

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2015-000266-001 DT

09/01/2015

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT

J. Eaton

Deputy

STATE OF ARIZONA

WEBSTER CRAIG JONES

v.

DEREK FOSTER (001)

SIMONE ANNE ATKINSON

MESA MUNICIPAL COURT - COURT  
ADMINISTRATOR

MESA MUNICIPAL COURT -  
PRESIDING JUDGE

REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

**Lower Court Case Number 2014-038250.**

Defendant-Appellant Derek Foster (Defendant) was convicted in Mesa Municipal Court of driving under the influence. Defendant contends the trial court erred in denying his request to introduce evidence of his Arizona Medical Marijuana Act card. For the following reasons, this Court affirms the judgment and sentence imposed.

I. FACTUAL BACKGROUND.

On June 17, 2014, the State filed a Complaint charging Defendant with driving under the influence, A.R.S. § 28-1381(A)(1), and driving with drugs or metabolite in his system, A.R.S. § 28-1381(A)(3), alleged to have been committed on July 16, 2013. At a Joint Trial Management Conference held January 8, 2015, Defendant's attorney made an oral request for the trial court to hear argument on introduction of Defendant's Arizona Medical Marijuana Act card. On January 22, 2015, the trial court held another Joint Trial Management Conference, at which time the parties made their arguments to the trial court. (R.T. of Jan. 22, 2015, at 4-6, 7-11, 11-12.) The trial court took the matter under advisement. (*Id.* at 13-14.) On January 22, 2015, the State filed a Response to Defendant's Request To Present Medical Marijuana Card; State's Motion in Limine; and State's Requested Jury Instructions.

On January 28, 2015, the trial court issued its written Order, ruling as follows:

[T]he Court finds the Defendant's Registry Identification Card issued under the AMMA is not relevant as evidence to the charges and it is therefore ordered denying the Defendant's motion in limine.

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(Order, dated Jan. 28, 2015, at 7.) At a subsequent hearing, Defendant's attorney advised the trial court that Defendant would submit the matter on the record. (R.T. of Feb. 2, 2015, at 3.) The State provided Plaintiff's Exhibit No. 1, the Police Reports, and Plaintiff's Exhibit No. 2, the lab report, and Defendant's attorney provided Defendant's Exhibit No. 1, Defendant's medical marijuana card. (*Id.* at 3–4.) The trial court then reviewed those documents. (*Id.* at 5.) The trial court found Defendant guilty of both charges, noting certain matters it had viewed in the exhibits. (*Id.* at 5–6.) The trial court next imposed sentence. (*Id.* at 10–12.) On that same day, Defendant filed a timely notice of appeal. This Court has jurisdiction pursuant to ARIZ. CONST. Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUES.

A. *Did the trial court abuse its discretion denying his request to introduce evidence of his Arizona Medical Marijuana Act card for the (A)(3) charge.*

Defendant contends the trial court abused its discretion denying his request to introduce evidence of his Arizona Medical Marijuana Act card as a defense for the (A)(3) charge. In *Dobson & Anderson v. McClennen*, 236 Ariz. 203, 337 P.3d 568 (Ct. App. 2014), *pet. for rev. granted*, CV–14–0313–PR (May 26, 2015), Petitioners were convicted of violating A.R.S. § 28–1381(A)(3) and contended the municipal courts erred in “precluding evidence that Petitioners held medical marijuana cards at the time of the offenses.” *Dobson & Anderson* at ¶ 1. The Petitioners both had valid registry identification cards and contended (1) certification provided an affirmative defense to an (A)(3) charge under A.R.S. § 28–1381(D), and (2) they were immune to prosecution under (A)(3) based on two provision of the Arizona Medical Marijuana Act (AMMA).

The court first held the Petitioners were not entitled to rely on the defense in A.R.S. § 28–1381(D), which provides as follows:

A person using a drug as prescribed by a medical practitioner licensed pursuant to title 32, chapter 7, 11, 13 or 17 is not guilty of violating subsection A, paragraph 3 of this section.

A.R.S. § 28–13814(D). The court held a “written certification” as used in the AMMA was not the same as the “as prescribed” in A.R.S. § 28–13814(D). *Dobson & Anderson* at ¶ 13. It noted that, “as a Schedule 1 controlled substance, marijuana ‘cannot be dispensed under a prescription’ by a medical practitioner.” *Dobson & Anderson* at ¶ 14, *citing United States v. Oakland Cannabis Buyers’ Coop*, 532 U.S. 483, 492 n.5 (2001). It further noted there was no showing the “written certification” under the AMMA contained the information required for a medical prescription in Arizona. *Dobson & Anderson* at ¶ 14. It therefore concluded the “written certification” under the AMMA did not provide an affirmative defense to an (A)(3) charge. *Dobson & Anderson* at ¶ 16.

The court next discussed A.R.S. § 36–2802, which provides in part as follows:

This chapter does not authorize any person to engage in, and does not prevent the imposition of any civil, criminal or other penalties for engaging in, the following conduct:

....

