apply even if a patient has a proper identification card. Appellee argued that Appellant testified that he did not receive the device from a qualified caregiver but someone gave it to him and that he received the marijuana from an unknown person via anonymous text message.

Appellee further argued that because the pre-2019 version section 381.986(1)(j)(2) specifically prohibits smoking medical marijuana, immunity does not apply.

The trial court found that "because the constitutional amendment has to be implemented and the only implementation I have is the statute," immunity does not apply because Appellant violated the statute.

The trial court further found that Appellant did not establish immunity because he only presented the patient identification card and therefore failed to establish the three requirements for immunity listed in Article X, Section 29(a)(1), of the Florida Constitution.

Immediately after the denial, Appellant pled no contest to the charged offenses. The trial court withheld adjudication. Appellant reserved the right to appeal the motion to dismiss and timely did so.

STANDARD OF REVIEW

Where a trial court's order ruling on immunity pursuant to a Florida Rule of Criminal Procedure 3.190(b) motion to dismiss presents a mixed question of law and fact, legal conclusions are reviewed *de novo* and findings of fact are reviewed for competent substantial evidence. *Cf. Bouie v. State*, 2020 WL 911979, 45 Fla. L. Weekly D415 at *16-17 (Fla. 2d DCA February 26, 2020) ("Starting with first principles, we think that the question of whether a defendant is entitled to immunity under the statute is a mixed question of law and fact because to answer it one must determine the governing law as stated in the statute, find the operative facts, and apply the law to those facts").

Interpretation of a constitutional provision is reviewed *de novo*. *Lewis v. Leon County*, 73 So. 3d 151, 153 (Fla. 2011).

LAW AND ANALYSIS

This appeal raises potential constitutional issues related to Article X, Section 29, including whether the exclusion of smoking marijuana from the definition of "medical use" in the 2018 version of section 381.986(1)(j)(2), Florida Statutes, violates Article X, Section 29; whether an otherwise qualifying patient must establish that the marijuana and paraphernalia came from a Medical Marijuana Treatment Center (MMTC) in order to successfully claim immunity; whether a person claiming immunity must establish compliance with all applicable provisions of section 381.986; and which party has the burden of proof in a motion for immunity from criminal prosecution under the medical marijuana constitutional amendment. However, because the trial court correctly found that Appellant's amended motion to dismiss was legally insufficient, this Court need not address those issues.

Article X, Section 29(a)(1) of the Florida Constitution provides that a "*qualifying patient* in compliance with this section is not subject to criminal . . . liability or sanctions under Florida law." (Emphasis added.) "Qualifying patient" is a legal term for which a definition is provided within the medical marijuana constitutional provision itself. *See* Art. X, § 29(b)(10), Fla. Const. To meet the definition of a qualifying patient, a defendant must meet three requirements: (1) Be diagnosed with a "debilitating medical condition;" (2) possess a physician certification; and (3) possess a qualifying patient identification card.

A "debilitating medical condition" is defined as cancer, epilepsy, glaucoma, positive status for [HIV, AIDS, PTSD, ALS], Crohn's disease, Parkinson's disease, multiple sclerosis . . . [etc]." Art. X, § 29(b)(3), Fla. Const. However, based upon the language of section 29(a)(1), it is not sufficient to simply testify that you have a debilitating medical condition. Depending on the burden of proof, you must either affirmatively allege or establish with evidence that a doctor diagnosed you with a debilitating medical condition.

A "physician certification" is a "*written document signed by a physician*, stating that in the physician's professional opinion, the patient suffers from a debilitating medical condition, that the medical use of marijuana would likely outweigh the potential health risks for the patient, and for how long the physician recommends the medical use of marijuana for the patient." Art. X, § 29(b)(9), Fla. Const. (Emphasis added.)

An "identification card" is a "document issued by the [Florida] Department [of Health] that identifies a qualifying patient or caregiver." Art. X, § 29(b)(3), Fla. Const.

Appellant attempted to argue before the trial court that because he possesses an "identification card," he is a "qualifying patient" according to the Department because the Department only issues identification cards to qualifying patients. Therefore, the identification card itself creates a prima facie claim that he is a "qualifying patient" for the purpose of pretrial immunity from criminal prosecution. Appellant is incorrect for a number of reasons.

First, the plain language of section 29 (b)(10) requires the establishment of all three elements to meet the definition of a "qualifying patient." Second, the trial court determines whether a defendant is a "qualifying patient" for the purposes of immunity from criminal prosecution, not the Department. Third, whether a defendant is immune from criminal prosecution turns on whether the defendant was a qualifying patient at the time he was alleged to have committed the criminal offenses of possession of marijuana or paraphernalia. The possession of an "identification card" only establishes that the defendant met the definition of a qualifying patient at the time the identification card was issued. Diagnoses can change and physician certifications expire. Thus, in a claim for pretrial immunity from criminal prosecution, a defendant must establish, and the trial court must find, that all three elements were met *at the time of marijuana or paraphernalia possession* for a defendant to claim he is a "qualifying patient" entitled to pretrial immunity.[3]

Having determined what must be established before a defendant can claim he is a qualifying patient entitled to pretrial immunity, the Court now turns to the burden of proof. Appellant argued below that similar to pretrial immunity under the Stand Your Ground statute, a defendant need only assert a prima facie claim for immunity in the written

