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Privileges and Immunities, Criminal Court New York County, People v. Moore

PRIVILEGES AND IMMUNITIES

U.S. CONST. art. IV, § 2, cl. 1:

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States

CRIMINAL COURT

NEW YORK COUNTY

People v. Moore[1]
(decided January 25, 1996)

Defendant, John Moore, was charged with criminal sale of marihuana in the fourth degree[2] and unlawful possession of marihuana.[3] Moore moved to dismiss the charges in the interest of justice,[4] asserting that the marihuana laws of the State of New York violated the Privileges and Immunities Clause[5] of the Federal Constitution.[6] The Criminal Court of the City of New York, New York County, denied defendant's motion to dismiss

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1. 167 Misc. 2d 994, 637 N.Y.S.2d 652 (N.Y. Crim. Ct. 1996).

2. N.Y. PENAL LAW § 221.40 (McKinney 1989). Section 221.40 provides in pertinent part: "A person is guilty of criminal sale of criminal sale of marihuana in the fourth degree when he knowingly and unlawfully sells marihuana except as provided in section 221.35 of this article . . . ." *Id.*

3. N.Y. PENAL LAW § 221.05 (McKinney 1989). Section 221.05 provides in pertinent part: "A person is guilty of unlawful possession of marihuana when he knowingly and unlawfully possesses marihuana . . . ."

4. *Moore*, 167 Misc. 2d at 996, 637 N.Y.S.2d at 653. Defendant moved to dismiss under CPL § 170.40 which enumerates ten factors to be considered "individually and collectively" in determining dismissal. *Id.* at 997, 637 N.Y.S.2d at 654-55. *See* N.Y. CRIM. PROC. LAW § 170.40 (McKinney 1993).

5. U.S. CONST. art. IV, § 2, cl. 1. This section provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." *Id.*

6. *Moore*, 167 Misc. 2d at 1002, 637 N.Y.S.2d at 658.

in the interest of justice on the grounds that the defendant failed to provide the court with factors that were sufficiently compelling to warrant such a dismissal.[7] The court also denied the defendant's constitutional claim, holding that there is no fundamental constitutional right to possess or sell marihuana.[8]

Moore suffered from Acquired Immune Deficiency Syndrome [hereinafter "AIDS"]. In his motion papers, the defendant asserted that he had tried all of the conventional methods of medical treatment in coping with the debilitating disease, but that these methods failed to alleviate the pain and suffering as effectively as did marihuana.[9] The defendant believed that his symptoms of nausea, decreased appetite, chronic pain and insomnia subsided greatly after the ingestion of marihuana.[10] As a result of his experimentations, Moore set out on a "mission of mercy" to help those who similarly suffered by distributing marihuana to those who requested it for medicinal purposes.[11] As the number of requesters steadily increased, Moore established a "medical marihuana buyer's club."[12] The "club" distributed marihuana at wholesale prices to those sufferers who could provide documentation of their illness.[13]

Moore was arrested in Washington Square Park in August 1995 after a police officer observed him selling a bag of marihuana to a "client."[14] It was later discovered that Moore was in

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7. *Id.*, 637 N.Y.S.2d at 657-58.

8. *Id.* at 1003, 637 N.Y.S.2d at 658.

9. *Id.* at 996, 637 N.Y.S.2d at 654.

10. *Id.*

11. *Id.* Expert testimony offered by the defendant supported the claim that marihuana has the beneficial effects of suppressing nausea and increasing the appetite of those suffering from AIDS or those undergoing chemotherapy treatments, thereby allowing such sufferers to nourish themselves. *Id.* at 995, 637 N.Y.S.2d at 653-54.

12. *Id* at 996, 637 N.Y.S.2d at 654.

13. *Id.* Defendant was neither a physician nor a pharmacist. The court looked to medical literature that emphasized that the marihuana "must be administered under appropriate medical supervision." *Id.* at 998, 637 N.Y.S.2d at 655.

14. *Id.* at 995-96, 637 N.Y.S.2d at 653-54.

possession of eight bags of marihuana at the time.[15] Defendant argued that the court should have granted his motion to dismiss in the interest of justice because his efforts were part of a "mission of mercy" to help others who suffered from debilitating medical conditions.[16] Additionally, the defendant challenged the constitutionality of the state's marihuana laws[17] arguing that the privileges and immunities granted to him by the United States Constitution had been violated.[18]

Initially, the court evaluated its power to make a determination to dismiss the case in the interest of justice.[19] The statute cited by defendant in his motion papers provided for the dismissal of a charge if "the existence of some compelling factor, consideration, or circumstance clearly demonstrat[ed] that conviction or prosecution of the defendant upon such accusatory instrument or count would constitute or result in injustice."[20] The court found, through the analysis of each of the factors enumerated in the statute,[21] that there was no compelling factor to warrant dismissal of the charges in the interest of justice.[22]

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15. *Id.* at 996, 637 N.Y.S.2d at 654.

