
STATE OF NEW JERSEY
Plaintiff-Respondent,
- v -
EDWARD R. FORCHION,
Defendant-Appellant

: SUPREME COURT
: OF NEW JERSEY
: DOCKET NO. 076425
:
: CRIMINAL ACTION
:
: ON PETITION FOR
: CERTIFICATION FROM A
: FINAL JUDGMENT OF THE
: SUPERIOR COURT OF NEW
: JERSEY, APPELLATE
: DIVISION
:
: SAT BELOW:
:
: HON. CARMEN MESSANO,
: P.J.A.D.
: HON. MARGARET HAYDEN,
: J.A.D.
: HON. THOMAS SUMNERS,
: J.A.D.

BRIEF ON BEHALF OF *AMICI* NATIONAL ORGANIZATION FOR THE
REFORM OF MARIJUANA LAWS (NORML) AND COALITION FOR
MEDICAL MARIJUANA - NEW JERSEY, INC. (CMMNJ), IN
SUPPORT OF PETITION FOR CERTIFICATION

Law Offices of Allan Marain
100 Bayard Street
P.O. Box 1030
New Brunswick, NJ 08903
Telephone: 732-828-2020
Allan@MarainLaw.com
File No. 7516
Attorneys for Amici NORML and
CMMNJ

On the Brief:

Allan Marain
Attorney ID. 016001976

TABLE OF CONTENTS

STATEMENT OF THE MATTER	1
QUESTION PRESENTED	2
ERRORS COMPLAINED OF	2
WHY CERTIFICATION SHOULD BE GRANTED	2
COMMENTS WITH RESPECT TO APPELLATE DIVISION OPINION .	9
CONCLUSION	9

TABLE OF AUTHORITIES

CASES CITED

Franco v. Davis, 51 N.J. 237 (1967)	2, 9
State v. Tate, 102 N.J. 64 (1986)	2, 3, 5-9

STATUTES CITED

Compassionate Use Medical Marijuana Act (CUMMA)	1, 5-7
N.J.S. 2C:3-2a	2, 3, 6
N.J.S. 24:6I-1	1, 5
N.J.S. 24:6I-2 (e)	8
N.J.S. 24:6I-3	5, 6
N.J.S. 24:6I-10	7

STATEMENT OF THE MATTER

A Burlington County jury found Edward R. Forchion ("Forchion") guilty of possession of marijuana. Both Forchion and the State stipulated that Forchion in fact possessed the marijuana, and that he was a medical marijuana patient, certified as such by the State of California.

The trial court allowed Forchion to inform the jury of his status as a California medical marijuana patient only as that fact related to his contention that the marijuana was intended strictly for personal use, as opposed to intention to distribute, also charged in the indictment. Firmly excluded were proofs concerning Forchion's precise medical condition, and his medical needs as they relate to marijuana.

A revolution in medical acceptance of marijuana has occurred over the past thirty years. *Amici* assert that the time has come to reexamine case law that (now) limits possession of marijuana to specific conditions and limitations contained in New Jersey's Compassionate Use Medical Marijuana Act (CUMMA), N.J.S. 24:6I-1 et.

seq. More particularly, *Amici* ask this Court to modify or overrule the four to three opinion of *State v. Tate*, 102 N.J. 64 (1986) that barred the necessity defense for possession of marijuana for medical purposes.

QUESTION PRESENTED

Should the holding in *State v. Tate*, 102 N.J. 64 (1986), barring the necessity defense for possession of marijuana for medical purposes, be modified or overruled?

ERRORS COMPLAINED OF

With respect to the issue that *Amici* seek to raise, the courts below committed no error. They were constrained to follow the principles that this Court set forth in *Tate*. See *Franco v. Davis*, 51 N.J. 237, 238 (1967).

WHY CERTIFICATION SHOULD BE GRANTED

New Jersey's doctrine of medical necessity is defined in N.J.S. 2C:3-2a:

Necessity. Conduct which would otherwise be an offense is justifiable by reason of necessity to the extent permitted by law and as to which neither the code nor other statutory

law defining the offense provides exceptions or defenses dealing with the specific situation involved and a legislative purpose to exclude the justification claimed does not otherwise plainly appear.

Three decades ago, in its four to three decision, this Court held in *State v. Tate*, 102 N.J. 64 (1986), that the necessity doctrine defined by N.J.S. 2C:3-2(a) provided no defense for possessors of marijuana, regardless of medical need. The world of 2015 is utterly different from the one in which this Court decided *Tate*.

Since 1996, twenty-three states and the District of Columbia have legalized medical use of marijuana. New Jersey is one of them. Indeed, N.J.S. 24:6I-2c provides:

Although federal law currently prohibits the use of marijuana, the laws of Alaska, California, Colorado, Hawaii, Maine, Michigan, Montana, Nevada, New Mexico, Oregon, Rhode Island, Vermont, and Washington permit the use of marijuana for medical purposes, and in Arizona doctors are permitted to prescribe marijuana. New Jersey joins this effort for the health and welfare of its citizens[.]

