Volume 2, Number 11
April 2021

CANNABIS LAW™
& REGULATION REPORTER

CONTENTS

ARGENT COMMUNICATIONS GROUP

WWW.ARGENTCO.COM

Publisher's Note:

Accuracy is a fundamental of journalism which we take seriously. It is the policy of Argent Communications Group to promptly acknowledge errors. Inaccuracies should be called to our attention. As always, we welcome your comments and suggestions. Contact: Robert M. Schuster, Editor and Publisher; P.O. Box 1135, Batavia, IL 60510-1135; 530-852-7222; schuster@argentco.com.

WWW.ARGENTCO.COM

Subscription Rate: 1 year (11 issues) $595.00. Price subject to change without notice. Circulation and Subscription Offices: Argent Communications Group; P.O. Box 1135, Batavia, IL 60150-1135; 530-852-7222 or 1-800-419-2741. Argent Communications Group is a division of Argent & Schuster, Inc.: President, Gala Argent; Vice-President and Secretary, Robert M. Schuster, Esq.

CLR

FEATURE ARTICLE

NEW YORK STATE LEGALIZES RECREATIONAL CANNABIS AND PRIORITIZES EQUITY ISSUES

After years of failed attempts, New York State has legalized the use of recreational marijuana through a robust program that promises to reinvest millions of dollars of tax revenues into communities ravaged by the decades-long war on drugs.

On March 31, 2021, New York State legalized adult use of recreational cannabis.

Background

Governor Andrew Cuomo signed the bill in late March, a day after the state legislature passed the bill following hours of debate. Passage makes New York the 15th state to legalize the recreational use of cannabis, and it is likely to become one of the largest markets of legal cannabis in the nation. Beyond that, the bill focuses legalization to efforts for economic and racial equity.

Upon signing the bill into law, Governor Cuomo stated:

> This is a historic day in New York—one that rights the wrongs of the past by putting an end to harsh prison sentences, embraces an industry that will grow the Empire State's economy, and prioritizes marginalized communities so those that have suffered the most will be the first to reap the benefits. (https://abcnews.go.com/US/york-legalizes-recreational-marijuana-expunges-pot-convictions/story?id=76775175)

Not everyone in the legislature supported this bill—in particular, Senate Republicans. Rob Ortt, Republican leader in the Senate who stated:

> This deal legalizing marijuana is the result of closed-door discussions between leaders of one political party and a governor who is engulfed in scandal. . . .The outcome of these partisan negotiations is a deeply flawed piece of legislation that will hurt the health and safety of New Yorkers. (*See:* https://www.nytimes.com/2021/03/31/nyregion/cuomo-ny-legal-weed.html)

Prior attempts to legalize cannabis failed due to disagreements over how the tax revenue from sales would be distributed. Democratic lawmakers have insisted a large portion of the money be earmarked for communities where Black and Latino people have been arrested on marijuana charges in disproportionate numbers; the governor wanted to retain control over how the money was spent. (*See:* https://www.nytimes.com/2021/03/31/nyregion/cuomo-ny-legal-weed.html)

Following several recent scandals surrounding how the state reported nursing home deaths and accusations of misconduct by Governor Cuomo, the lawmakers prevailed. Under the bill, 40 percent of the tax revenue from cannabis sales will be steered to those communities, and people convicted of cannabis-related offenses that would no longer constitute crimes will have their records automatically expunged. The law also seeks to allow people with past convictions and those involved in the illegal cannabis market to participate in the new legal market.

In terms of specific taxation numbers:

> A total sales tax rate of 14% includes 9% allocated for the state, 3% for the municipality where the sale is made and 1% for the county. From that 9%, 40% has been earmarked for communities disproportionately affected by prior drug laws, 40% for schools and 20% for drug treatment and education. (Ibid)

An Emerging Market

Crystal D. Peoples-Stokes, the Democratic majority leader in the New York Assembly, emphasized that:

> . . .equity is not a second thought, it's the first one, and it needs to be, because the people who paid the price for this war on drugs have lost so much.

While certain parts of the law, including individual possession for recreational purposes, went into effect immediately, the legal market will take well over a year to become operational. Unlike in many other states, New Yorkers are permitted to smoke cannabis in public wherever smoking tobacco is allowed, though localities in a new state agency could create regulations to more strictly control where cannabis may be smoked in public. In New York City, it will be banned in parks, beaches, boardwalks, pedestrian plazas and playgrounds, but generally permitted on sidewalks.

Other changes will go into effect in months to come, once the regulatory framework that will govern the legal market is put into place. While people will eventually be able to get cannabis delivered to their homes, enjoy cannabis in consumption lounges and cultivate up to six plants at home for personal use. Dispensaries will not open for more than a year, and local governments will have flexibility to opt out of allowing dispensaries to operate within their jurisdiction.

The recreational market is expected to generate roughly $350 million in yearly tax revenue and billions of dollars in annual sales, in addition to creating thousands of new jobs in the newly legal industry.

The new law is also a big win for the medical cannabis industry, as it is expected to significantly expand the medical cannabis program and bring in new patients. Under the law, patients would no longer be restricted from smoking cannabis flower, and could receive up to a 60-day supply of cannabis, an expansion from the current 30-day cap. Previously, a small number of conditions qualified for medical cannabis use, but now practitioners will have the discretion to recommend medical cannabis for any condition.