16. *Id.*

17. *Id.* at 1002, 637 N.Y.S.2d at 658.

18. *Id.*

19. *Id.* at 996, 627 N.Y.S.2d at 654.

20. *Id.* (quoting N.Y. CRIM. PROC. LAW § 170.40(1) (McKinney 1993)).

21. N.Y. CRIM. PROC. LAW § 170.40(1). The factors listed in CPL § 170.40 for the court to consider are:

(a) the seriousness and circumstances of the offense;
(b) the extent of harm caused by the offense;
(c) the evidence of guilt, whether admissible or inadmissible at trial;
(d) the history, character and condition of the defendant;
(e) any exceptionally serious misconduct of law enforcement personnel in the investigation, arrest and prosecution of the defendant;
(f) the purpose and effect of imposing upon the defendant a sentence authorized for the offense;
(g) the impact of a dismissal on the safety or welfare of the community;
(h) the impact of a dismissal upon the confidence of the public in the criminal justice system;
(i) where the court deems it appropriate, the attitude of the complainant or victim with respect to the motion;

In its decision, the court recognized the limit of its discretion.[23] As expressed in the matter of *People v. Litman*,[24] "[a] trial court's discretion to dismiss in the interest of justice is an undertaking to be sparingly exercised."[25] In support of its decision to uphold the criminal charges, the *Moore* court recognized that although the defendant had no criminal record, the legislature had statutorily expressed its consideration of the offense to be "serious."[26] Additionally, the court viewed defendant's position as a leader of a "medical marihuana buyer's club," his lack of remorse, his belief that his actions were morally justified, and his failure to indicate an intent to cease the activity, as being unjustified.[27]

(j) any other relevant fact indicating that a judgment of conviction would serve no useful purpose.

Id.

22. *Moore*, 167 Misc.2d at 1002, 637 N.Y.S.2d at 657-58.

23. *Id.* at 996, 637 N.Y.S.2d at 654.

24. 99 A.D.2d 573, 470 N.Y.S.2d 940 (3d Dep't 1984).

25. *Id.* at 574, 470 N.Y.S.2d at 941 (citing People v. Belkota, 50 A.D.2d 118, 120, 377 N.Y.S.2d 321, 323 (4th Dep't 1975)). *Litman* involved a wife who, as office manager of her husband's business, withdrew checks from her husband's mail in a "carefully contrived scheme to steal." *Id.* at 574, 470 N.Y.S.2d at 940-41.The court found that, notwithstanding the defendant being a mother, having a good reputation in the community, and lacking a criminal record, an "unusual circumstance cr[ying] out for fundamental justice" did not exist. *Id.* at 573-74, 470 N.Y.S.2d at 940-41.

26. *Moore*, 167 Misc. 2d at 997-98, 637 N.Y.S.2d at 655. Since the offense under which defendant was charged was punishable by up to one year imprisonment, it was considered a "serious offense." *Id.* The penalty *imposed* for a particular offense is the relevant factor in determining whether an offense should be classified as either "serious" or "petty." Duncan v. Louisiana, 391 U.S. 145, 159-62 (1968) (emphasis added). In *Duncan*, appellant was convicted of the offense of "simple battery" which carried a possible punishment of up to two years imprisonment and a $300.00 fine. *Id.* at 146. Although Duncan was sentenced to serve only 60 days in the parish prison and pay a $150.00 fine, the Court found that, because of the punishment that *could have* been imposed, such offense should be classified as "serious" and not "petty" and therefore appellant was entitled to a jury trial. *Id.* at 161-62.

27. *Moore*, 167 Misc. 2d at 998-99, 637 N.Y.S.2d at 655-56. "[W]here the defendant has undertaken the unprescribed, unlicensed and unsupervised

After considering the defendant's constitutional claim, the court found that the claim lacked merit.[28] In *United States v. Maas*,[29] the District Court for the District of New Jersey found that the use of marihuana was neither an explicit nor implicit fundamental right protected by the Constitution.[30] The defendants in *Maas* argued that since it is scientifically unresolved as to whether the effects of marihuana are harmful, under the Ninth and Tenth Amendments[31] they cannot be prosecuted for a "victimless crime."[32] The defendants argued that the government must show a compelling state interest in support of the legislation in order to infringe upon their fundamental rights.[33] The court disagreed and failed to find a fundamental right to possess marihuana and, moreover, determined that the government was not required to support the challenged legislation with a "compelling state interest."[34] The *Maas* court found that as long as there is a "rational basis" for the legislation, its constitutionality will be upheld.[35] The rational basis test does not require scientific certainty, but rather a mere "reasoned justification" by the

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distribution of an illegal drug, the Court is reluctant to find a compelling circumstance warranting dismissal." *Id.* at 656.