Fifteen states have passed laws allowing for the use of cannabidiol (CBD). CBD is the oil derived from the non-psychoactive ingredients found in marijuana. It is often used to treat patients with epilepsy. Currently, four states and the District of Columbia have legalized small amounts of marijuana for recreational purposes.

Social attitudes about marijuana prohibition have changed. In 1969, the first Gallup poll found that just twelve percent of Americans favored legalizing marijuana use. A majority of Americans (53%) today believe that marijuana should be legalized. Among the fifty-three percent who believe marijuana should be legal, forty-one percent cite marijuana's health benefits as the main reason for their support. Pew Research Center, *In Debate Over Legalizing Marijuana Disagreement Over Drug Dangers* (April 15, 2015), <http://www.people-press.org/2015/04/14/in-debate-over-legalizing-marijuana-disagreement-over-drugs-dangers/>.

New Jersey itself adopted its "New Jersey

Compassionate Use Medical Marijuana Act" (CUMMA), N.J.S. 24:6I-1 et seq., in 2010. CUMMA authorizes possession and use of marijuana for medical purposes. But CUMMA's authorization, by its own terms, is incomplete. These are all developments that the *Tate* Court did not, and could not, consider.

In adopting CUMMA, the New Jersey Legislature deferred consideration of numerous conditions that benefit from use of medical marijuana. In defining "Debilitating medical condition," N.J.S. 24:6I-3 contemplated that the administrative process would address "any other medical condition or its treatment that is approved by the department by regulation".

Conditions reported in respected medical literature for which regulations were never considered include Alzheimer's Disease; chronic pain, severe nausea or vomiting, cachexia, or wasting syndrome when not associated with conditions listed in N.J.S. 24:6I-3; diabetes mellitus; dystonia; fibromyalgia; gastrointestinal disorders; gliomas; hepatitis C; Huntington's disease; hypertension; incontinence;

methicillin-resistant *Staphylococcus aureus* (MRSA); osteoporosis; Parkinson's disease; post-traumatic stress; pruritus; rheumatoid arthritis; sleep apnea; and Tourette's Syndrome. Yet now, almost six years after CUMMA's adoption, the Department has approved not a single additional condition. Nor is any such approval on the horizon.

The Legislature never contemplated that the Executive Branch would limit CUMMA as it has. Certification is needed to address this administrative breakdown that the Legislature could not have foreseen. The refusal of the Executive Branch to implement CUMMA with respect to debilitating conditions not covered as initially passed, combined with medical and social developments since this Court decided *Tate*, call for a fresh look at the applicability of N.J.S. 2C:3-2a.

Beyond the administrative failure, non-residents regularly travel to New Jersey for vacations, business, or family visits. Others just pass through. But in defining "Qualifying patient" to be someone who is a resident of the State, N.J.S. 24:6I-3, the Legislature

never addressed the issue of non-residents whose medical conditions would readily qualify them to possess and use medical marijuana. They are excluded from the compassion that CUMMA offers. Worth mentioning is that the medical programs Arizona, Delaware, Maine, Michigan, and Rhode Island recognize out-of-state patients.

N.J.S. 24:6I-10 limits the amount of medicinal marijuana that an alternative treatment center may dispense to two ounces per month. Admittedly, Mr. Forchion's 454.7 grams makes this less than the ideal case¹. But New Jersey's patients, and its infirm visitors, should not be forced to wait another twenty-nine years for the "ideal" case to arrive.

The same profound public interests that existed when this Court decided *Tate* continue to exist. One public interest consists of enabling persons with need for medicinal marijuana to be able to meaningfully address their infirmities without incurring the wrath

¹Two ounces equals 56.7 grams.

of the criminal justice system.

Another profound public interest consists of preserving limited criminal justice resources for those events that constitute a true threat to the orderly functioning of society.

CUMMA Section 2(e) provides:

Compassion dictates that a distinction be made between medical and non-medical uses of marijuana. Hence, the purpose of this act is to protect from arrest, prosecution, property forfeiture, and criminal and other penalties, those patients who use marijuana to alleviate suffering from debilitating medical conditions, as well as their physicians, primary caregivers, and those who are authorized to produce marijuana for medical purposes.

One way or another, the changes indicated above, singly and cumulatively, would have influenced the *Tate* Court. These changes could have produced the opposite outcome. Alternately, these changes might have reinforced the outcome then reached. Regardless of the direction in which these changes would have influenced the *Tate* Court, this is an issue whose time has come.

COMMENTS WITH RESPECT TO APPELLATE DIVISION OPINION

As indicated above, precedent from this Court required the Appellate Division (as well as the Law Division) to reject Mr. Forchion's assertion of medical necessity, *Franco*, supra. Were the Appellate Division writing on a clean slate, its holding might well have been different.

CONCLUSION

Given the *Tate* precedent, the courts below were constrained to hold as they did. Unfortunately, those holdings reflect a cruel and inhumane interpretation of the doctrine of necessity. That interpretation should be modified or overruled. At the very least, it should be reexamined. Towards that end, this Court should grant Certification to consider afresh its previous four to three holding in *State v. Tate*.

Respectfully submitted,

Law Offices of Allan Marain

By: s/Allan Marain
Allan Marain