Additionally, medical operators will be permitted to enter the recreational market by paying a one-time fee.

The 'Marihuana Regulation and Taxation Act'

With Governor Cuomo's signature, the Marihuana Regulation and Taxation Act (MRTA) became law in New York. SB 854A legalized recreational cannabis use by adults and also changed state labor law which [now] offers some protections for employees who use cannabis.

The Bill's Basic Text

Senate Bill 854A allows adults, 21 and older, to purchase and consume cannabis, and establishes the legal cultivation, distribution and sales of recreational cannabis. It establishes the Office of Cannabis Management (OCM), as an independent entity withing the state's Division of Alcoholic Beverage Control and the OCM is tasked with the promulgation of regulations to address all aspects of legalized recreational cannabis.

The bill also amends relevant state public health law and criminal law to accommodate cannabis' new legal status. Of course, the bill also establishes a protocol for the taxation of cannabis.

As many states before it, New York, via SB 854A, attempts to shift the state's focus from cannabis being an illegal/decriminalized substance to one that is legal. That means many regulations will need to be promulgated in the coming months [and years] to deal with cannabis' new status. This will a comprehensive task covering the items identified above, and includes a new state Cannabis Revenue Fund for funneling taxes and drug treatment programs and public education programs. In a state where business is of such importance, labor laws play a paramount role with the bill's passage.

A summary of 854A's provisions include:

- Section 2 establishes a new Chapter 7-A of the consolidated laws entitled "Cannabis Law' as follows:

  Article 1 of the Cannabis Law provides legislative findings and intent and offers definitions of terms.

  Article 2 of the Cannabis Law establishes the Office of Cannabis Management; defines the powers of the cannabis control board, executive director, chief equity officer, and state cannabis advisory board; and establishes rulemaking

authority and procedures for the office.

Article 3 of the Cannabis Law provides for the regulation of medical cannabis by the Office of Cannabis Management.

Article 4 of the Cannabis Law provides for the regulation of adult-use cannabis by the Office of Cannabis Management.

Article 5 of the Cannabis Law provides for the regulation of cannabinoid hemp and hemp extract by the Office of Cannabis Management.

Article 6 of the Cannabis Law establishes general provisions for the Cannabis Law.

•Sections 3 through 62-h of the bill amend various sections of law to conform New York State law as it relates to the Cannabis Law and the purposes of this act, including to:

1) remove marihuana from the schedule of controlled substances;

2) provide for the lawful possession, use, and personal growth of cannabis;

3) expand sealing and expungement opportunities for past marijuana convictions;

4) establish parameters related to cannabis and probation, parole, and Family Court matters;

5) provide for the taxation of cannabis;

6) provide for the distribution of tax revenues, including:

7) 40% to the community grants reinvestment fund;

8) 40% to education in order to add to the State's current investment in education;

9) 20% for mental health services; youth cannabis use prevention; public health campaigns; and drug treatment, prevention, and harm reduction services; and

10) certain administrative costs to implement this act.

11) provide for vehicle and traffic, and other public safety measures;

12) clarify workplace standards and employee/employer rights and protections related to cannabis;

13) research potential technologies to assist in detecting motorist cannabis impairment; and

14) transfer certain functions and employees from various state agencies to the Office of Cannabis Management.

A Focus on Equity

New York is creating a tiered system of licenses to differentiate between those who produce, wholesale, and retail the products, much like how the state handles the alcohol market. Most businesses will only be allowed to have one type of license to keep a few players from consolidating the entire market. Most dispensaries, for example, will not be able to grow or distribute cannabis. The vertical integration provision will not apply to the state's medical cannabis companies, which will be allowed to cultivate, process and sell cannabis.

The vertical integration restrictions are intended to prevent a few companies from dominating the market and to make sure that wealthy white investors do not reap most of the benefits, as has happened in other states. Half of cannabis licenses are proposed to be issued to "social equity applicants," including people from communities with high rates of marijuana enforcement, as well as businesses owned by women, minorities, distressed farmers and disabled veterans. Priority will also be given to applicants who have a cannabis-related conviction, or a close relative with such a conviction.

The Cannabis Control Board will conduct a review two years after the first retail sale of cannabis to study the market share in the industry and make licensing adjustments to ensure equity. Further, medical cannabis firms would be limited to operating up to eight dispensaries each.

Labor Law Changes

Current labor law in New York bars employers, under Section 201-d, from discriminating against employees due to their actions, off duty "recreational" or "political" activities. The MRTA's provisions impacting labor law amends the state's labor laws to prohibit employers to make decisions on hiring or firing those who use cannabis during off duty hours.

There are, however, exceptions and clarification. An employer is permitted to make decisions related to an employee's off duty actions related to cannabis use that may impact the employee's performance of their job duties or subject the employer to prosecution under federal law. The MRTA also won't alter current labor law in protecting the employer, for actions based on his/her belief that they are:

> . . .permissible pursuant to an established substance abuse or alcohol program or workplace policy, professional contract or collective bargaining agreement' [or the belief that]. . .the individual's actions were deemed by an employer or previous employer to be illegal or to constitute habitually poor performance, incompetency or misconduct.

In addition, employers may still enact policies that prohibit marijuana use and possession in the workplace and does not restrict employers from testing applicants or employees for cannabis use on the job.