[3] To be clear, this Court <u>*does not hold*</u> that a defendant need only establish that he or she is a qualifying patient in order to be entitled to pretrial immunity. This Court only holds that being a "qualifying patient" is one of the requirements for immunity. It may be that a district court of appeal or the Supreme Court of Florida will eventually hold that a defendant claiming immunity must also establish, among other things, that the marijuana was for a medical use by asserting that it came from a Medical Marijuana Treatment Center. *See* Art. X, § 29(a)(1) ("The *medical use* of marijuana by a qualifying patient or caregiver . . . is not subject to criminal . . . liability or sanctions."); 29(b)(6) ("'Medical use' means the acquisition, possession," or "use . . . *not in conflict with Department rules*") (Emphasis added). However, resolution of that and other Constitutional questions is not necessary to resolve this appeal and so this Court does not reach them.

motion, whereupon the State has the burden of proving that a defendant is not entitled to immunity by a preponderance of the evidence.

Initially, like the medical marijuana Constitutional provision, the Stand Your Ground statute used to be silent regarding the burden of proof. As a result of this silence, the Florida Supreme Court found that the defendant bore the burden of proving entitlement to immunity by a preponderance of the evidence. *See Dennis v. State*, 51 So. 3d 459 (Fla. 2010); *Bretherick v. State*, 170 So. 3d 766 (Fla. 2015). After *Bretherick*, the burden of proof in Stand Your Ground immunity changed from the defendant to the State due to a statutory amendment expressly providing the burden of proof. *See* § 776.032(4), Fla. Stat. (2018). No similar change has occurred to Article X, Section 29. Therefore, it is at least arguable that the defendant bears the burden of proving entitlement to medical marijuana immunity by a preponderance of the evidence for the reasons stated in *Dennis* and *Bretherick*.

Ultimately, however, the burden of proof question need not be resolved. This Court holds that the trial court correctly found that even under Appellant's preferred burden of proof, his amended motion failed to make a prima facie claim that he was a qualified patient within the meaning of Article X, Section 29(a)(1) and (b)(10). Therefore, he failed to make a prima facie claim for pretrial immunity.

In order to establish a prima facie *claim*, as opposed to a prima facie *case*, a defendant need only allege a facially sufficient claim of immunity within the written motion itself. No evidence, even prima facie evidence like the State would need to adduce for a trial court to deny a motion for judgment of acquittal, is required. *See Jefferson v. State*, 264 So. 3d 1019, 1029-30 (Fla. 2d DCA 2018) ("We interpret section 776.032(4)'s requirement of a prima facie claim . . . to mean that an accused must simply allege a facially sufficient prima facie claim . . . in a motion to dismiss filed under rule 3.190(b) and present *argument* in support of that motion at a pretrial immunity hearing") (emphases added).

Appellant's motion failed to make a prima facie claim because it asserted only one of the three elements required to meet the definition of a "qualifying patient:" that he possessed an identification card. The motion did not assert that he was diagnosed with a debilitating medical condition and did not assert that he possessed a physician

certification. Even after the trial court permitted Appellant to testify, he failed to correct these deficiencies. Appellant attempted to testify to the physician certification but the trial court sustained Appellee's hearsay objection. Appellant does not appeal that evidentiary ruling. And even if Appellant had been able to testify to what his physician told him, a physician certification is a physical document. *See* Art. X, § 29(b)(9), Fla. Const. Appellant did not assert in his written motion that he possessed one, did not testify during the hearing that he possessed one, and did not provide one in open court for inspection like he did with his identification card.

Finally, he did not assert in the written motion that he had been diagnosed with a debilitating medical condition. While he testified during the hearing that he had PTSD and cancer, both debilitating medical conditions listed in section 29(b)(1), he did not testify that he was diagnosed with those conditions by a physician. The definition of "qualifying patient" specifically requires a diagnosis. *See* Art. X, § 29(b)(10), Fla. Const.

Because Defendant's written amended motion did not establish a prima facie claim that he was a "qualifying patient" within the meaning of the medical marijuana amendment at the time of his arrest for possession of marijuana and paraphernalia, his motion failed to make a prima facie claim for pretrial immunity from criminal prosecution under Article X, Section 29(a)(1), of the Florida Constitution. Appellant did not correct this facial deficiency during the hearing. Therefore, the trial court did not err in denying Appellant's amended pretrial motion to dismiss for medical marijuana immunity.

CONCLUSION

The trial court correctly found that Appellant's amended motion to dismiss failed to make a prima facie claim for pretrial immunity. Accordingly, the trial court did not err in denying the motion and Appellant's judgment and sentence are affirmed.

It is therefore ORDERED and ADJUDGED that the order of the trial court is hereby AFFIRMED.

DONE AND ORDERED in Chambers at New Port Richey, Pasco County, Florida this ___ day of _____, 2020.

Original Order entered on June 15, 2020, by Circuit Judges Daniel D. Diskey, Susan G. Barthle, and Kimberly Sharpe Byrd.

Copies to:
Honorable Anne Wansboro

Christopher DeLaughter, Esq.
506 North Armenia Avenue
Tampa, FL 33609

Office of the State Attorney

Staff Attorney