D. Operating, navigating or being in actual physical control of any motor vehicle, aircraft or motorboat while under the influence of marijuana, except that a registered qualifying patient shall not be considered to be under the influence of marijuana solely because of the presence of metabolites or components of marijuana that appear in insufficient concentration to cause impairment.

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A.R.S. § 36–2802(D). The court noted an (A)(3) charge does not require that the defendant be “under the influence of marijuana,” or require that the State prove impairment. *Dobson & Anderson* at ¶ 17. It held, notwithstanding the AMMA, the State can charge marijuana users for violating (A)(3), and regardless of impairment, marijuana users violate (A)(3) if they are discovered with any amount of THC or an impairing metabolite in their body, citing *State ex rel. Montgomery v. Harris (Shilgevorkyan)*, 234 Ariz. 343, 322 P.3d 160 (2014), for authority. It further noted another panel of the Arizona Court of Appeals had held A.R.S. § 36–2802(D) does not apply to an (A)(3) charge. *Darrah v. McClennen*, 236 Ariz. 185, 337 P.3d 550, ¶¶ 5–8 (Ct. App. 2014).

The court next discussed A.R.S. § 36–2811, which provides as follows:

B. A registered qualifying patient . . . is not subject to arrest, prosecution or penalty in any manner, or denial of any right or privilege, including any civil penalty or disciplinary action by a court or occupational or professional licensing board or bureau:

1. For the registered qualifying patient’s medical use of marijuana pursuant to this chapter, if the registered qualifying patient does not possess more than the allowable amount of marijuana.

A.R.S. § 36–2811(B)(1). The court noted Petitioners were not being prosecuted or penalized for use or possession of marijuana, thus A.R.S. § 36–2811(B)(1) did not apply. *Dobson & Anderson* at ¶ 19. The court then concluded as follows:

The affirmative defense available under A.R.S. § 28–1381(D) does not apply to an A.R.S. § 28–1381(A)(3) charge resulting from use of marijuana under the AMMA. Similarly, neither A.R.S. § 36–2811(B) nor A.R.S. § 36–2802(D) provides immunity for defendants facing charges for driving with an impermissible drug or impairing metabolite in their bodies under A.R.S. § 28–1381(A)(3). Accordingly, the municipal court did not err in excluding from evidence at trial that Petitioners held medical marijuana cards and the superior court did not err in affirming those decisions.

*Dobson & Anderson* at ¶ 20. In the present case, Defendant is making essentially the same argument as Petitioners did in *Dobson & Anderson*. The trial court therefore did not abuse its discretion in denying his request to introduce evidence of his Arizona Medical Marijuana Act card as a defense to the (A)(3) charge.

B. *Did the trial court abuse its discretion denying his request to introduce evidence of his Arizona Medical Marijuana Act card for the (A)(1) charge.*

Defendant contends the trial court abused its discretion denying his request to introduce evidence of his Arizona Medical Marijuana Act card as a defense for the (A)(1) charge. Defendant points to that part of A.R.S. § 36–2802(D) that provides “a registered qualifying patient shall not be considered to be under the influence of marijuana solely because of the presence of metabolites or components of marijuana that appear in insufficient concentration to cause impairment.” Because this subsection provides a defense to an (A)(1) charge, it places on a defendant the obligation to present evidence that “the presence of metabolites or components of marijuana” were “in insufficient concentration to cause impairment.” In the present case, Defendant made no offer of proof to

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the trial court of any evidence that the metabolites or components of marijuana in his system were in insufficient concentration to cause impairment. Moreover, the State's evidence of impairment was not limited solely to the presence of metabolites or components of marijuana in Defendant's system. The Police Report submitted as Plaintiff's Exhibit 1 contained the following information:

- Defendant was driving 55 miles per hour in a 45 mile-per-hour zone.
- Defendant was swerving in and out of his lane.
- Defendant's eyes were bloodshot and watery.
- Defendant's pupils were very dilated.
- Defendant was extremely nervous.
- Defendant admitted smoking marijuana 3 hours previous.
- Defendant showed numerous signs of impairment on the field sobriety tests.
- Defendant's reaction to light was slow.

Because the State's evidence that Defendant was under the influence of marijuana was not solely based on the presence of metabolites or components of marijuana in Defendant's system, and because Defendant offered no evidence that the presence of metabolites or components of marijuana in his system were in insufficient concentration to cause impairment, the trial court correctly excluded from evidence at trial that Petitioners held a medical marijuana card.

III. CONCLUSION.

Based on the foregoing, this Court concludes the trial court correctly found Defendant's Registry Identification Card issued under the AMMA was not relevant as evidence to the charges.

**IT IS THEREFORE ORDERED** affirming the judgment and sentence of the Mesa Municipal Court.

**IT IS FURTHER ORDERED** remanding this matter to the Mesa Municipal Court for all further appropriate proceedings.

**IT IS FURTHER ORDERED** signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen  
THE HON. CRANE MCCLENNEN  
JUDGE OF THE SUPERIOR COURT

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