All this latter language will undoubtedly produce litigation now that cannabis use has entered the stage.

There are many more provisions of the bill that address the employer/employee relationship and reading the bill's text as to these provisions will be necessary to the law practitioner.

Conclusion and Implications

The standard aspects of legalized cannabis are all present in the bill's language and legislative intent. But as to labor law changes—the relationship between an employer or prospective employer and employees—there is substantial language in the bill that might need some time to mature and develop via regulation and most likely, case law that develops over time.

New York joins a growing number of states with thriving recreational cannabis marketplaces. The state aims to separate itself through its focus on equity, although many programs nationwide have emphasized equity and failed to live up to their lofty goals. If New York can manage its social equity program as it grows into one of the nation's largest legal markets, it may become a guidepost for the rest of the country as the trend of legalization continues to grow. Clearly, New York State watched the problems developed in other states in dealing with legal cannabis use by employees and prospective employees and attempted to address those concerns in the MRTA. Any it is likely unions will play a role in the development of the labor laws impacted by the MRTA. The bill's text is available online at: https://www.nysenate.gov/legislation/bills/2021/S854.

Jordan Ferguson, Esq. is an Associate at the law firm, Venable, LLP, resident in the firm's Los Angeles, California office. Jordan represents clients in emerging and traditional industries on real estate, land use, environmental, government contracts and regulatory compliance matters. In terms of land use, Jordan addresses entitlement processes, licensing and development agreements and regulatory compliance issues. In terms of emerging industries Jordan advises clients in California on licensure, regulatory compliance and land use-related issues in the cannabis industry. Jordan sits on the Editorial Board of the *Cannabis Law & Regulation Reporter.*

Robert Schuster, Esq. is the Executive Editor of Argent Communications Group's family of monthly reporters. "Back in the day," Robert litigated real property and land use issues for clients throughout California.

PRACTICE GUIDE

LOCAL JURISDICTION CONSIDERATIONS OF CANNABIS 'ACTIVITY BUFFERS' IN CALIFORNIA

California's Medicinal and Adult-Use Cannabis Regulation and Safety Act (MAUCRSA) confers certain authority to local jurisdictions to license and regulate the cultivation, distribution, transport, storage, manufacturing, processing, and sale of both medical and adult-use cannabis and cannabis products. In adopting such a regulatory scheme, local jurisdictions face a whole litany of policy considerations. These include, among other things, whether to permit cannabis activity, what types of cannabis activity to allow, whether to restrict the number of licensees, and in which zones to allow the activity. Alongside these considerations, local jurisdictions must also consider the compatibility of the types of cannabis activity they intend to permit with other uses in the vicinity of where cannabis activity is to be allowable.

Cannabis Retail Sales, Sensitive Uses and Buffer Zone Considerations

School, Day Care, and Youth Center Buffers

When approving Proposition 64 legalizing adult-use cannabis in California, voters approved language acknowledging that certain uses involving children are highly sensitive to legalized cannabis activity. In acknowledgement of that sensitivity, Proposition 64 included in Business and Professions Code § 26054, language that created a default 600-foot buffer zone around all K-12 schools, day care centers, and youth centers (Sensitive Uses) in which no cannabis activity could be licensed. This buffer is measured from the property line of Sensitive Uses.

However, § 26054 also provides local jurisdictions with the authority to modify this buffer ("unless a licensing authority or local jurisdiction specifies a different radius"). *[Immediately following the approval of Prop. 64, some debate existed about whether the authority conferred on local jurisdictions only provided for more restrictive—or larger—buffers than the 600 feet provided for in § 26054. Local jurisdictions have since interpreted this language to allow for both larger and smaller buffers.]

An example of such a modification is found in the City of Goleta's municipal code which provides for a 600-foot buffer from K-12 schools for cannabis retail storefronts but does not provide such a buffer around day care centers and youth centers, and does not provide for any buffer around other types of cannabis activity.

Buffers around Other Uses

Proposition 64 did not call out any other types of uses as so sensitive to warrant a default buffer zone. Nevertheless, local jurisdictions regularly impose buffers around other sensitive uses such as residential zones, parks, libraries, and community centers. For example, the City of Modesto's municipal code provides for a 200-foot buffer around the city's parks and libraries as well as a 100-foot buffer around residential uses.

Some local jurisdictions also provide for buffers between cannabis retail storefronts to minimize the appearance of a cannabis-centric business district. Turning again to the City of Goleta for an example, cannabis retail storefronts there may not be located within 600 feet of another cannabis retain storefront.

Policy Considerations for Local Jurisdictions

Once a local jurisdiction has made the threshold determination that it wishes to permit cannabis activity the complex process of developing a set of local regulations begins. In considering buffers, it is important for local jurisdictions to keep in mind what types of issues they are seeking to address in creating a buffer: public health and safety, child exposure to cannabis activity, density of cannabis activity, or some other concern.

Proximity to Sensitive Uses

Depending on the types of zones in which a local jurisdiction chooses to permit cannabis activity, different types of sensitive uses may or may not be an

issue within their jurisdiction. For jurisdictions only seeking to permit manufacturing or cultivation activity in industrial zones, school buffers are less likely to be an issue than for those local jurisdictions focusing on retail activity. If local zoning places residential zones immediately adjacent to industrial zones, a residential buffer may be appropriate. If a local jurisdiction's business districts contain a lot of mixed-use parcels, then a buffer not just around residential zoning but one around parcels *containing a residential use* may be appropriate.