28. *Id.* at 1002, 637 N.Y.S.2d at 658.

29. 551 F. Supp. 645 (D.N.J. 1982).

30. *Id.* at 646-47.

31. U.S. CONST. amend. IX. The Ninth Amendment provides in pertinent part: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." *Id.* U.S. CONST. amend. X. The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." *Id.*

32. *Maas*, 551 F. Supp. at 646. In *Maas*, the defendants were arrested while aboard a vessel which was allegedly stopped by Coast Guardsmen for a routine document check when 543 bales of marihuana were discovered (approximately 13 tons), and confiscated. *Id.*

33. *Id.*

34. *Id.* at 647.

35. *Id.* (citing United States v. Carolene Products Co., 304 U.S. 144, 152 (1938)). *See* United States v. Kiffer, 477 F.2d 349, 352-53 (2d Cir. 1973) ("[c]ourts usually review challenged legislative acts with the understanding that they are presumed valid and will be so found unless it is shown that the statute in question bears no rational relationship to a legitimate legislative purpose.")

legislation for its decision.[36] The *Maas* court found a rational basis for the legislation, and upheld its constitutionality.[37] Furthermore, the court found that the debate over whether marihuana is or is not harmless is a task for Congress, and consequently, the court chose not to violate the separation of powers by interfering.[38]

It is with this presumption of validity that courts review challenged legislation. This presumption applies unless the court finds that there is no rational relationship between the challenged statute and the legislative purpose.[39] In *United States v. Gaertner*,[40] the defendant challenged the constitutionality of the federal marihuana statute under which he was prosecuted.[41] The court upheld the statute by finding that Congress's classification was rational.[42] The court noted that those cases requiring a stricter standard "involve an infringement of a right explicitly enunciated in the Constitution or otherwise recognized as fundamental."[43] Having determined that there is no fundamental constitutional right to the possession or use of marihuana,[44] the *Moore* court followed the lead of other courts and was unwilling to disturb Congress's prohibition of its possession or sale.[45]

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36. *Maas*, 551 F. Supp. at 648. The *Maas* court commented that if the defendants were able to show the harmlessness of marihuana to its users and the community, the court would then be able to declare the legislation unconstitutional. *Id.* at 647-48.

37. *Id.* at 648.

38. *Id.* at 645.

39. *Moore*, 167 Misc. 2d 994, 1002-03, 637 N.Y.S.2d at 658.

40. 583 F.2d 308 (7th Cir. 1978).

41. *Id.* at 312. In *Gaertner*, the defendant pled "guilty to four counts of interstate travel to promote a business involving a controlled substance, in violation of 18 U.S.C. §§ 1952(a)(3), 2; and ple[d] guilty to six counts of possession of marihuana with intent to distribute, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2." *Id.* at 310.

42. *Id.* at 312.

43. United States v. Kiffer, 477 F.2d 349, 352 (2d Cir.), *cert. denied*, 414 U.S. 831 (1973).

44. *Maas*, 551 F. Supp. at 646.

45. *Moore*, 167 Misc. 2d at 1003, 637 N.Y.S.2d at 658. *See also* People v. Shepard, 50 N.Y.2d 640, 409 N.E.2d 840, 431 N.Y.S.2d 363 (1980) holding:

When confronted with a question of constitutionality concerning marihuana laws, courts routinely presume that the challenged legislative acts are valid. This view adopts the position that until it is proven that marihuana is not harmful to the person in its ingestion, or to society, the legislative acts are deemed constitutional and will remain in force. As long as a rational relationship can be found to exist between the challenged legislative acts and the intentions of Congress, the acts will not be declared unconstitutional.

> [t]he statute now before us represents the current and considered judgment of an elected Legislature acting on behalf of the people of this State . . . . Nothing would be more inappropriate than for us to prematurely remove marihuana from the Legislature's consideration by classifying its personal possession as a constututionally protected right. The sphere within which we may properly declare a legislative act unconstitutional is extremely limited and clearly does not emcompass this case.

Id. at 645-46, 409 N.E.2d at 843, 431 N.Y.S.2d at 366.

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