

In the
Supreme Court
of the
State of Ohio

STATE OF OHIO,

Plaintiff-Appellant,

v.

WILLIAM NUCKLOS, M.D.,

Defendant-Appellee.

ON APPEAL FROM THE CLARK COUNTY COURT OF APPEALS
2ND APPELLATE DISTRICT, COURT OF APPEALS CASE NO. 06-CA-23

**MEMORANDUM IN RESPONSE OPPOSING
JURISDICTION REQUESTED BY APPELLANT**

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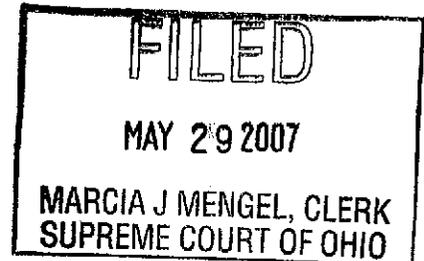


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MEMORANDUM IN RESPONSE

I. The State's argument that Dr. Nucklos opposes.

The State's two-fold argument to this Court – and that we oppose - may be fairly stated as follows:

1. **The Jury Instruction**. The State claims that it did not have to prove a critical element of the crime, that is, that the Accused intended to act outside the course of professional medical practice, and that it was constitutionally permissible for the trial court to shift that burden of proof to the Accused, to require him instead to prove that he was providing “bona fide” treatment.

2. **The Similar Act Evidence**. The State claims that it was rightly permitted to admit “similar act” evidence of uncharged conduct encompassing the patient records of over 200 hundred other patients whom the Accused treated, as well as three undercover officers posing as pain patients, even though the Accused was only charged with unlawfully over-prescribing medication for three (3) patients.

II. The basis for Dr. Nucklos' opposition.

In compliance with Rule III, Section 2 (B) of the Rules of Practice of the Supreme Court of Ohio, we assert the following in this Memorandum in Response, in opposition to the State's Memorandum:

1. **There is no constitutional question – substantial or otherwise – invoked by the State's Memorandum in Support of Jurisdiction; however, were this Court to adopt the State's argument, that would create “a constitutional question”.**

The State invoked no constitutional question in its Memorandum in Support of Jurisdiction. Accordingly, there is nothing that requires our response as to this aspect of the

State's request. If this Court did, however, adopt the argument that the State makes in its Memorandum, that is, that the Accused had the burden of proof, rather than the State, then that would involve a fundamental violation of due process that the Court of Appeals sought to cure by its decision reversing Dr. Nucklos' convictions.

2. The case is not of "public or general interest".

The State argues that the Court of Appeals decision below "has taken away two of the sharpest arrows in a prosecutor's quiver," in reliance on its two-fold argument (summarized at the outset of this Memorandum). *See also* State's Memorandum, at p. 1, 1st par., also p. 5, par. 1.

Quibbles about the State's archery metaphor aside, the State's argument is not on behalf of the "public interest"; rather, it is against the public interest – as the State's arguments contradict relevant constitutional, case and statutory authority.

First, let us briefly consider its burden-shifting argument.

The State tells this court that it must consider its arguments in a full blown appeal because it has "conflicting guidance as to who bears the burden of proof." *See* State's Memorandum, at 1, 2nd par.

But the State, by David Rowland, Special Assistant Prosecuting Attorney, suffered from no such "confusion" when Mr. Rowland discussed this jury instruction with the trial court judge.

Mr. Rowland informed the trial court before it gave the offending jury instruction that there was a difference between the "definition" of what constituted "bona fide treatment", and characterizing "bona fide treatment" as an "affirmative defense".

More precisely, Mr. Rowland told the trial court: “I have the concern about it being an affirmative defense as opposed to a simple definitional matter” (underscoring supplied) (Tr. 1796).

Mr. Rowland drew the trial court’s attention to his “concern” and advised the trial court of the relevant case authority: “I do not recall that [affirmative defense] being part of the [*State v. McCarthy* [, 65 Ohio St.3d 589, 605 N.E.2d 911 (1992)] decision...” (Tr. 1795).

Mr. Rowland was quite correct – *McCarthy* did not make the phrase, “bona fide treatment,” an “affirmative defense”.