Additional Impact Mitigation

While cannabis retail storefronts are perhaps the most visually impactful type of cannabis activity, other types of cannabis activity may pose other types of risks than visual exposure. For example, some jurisdictions consider extraction facilities to pose a heightened risk. When considering this type of risk, local jurisdictions may wish to consider whether a buffer from sensitive uses is the most effective avenue for risk mitigation. Other types of mitigation such as special safety plans or security plans for specific types of uses may be better-suited to provide for public health and safety as well as peace of mind to nearby residents and businesses.

Availability of Commercial and Industrial Properties

When considering whether and how large a buffer to impose on cannabis activities, local jurisdictions may wish to consider the availability of commercial and industrial sites where cannabis activity could be located depending upon how large a buffer is imposed. This consideration may also be of particular importance to local jurisdictions that are relatively small, have small business and industrial districts, or that have sensitive uses spaced throughout in a way that would preclude all but a small portion of their jurisdiction to contain cannabis activity.

Conclusion and Implications

Perhaps the most important takeaway for local jurisdictions and anyone in the cannabis industry seeking to do business within a jurisdiction that permits cannabis activity is that California law provides flexibility. Local jurisdictions facing public health and safety concerns, or resident concerns should know that their ability to impose use buffers on cannabis activity gives them the ability to address a multitude of concerns. Cannabis businesses seeking to do business in a local jurisdiction where concerns about their type of use should likewise keep this approach in mind when applying for local approvals and should proactively propose a solution-oriented approach to overcoming whatever concerns may have been expressed.
(Andreas L. Booher)

LEGISLATIVE DEVELOPMENTS

MEMBERS OF CONGRESS INTRODUCE JOINT BILLS IN THE HOUSE AND SENATE SEEKING TO FACILITATE DISCUSSION AND POTENTIAL RECOMMENDATION FOR THE USE OF CANNABIS TO TREAT VETERANS

Representatives Barbara Lee (D-CA) and Dave Joyce (R-OH), co-chairs of the Congressional Cannabis Caucus, joined with Senator Brian Schatz (D-HI) to introduce the Veterans Medical Marijuana Safe Harbor Act of 2021, which would allow doctors at the U.S. Department of Veterans Affairs (VA) to discuss and potentially recommend medical marijuana to veterans in states that have established medical marijuana programs.

The Medical Marijuana Safe Harbor Act

Medical marijuana is currently legal in 36 states and four territories and more states are making progress on this issue. Research has indicated that medical marijuana can be a valuable treatment option for a wide range of clinical applications and has been used to help treat chronic pain and post-traumatic stress disorder (PTSD). Opioid related drug overdoses account for the majority of drug overdose deaths in the United States and Veterans are twice as likely to die from opioid related overdoses than nonveterans. This bipartisan, bicameral legislation would create a temporary, five-year safe harbor protection for veterans who use medical marijuana and their doctors. The bill would also direct the VA to research the effects of medical marijuana on veterans in pain, as well as the relationship between medical marijuana programs and a potential reduction in opioid abuse among veterans:

The bill's preamble reads as follows, as to the bill's intent:

> To allow veterans to use, possess, or transport medical marijuana and to discuss the use of medical marijuana with a physician of the Department of Veterans Affairs as authorized by a State or Indian Tribe, and for other purposes.

Chronic Pain and an Opioid Use Problem

The bill points out that nearly:

> . . .60 percent of veterans returning from serving in the Armed forces in the Middle East and more than 50 percent of older veterans who are using the health care system of the Department of Veterans Affairs [are] living with some form of chronic pain.

And the bill further emphasizes the need to treat that chronic pain using something other than the current widespread use of opioids:

> In 2018, opioids accounted for approximately 70 percent of all drug overdose deaths in the United States. . . .Veterans are twice as likely to die from opioid related overdoses than nonveterans.

The Bill's Supporters Chime in

In support of the bill, Congresswoman Barbara Lee stated:

> It has been scientifically proven that medical marijuana has a considerable impact in treating conditions common with veterans when they return from service, like chronic pain and PTSD. . . .This legislation will empower veterans and their doctors to make informed decisions about the use of medical marijuana to treat chronic conditions in states with legal medical marijuana programs without federal interference. As the proud daughter of a veteran, I'm committed to working in Congress to ensure every veteran has a roof over their head, a job that pays them a living wage, and access to the health care services they deserve when they return home.

Senator Brian Schatz added the following:

> In 36 states, doctors and their patients have the option to use medical marijuana to manage pain—unless those doctors work for the VA and

their patients are veterans. This bill protects veteran patients in these states and gives their VA doctors the option to prescribe medical marijuana to veterans, and it also promises to shed light on how medical marijuana can help with the nation's opioid epidemic.

Congressman Dave Joyce stated about the need for this bill as follows:

> There is a growing body of evidence about the beneficial uses of medical cannabis as treatment for PTSD and chronic pain, two terrible conditions that plague many of our veterans. If a state has made it legal, like Ohio has, the federal government should not be preventing a VA doctor from recommending medical cannabis if they believe that treatment is right for their patient. As the son of a World War II veteran who was wounded on the battlefield, I've seen firsthand the many challenges our nation's heroes face when they return home. I'm proud to join my colleagues in introducing this important bill and will continue to do everything in my power to ensure we are providing our veterans with the care they need to overcome the wounds of war.

Conclusion and Implications

The *Veterans Medical Marijuana Safe Harbor Act* is supported by the Iraq and Afghanistan Veterans of America (IAVA), VoteVets, Minority Veterans of America, Veterans Cannabis Coalition, Veterans Cannabis Project, Veterans for Medical Cannabis Access, National Cannabis Industry Association (NCIA), NORML, National Cannabis Roundtable, U.S. Pain Foundation, Drug Policy Alliance, Americans for Safe Access (ASA), Students for Sensible Drug Policy, Veteran's Initiative 22, Arizona Dispensary Association, California Cannabis Industry Association, and Hawaii Cannabis Industry Association. As with any bill introduced at the federal level to address cannabis use—whether it be for medicinal use or recreational use, the road to possible passage has not seen any real success. Perhaps the fact that this bill addresses medicinal use only, and its target being the very real PTSD that many of the nation's veterans suffer from, perhaps its chances for traction and success will be much higher. The full text of the bill is available online at: https://lee.house.gov/imo/media/doc/Veterans%20Medical%20Marijuana%20Safe%20Harbor%20Act-%20Lee.pdf
(R. Schuster)

NEVADA LEGISLATURE PROPOSES A BILL TO ADDRESS CANNABIS USE AND DRIVING UNDER THE INFLUENCE STANDARDS

A bill in the Nevada State Legislature had been introduced to distinguish operating a motor vehicle with cannabis traces in one's blood from driving under the influence. The key issue here is Nevada's current presumption of driving while impaired with the presence of small but measurable quantities of cannabis in one's system.

Assembly Bill 400

Perhaps not by coincidence, a bill in the Nevada Assembly was introduced on April 20, 2021 (420?) to treat differentiate drivers of motor vehicles with cannabis metabolites from operating that vehicle while under the influence (DUI) as has historically been applied to alcohol.

Current Law—A Presumption of Impairment with Cannabis Metabolites Present

Under current law in Nevada, the presence of any measure quantity of cannabis in one's blood might subject that person, if driving a motor vehicle with a traditional DUI criminal prosecution. But cannabis is different than alcohol when it comes to measure quantities in one's system. Assemblyman Steve Yeager (D-Las Vegas), the bill's sponsor defines the issue as follows:

> This stuff stays in your system, like way longer than alcohol does. . . There have been some studies that have shown heavy users still have metabolites in their blood two weeks after their last consumption.

Nevada currently has a per se style prosecution for impairment while driving. Proponents of AB 400 point out that the per se limit is irresponsible because taking a blood sample and measuring the amount of metabolites does not always accurately convey whether an individual is high, or impaired. Nevada is one of five states that have per se limits that apply to marijuana metabolites. One state, Colorado, has a 5 nanogram limit, but the limit is a "reasonable inference." A reasonable inference allows a jury to infer that a driver was impaired based on the blood test result, but a defendant can provide evidence to the contrary. (https://www.rgj.com/story/life/arts/2021/04/20/nevada-cannabis-lawmakers-consider-pot-lounges-stoned-driving-bills/4849587001/)

> Existing law prohibits a person from driving or being in actual physical control 1of a vehicle or commercial motor vehicle on a highway or on premises to which the public has access or operating or being in actual physical control of a vessel under power or sail on the waters of this State if the person: (1) is under the influence of intoxicating liquor or a controlled substance; (2) has specified amounts of certain prohibited substances in his or her blood or urine; or (3) has specified amounts of marijuana or marijuana metabolite in his or her blood.
> (Text of AB 400)

A New Way of Looking to Impairment for Cannabis Metabolites

Assembly Bill 400's aim is to:

> . . .remove the prohibition against such a person having specified amounts of marijuana or marijuana metabolite in his or her blood, thereby providing that a person who uses marijuana is subject to the general prohibition against driving or being in actual physical control of a vehicle or commercial motor vehicle on a highway or on premises to which the public has access or operating or being in actual physical control of a vessel under power or sail on the waters of this State if the person is under the influence of a controlled substance. Sections 3-5 and 7-16 of this bill make conforming changes to remove references in the Nevada Revised Statutes to marijuana or marijuana metabolite in a person's blood. (Ibid)

Conclusion and Implications

Assembly Bill 400 has just been introduced and referred to the Assembly Judiciary Committee for review, so it's pretty early in the process. But the bill raises a very interesting issue: is one impaired to operate a vehicle [or boat] simply by the presence of cannabis metabolites in one's system—and should a court or jury be permitted to presume impairment by that presence? This is an issue that all states and jurisdictions that have licensed medical or recreational cannabis will have to grapple with. Some states have per se style impairment statutes. It will be interesting to see if AB 400 garners any traction in Nevada and when other legislators in other states follow suit in addressing this issue. To track the progress and for the full text of Assembly Bill 400, *see:* https://trackbill.com/bill/nevada-assembly-bill-400-revises-provisions-relating-to-prohibited-acts-concerning-the-use-of-marijuana-and-the-operation-of-a-vehicle-or-vessel-bdr-43-485/2087460/
(R. Schuster)

JUDICIAL DEVELOPMENTS

NEW JERSEY SUPREME COURT RULES ON INJURED EMPLOYEE RIGHT TO REIMBURSEMENT FOR MEDICINAL CANNABIS USE—FINDS NO FEDERAL PREEMPTION OF THE STATE'S MEDICINAL CANNABIS LAW

Hager v. M&K Construction, 2021 N.J. LEXIS 332 (N.J. April 13, 2021).