In *State v. McCarthy*, 65 Ohio St. 3d 589, 605 N.E. 2d 911 (1992), the Court hearkened back to its earlier decision, *State v. Sway*, 15 Ohio St. 3d 112, 115, 472 N.E. 2d 1065, 1068 (1984) defining the offense with this phrase, “bona fide treatment,” as an element of the offense:

“[A] physician who unlawfully issues a prescription for a controlled substance and not in the course of the bona fide treatment of a patient is guilty of selling a controlled substance in violation of R.C. 2925.03.”

In *McCarthy*, this Court made it clear that the term, “bona fide treatment”, related directly to “whether [the defendant’s] actions constituted criminal conduct under the law.” *State v. McCarthy, supra*, 65 Ohio St. 3d, at 594.

This Court stated: “Criminal intent must be shown in order to support a conviction thereunder.” *Id.*

This Court concluded that “the term ‘bona fide’ in this context to be akin to such legal important terms as ‘knowingly’, ‘intentionally’ or ‘purposefully’, which are otherwise familiar to lay persons, but which are also universally defined in jury instructions in criminal prosecutions throughout the country.” *Id.*

The State’s proposed instruction in the trial court stated:

“If you find that the defendant physician authorized prescriptions for a controlled substance not in the course of the legitimate treatment of a patient, and not having a bona fide or good faith intention to practice medicine, you must find that defendant acted outside the scope of Chapters 4729, 4731, and 3719 of the Ohio Revised Code.” (Dkt. No. 37).

The Court itself commented that “bona fide” was “duplicative” as this was “one of the elements that the State’s required to prove...” (Tr. 1798).

It is a remarkably sophistic pirouette therefore for the State, in its Memorandum, to treat this term, “bona fide,” as an “affirmative defense” when this Court’s “guidance” in *Sway* and *McCarthy* was to the contrary.

It would be “charitable” to describe the State’s failure to make any mention of either *Sway* or *McCarthy* in its Memorandum as an “oversight,” when *McCarthy* was invoked by the State in its colloquy with the trial court, discussed by the parties at oral argument in the Court of Appeals, and *Sway* was cited by the Court of Appeals when it concluded in its decision that this jury instruction was fatally defective. *See State v. Nucklos*, __ N.E.2d __, 2007 W.L. 706811 (Ohio App. 2 Dist., March 9, 2007);

It is entirely misleading for the State to argue to this Court: “Until now, courts in Ohio have treated this ‘doctor’s exception’ as an affirmative defense with the burden on the doctor to prove that his conduct is within the exception.” *See State’s Memorandum*, at 1, par. 2. The State cited not a single case where that was true – as there is no such case authority.

Second, the State’s other argument is that, following the Court of Appeals’ decision in this case, similar act evidence may only be admitted into evidence if charged.

The State made this over-arching claim:

“The only way to get such evidence admitted [after this Court of Appeals’ decision] will be to indict every possible count, resulting in large, unwieldy cases and judicial inefficiency” (emphasis supplied). *See* State Memorandum, at p. 1, par. 3; compare State Memorandum, at p. 5, par.2.

In fact and truth, the Court of Appeals decision adhered strictly to the Ohio Rules of Evidence and the Revised Code provisions that allow evidence of uncharged “bad acts.”

Indeed, the Court of Appeals’ decision concluded that some uncharged “bad conduct” was admissible at the re-trial of Dr. Nucklos (a civil judgment – to demonstrate “motive”, a loaded shotgun – as *res gestae*), while excluding other “bad conduct” evidence.

It is the hundreds of other patients’ files and the three *faux* pain patients that is the focus of the State’s petition to this Court.

But these other bad acts offered by the State were excluded because they impermissibly suggested that the Accused had a propensity to act in a certain manner, and otherwise failed to satisfy the strictures of Rule 404(b).

3. Leave to appeal this felony case should not be granted for the reasons stated in the well-considered opinion of the Court of Appeals for the Second District.

The State based its request to this Court on “public interest” and, apparently, for no other reason; the Court of Appeals’ decision gave good and sufficient reason why no leave to appeal need be granted in this case.

III. Statement of Case

1. The charge. Dr. William Nucklos was indicted in a 20-count indictment in October 2004, charging him with ten counts in violation of Section 2925.03 of Ohio’s Revised Code

Annotated, the so-called “trafficking offenses counts”, and ten counts in violation of Section 2925.23 of Ohio’s Revised Code Annotated, the so-called “illegal processing counts”.

2. The trial and sentence. On February 16, 2006, following a jury trial commencing on February 6, 2006, the jury returned a verdict of guilty on each of twenty counts, and the Court sentenced Dr. Nucklos on each of the first ten counts to serve consecutive two-year sentences. Thus, Dr. Nucklos was sentenced to twenty (20) years confinement in prison.