This is a worker's compensation matter where an injured employee used prescribed cannabis for medicinal purposes and sought reimbursement from the employer. The employer was ordered to pay those expenses by the workers compensation court. The employer appealed that decision with the primary argument that it would be liable under federal law for aiding and abetting a criminal act because cannabis remains a Schedule I drug. The Supreme Court found for the employee and affirmed the order for payment of reimbursement.

Background

Hager suffered a back injury in a work-related accident in 2001. He underwent surgeries and used opioid medications for chronic pain. M&K denied petitioner's workers' compensation claim, stating it was investigating the matter. *Fifteen years later*, when the trial began in November 2016, M&K stipulated petitioner had sustained a compensable accident.

In 2016, Hager enrolled in New Jersey's medical marijuana program and began using medical marijuana both for pain treatment and to overcome an opioid addiction. His marijuana prescription cost him more than $600 per month. A workers' compensation court ordered the employer to reimburse Hager for the ongoing costs of his medical marijuana costs. (https://www.natlawreview.com/article/medical-marijuana-expenses-held-reimbursable-new-jersey-workers-compensation-case)

New Jersey's Medical Marijuana Act

In 2010, New Jersey enacted the MMA which decriminalized the possession of a certain amount of marijuana for medical use by qualifying patients (MMA). The MMA affords an affirmative defense to patients who are properly registered under the statute but are nevertheless arrested and charged with possession of marijuana. N.J.S.A. 2C:35-18. The MMA also shields qualifying users of medical marijuana from civil penalties and other administrative actions. N.J.S.A. 24:6I-6(b).

The New Jersey Supreme Court's Decision

The employer, M&K Construction appealed the workers' compensation order of reimbursement of medicinal cannabis costs which the worker, Mr. Hager, claimed were prescribed as medically necessary to deal with his pain and to overcome an opioid addiction he developed allegedly due to his on the job back injury.

M&K made three arguments to the Supreme Court why they should not be ordered to reimburse Mr. Hager: 1) Federal law treats any cannabis use as illegal *and* preempts New Jersey's law which "legalized" medical cannabis use. The employer would be aiding and abetting under federal law if they reimbursed Mr. Hager; 2) Use of cannabis by Hager was not medically necessary or reasonable to treat his pain; and 3) M&K was exempt under state law from reimbursement.

Federal Preemption and 'Aiding and Abetting'

Regarding M&K's first argument the Court rejected both aspects of the argument involving federal preemption and federal criminal liability.

The Court pointed out that:

> Of the thirty-three states 11 that have legalized medical marijuana, only New Mexico and Maine have considered whether their medical marijuana legislation is preempted by the CSA. *See, Lewis v. Am. Gen. Media*, 355 P.3d 850, 858 (N.M. Ct. App. 2015) [wherein the court found no federal preemption.]

The Court found that the federal Controlled

Substances Act (CSA) did not preempt New Jersey's legalization of medicinal cannabis. The Court pointed out that the U.S. Justice Department has deprioritized prosecution of many cannabis related "crimes" and that Congress has recently prohibited the DOJ from using its funding to go after states that have legalized cannabis in some form. Therefore New Jersey's medicinal cannabis laws did not create an obstacle to the accomplishment of the goals of Congress and as such was not federally preempted. The Court further held that reimbursement was not aiding or abetting federal criminal activity as M&K was ordered to pay the reimbursement. (*See;* https://www.natlawreview.com/article/medical-marijuana-expenses-held-reimbursable-new-jersey-workers-compensation-case)

Aiding and Abetting Federal Crimes

As to M& K's second argument, that reimbursement of Hager's cannabis treatment costs subjected the company to criminal liability for aiding and abetting violation of the federal Controlled Substances Act, the Court, in rejecting this argument stated:

> Under the circumstances presented here, M&K is not an active participant in the commission of a crime. The employer would be complying with an order requiring it to reimburse a person for the legal use of medical marijuana under this state's law. M&K has not established the requisite intent and active participation necessary for an aiding and abetting charge. We further note that "one cannot aid and abet a completed crime.

The Court, in addition to pointing out that M&K was ordered by the lower court to reimburse, went on to state:

> Here, M&K is not purchasing or distributing the medical marijuana on behalf of petitioner; it is only reimbursing him for his legal use of the substance. In addition, petitioner has obtained the medical marijuana before M&K reimburses him. M&K is never in possession of the marijuana. Therefore, the federal offense of purchasing, possessing or distributing has already occurred. M&K cannot abet the completed crime.

The Court also went on to point out the current nature of the DOJ wherein prosecution of cannabis in "legal" states has been discouraged both by the Administration and by Congress' power to defund the Department.

The Court concluded that M&K made no case for a credible risk of federal prosecution, therefore the aiding and abetting argument failed:

> M&K has presented no evidence that it faces a credible threat of [federal] prosecution. Despite the enactment of medical marijuana legislation by the majority of states, M&K could not apprise this court of any federal prosecution against an employer or insurance carrier for its reimbursement of authorized medical marijuana treatment.

Conclusion and Implications

The Supreme Court of New Jersey also shot down M&K's other argument as to medical necessity of cannabis treatment. In the end, the Court affirmed the decision of the lower court ordering M&K to reimburse Mr. Hager for his medical costs for medicinal cannabis use and it only took many years of wrangling and delay to get to that point.

The case is important primarily for the Court addressing claims of federal preemption of the state's Medical Marijuana Act by the federal Controlled Substances Act. The Court took its time with its analysis of this important issue, finding no federal preemption. While the Court did so within the factual parameters of a workers compensation claim, it's highly probably New Jersey attorneys will be looking to this opinion for guidance on federal preemption claims in other contexts. The Supreme Court's opinion is available online, here: https://law.justia.com/cases/new-jersey/appellate-division-published/2020/a0102-18.html

(R. Schuster)

PENNSYLVANIA APPELLATE COURT FINDS STATE'S MEDICAL CANNABIS LAW ELIMINATES ANY PREVIOUS 'BRIGHT LINE' RULE THAT PROVIDES PROBABLE CAUSE TO SEARCH A LOCKED VEHICLE WITHOUT A WARRANT

Commonwealth of Pennsylvania v. Groom, Case No. 71 MDA 2020 (Pa Super Feb 24, 2021).

In an appeal from the state's Court of Common Pleas, Grooms appealed a criminal sentence following a bench trial for a conviction of 1) criminal use of a communication facility, 2) possession with intent to deliver a controlled substance (cocaine), 3) possession of a small amount of cannabis and 4) possession of drug paraphernalia.

The Superior Court vacated the lower court's judgment of sentence and remanded the case to the trial court for reconsideration of probable cause.

Factual Background

Following the October 8, 2018 warrantless search of a locked and parked vehicle in a mall parking lot, Appellant was charged with the foregoing crimes. On May 3, 2019, Appellant filed a motion to suppress, alleging that the police lacked probable cause to search. On June 26, 2019, the trial court conducted a suppression hearing, at which the Commonwealth offered only the testimony of Detective Kenneth Platt, Swatara Township Police Department. N.T. Suppression, 6/26/19, at 4. Detective Platt testified that at the time of the incident in question, he was assigned to the department's patrol division, where he worked as a patrolman. He testified about his training and experience in detecting and identifying narcotics. Detective Platt recalled that, during his time as a patrolman, he would average 10-15 drug arrests per month. With respect to marijuana, he testified that it was "easily detectable" because of its strong odor. He further testified that based on his training and experience, he was able to distinguish between the odors of fresh and burnt marijuana:

> I would say that the – how strong the odor is, the – just how strong the odor is, whether it's fresh, it has a fresh smell to it. Because it's so distinct, it smells like marijuana where when it's burnt it has a different smell to it. . . . [O]ther than the fact it's marijuana, I don't have a good descriptor to give you.

Recalling the specific events of Monday, October 8, 2018, Detective Platt testified:

> I was working the capacity of a patrolman on that day. Lieutenant Krahling and I met at the Harrisburg Mall to conduct a foot patrol through the mall. It's common practice for us to do foot patrol through the mall parking lots for several reasons, one, the Harrisburg Mall parking lot is a high-drug area for [sic] us for whether it be use or transactions as well as we make numerous firearms violations arrests in those parking lots, but also as a service to the community. You know, we'll leave notes, Hey, your purse is in plain view or, you know, we've come across children left in the car. So it's common practice for us to walk through that lot – through the lot at the mall.

Detective Platt testified that, on the day of and just prior to the incident at bar, he and Lieutenant Krahling had made an arrest for marijuana three rows over from Appellant's vehicle in that parking lot. Thereafter, they walked in the parking lot until they detected an odor of marijuana coming from Appellant's vehicle. Detective Platt described:

> [A]s we proceeded west through the parking lot, Lieutenant Krahling was just a little bit ahead of me. When he walked past a black Mercedes Benz R350, kind of like a station wagon looking vehicle, at that time as he walked past, he detected the odor of marijuana in the air. And he called me over and said, Hey, I smell weed over here. And I walked over to it in that area and then began smelling, like, at the seams of the door. So I also detected the odor of fresh marijuana coming from the black Mercedes.

Detective Platt relayed that when Lieutenant Krahling initially smelled the odor of marijuana,

he was "at the front of the black Mercedes." Upon confirming the odor of fresh marijuana, Detective Platt testified that they shined their flashlights into the vehicle to observe any contraband in plain view. According to Detective Platt, they saw nothing. He further testified that the vehicle was locked. At that point, according to Detective Platt, they retrieved their lockout tool to unlock the vehicle. In explaining why they used the lockout tool, Detective Platt testified that:

> . . .[w]e didn't have anybody near the vehicle or a contact number for the owner of the vehicle, so we utilized it to unlock the vehicle, conduct our search.

The officers claimed that "[O]nce the doors were unlocked, the odor of fresh marijuana was stronger." The officers began searching the vehicle. Inside the vehicle, Lieutenant Krahling located two bags that contained marijuana and a marijuana-filled cigar. They also recovered a bag containing 18.4 grams of crack cocaine and a bag containing 3.8 grams of ecstasy pills. Ultimately, the officers came into contact with the defendant/appellant who was in possession of the keys to the vehicle and he "accepted ownership of the marijuana, crack cocaine, and ecstasy pills recovered from the vehicle."

At the Trial Court

Appellant filed a motion to suppress the evidence which the trial court denied. The trial court applied a "per se, bright line rule [that] an 'odor [of cannabis] alone may establish probably cause [to search the vehicle]." Based on this rule, the trial court found the officers had probable cause to search the vehicle.

The Appeal

Before the Superior Court on appeal, the single issue on appeal was the denial of the motion to suppress when the officers effectuated a warrantless, non-exigent entry into the vehicle without appellant being present and based solely on the odor of cannabis.

At the core:

> Appellant argued that the officers' warrantless search of his vehicle was illegal because they lacked probable cause. In support of this, the appellant argued that the mere odor of fresh cannabis, without more, was insufficient to sustain a finding of probable cause. Appellant pointed out that this position is consistent with Pennsylvania case law and that the *"per se"* rule in the state for probably cause was "necessarily has been diluted by the enactment of the Pennsylvania's Medical Marijuana Act (MMA)"

The MMA was enacted on May 17, 2016 and:

> provides for a system through which individuals suffering from one of 17 "serious medical conditions" (e.g., cancer, post-traumatic stress disorder, HIV/AIDS, epilepsy, and Parkinson's disease) can obtain and use medical marijuana for treatment. It governs the growth, processing and dispensing of medical marijuana to eligible individuals. (https://www.hh-law.com/Employment-and-Labor-Law/Medical-Marijuana/)

The Smell of Cannabis and the So-Called Bright Line Test for Probable Cause

The court went through a thorough review of the many cases finding similarities and distinguishing facts. But as to the court's previous decision in *Commonwealth v. Stoner*, 344 A.2d 633 (Pa. Super. 1975) became a key focus where the sole issue on appeal was the warrantless search of the trunk of a car while stopped on the highway [which was illegal] and the Fourth Amendment of the U.S. Constitution's prohibition on unreasonable searches and seizures. While the cannabis in question was in "plain view" to the officer, the court found that view alone wasn't the sole basis for probable cause to search the car without a warrant—the smell of cannabis coming from inside the car might too provide probable cause to so search the vehicle.

As such, the court held that its decision in *Stoner* was *not* based on any so-called bright line rule for odor along to provide probable cause to justify a warrantless search. However, the court found that even if arguendo, the smell alone might provide the probable cause to search:

> . . .with the passage of the MMA, the use of marijuana in specified forms is now legal for medicinal use which might include the vaping of dry leaf marijuana.

The court went on to state that:

> Since the mere smell of burnt marijuana now *does not always* establish an illegal use. . . while odor certainly may be a contributing factor to establish probable cause. . .*odor along* may not always be sufficient. (emphasis added)

In the end the court found that:

> It is precisely because the police cannot discern lawful from unlawful conduct by the odor of marijuana alone that the police may need to rely on other circumstances to establish probable cause to believe that the possession of marijuana detected by that odor is criminal. (Citing to *Commonwealth v. Barr*, 240 A.3d 1263, 1274 (Pa. Super. 2020).)

The court, putting all the facts and case law together decided:

> In sum, and as discussed, the police here detected the smell of marijuana coming from an unoccupied, locked, and legally parked vehicle. Consistent with *Barr*, the enactment of the MMA, and the rationale set forth in *Hicks*, we conclude that the odor of marijuana alone does not always establish probable cause. Rather, it is a factor that may contribute to a finding of probable cause when assessed under the totality-of-the-circumstances test. The trial court in this case erred in applying a *per se* rule for establishing probable cause. It anchored its conclusion that the police officers possessed probable cause to search Appellant's vehicle—which was unoccupied, locked, and legally parked in a mall parking lot—solely on the odor of marijuana emanating therefrom. Accordingly, we are constrained to vacate Appellant's judgment of sentence, reverse the order denying Appellant's suppression motion, and remand this matter to the trial court for proceedings consistent with this decision. On remand, the trial court shall determine on the existing record and consistent with this Opinion, whether the police officers relied on, or were influenced by, any additional factors beyond the smell of marijuana, to establish probable cause to execute a warrantless search of Appellant's vehicle.

Conclusion and Implications

In this case the Superior Court, was "constrained" to conclude that the MMA did impact the nature of law enforcement smelling cannabis in a locked vehicle. While at one time there might have been a bright line, *per se* rule that such smells provided probable cause to search a vehicle without a warrant, that is no longer the case. Odor has now become one contributing factor in determining probable cause. The Superior Court remanded the case to the trial court for just such a determination on the facts before it. The court's opinion is available online at: http://www.pacourts.us/assets/opinions/Superior/out/j-a22032-20o%20-%20104698090128344797.pdf#search=%22keith%20edward%20grooms%22 (R. Schuster)

CANNABIS LAW™
& REGULATION REPORTER

Cannabis Law & Regulation Reporter
Argent Communications Group
P.O. Box 1135
Batavia, IL 60510-1135

CHANGE SERVICE REQUESTED

FIRST CLASS MAIL
U.S. POSTAGE
PAID
AUBURN, CA
PERMIT # 108