3. The Accused: Dr. Nucklos. Dr. William Nucklos, an African-American, 58, married, with three children, was a well-regarded physician, a graduate of Ohio State, with 29 years of medical experience.

4. The chronic pain patients – the focus of the twenty count Indictment. Dr. Nucklos had three (3) patients that he treated for chronic pain in his Springfield, Ohio office, over the course of ten visits and these pain patients are the exclusive legitimate focus of the criminal charges in this case:

a. Ms. Ramona Swyers had been shot with a 3030 deer rifle, the slug piercing her posterior right shoulder in the area of the thoracic spine, leaving her with 40% use of her right upper extremity. She had restricted use of her shoulder and claimed that she had constant, unremitting pain.

b. Darrin Briggs had three gunshot wounds to his left hand, had reconstructive surgery, and suffered from “pain inhibition weakness” and he claimed severe pain.

c. Billy Jo Booth had been in a head-on collision that seriously damaged her lower back, right hip, requiring multiple surgeries, and causing right lower extremity pain that she described as “severe”.

5. **Undercover agents posed as Chronic Pain Patients.** Unbeknownst to Dr. Nucklos, in that same period that he was seeing Ms. Swyers, Mr. Briggs and Ms. Booth, in 2001-2002, the State was sending in three undercover agents who pretended to have chronic pain. They were quite convincing – as the record below shows – and they were treated for their “apparent” chronic pain.

6. **The seizure of patients’ records.** In 2002, the State conducted a general search of Dr. Nucklos’ office, seizing everything from his medical office in Springfield, but not one of the hundreds of patients’ files or the treatment of any patient, other than the three identified above, resulted in any criminal charges against Dr. Nucklos. Only About 100 pages of the trial transcript are concerned with the three chronic pain witnesses, about 5% of the trial transcript; the remaining 1,900 pages of the trial transcript are devoted almost exclusively to uncharged bad acts, that are highly prejudicial, and irrelevant to any of the exceptions provided for in Rule 404(b), and more precisely, that means the evidence relating to the undercover agents, and all the other patients’ files, discussed at length by the State’s expert witness.

IV. Argument

A. THE TRIAL COURT FAILED TO INSTRUCT THE JURY CORRECTLY AS TO THE LAW

The trial court wrongly treated the question, whether Dr. Nucklos’ conduct fell within the accepted bounds of Ohio Revised Code Sections 3719.06 and 4731.052, as an “affirmative defense”.

Thus, the Court allocated the burden of production of evidence, and the burden of proof, to Dr. Nucklos.

Regarding the charge of drug trafficking, the trial court instructed the jury:

“If you find that the State proved beyond a reasonable doubt all the essential elements of trafficking in OxyContin, you will then go on to determine whether the defendant has established by a preponderance of the evidence the affirmative defense that he was a physician acting in the course of the bona fide treatment of patients. Judge’s Charge, Jury Trial, Tr. 1903.

Regarding the charges of illegal processing of drug documents, the Court instructed the jury in a similar fashion:

“If you find that the State proved beyond a reasonable doubt all the essential elements of illegal processing of drug documents, you will then go on to determine whether the defendant has established by a preponderance of the evidence the affirmative defense that he was a physician acting in the course of the bona fide treatment of patients.” *See* Judge’s Charge, Jury Trial, Tr 1906.

Whether an issue is an affirmative defense under Ohio law is governed by statute. *See* Ohio Rev. Code, Sec. 2901.05(C). But, it must be obvious from the outset how difficult it would be for any juror to reconcile the court’s contradictory directives.

The General Assembly has determined that an issue is an “affirmative defense” in two circumstances:

“(C) As used in this section, an "affirmative defense" is either of the following:

(1) A defense expressly designated as affirmative;

(2) A defense involving an excuse or justification peculiarly within the knowledge of the accused, on which he can fairly be required to adduce supporting evidence.” Ohio Revised Code, Sec. 2901.05 (C).

A careful review of the facts and law in this case demonstrates that the issue of whether Dr. Nucklos’ conduct fell within the accepted bounds of Ohio Revised Code Sections 3719.06 and 4731.052 is neither expressly designated an affirmative defense by statute, nor is it

“particularly within the knowledge of the accused, on which he can fairly be required to adduce supporting evidence.” See Ohio Rev. Code, Sec. 2901.05(C).

Furthermore, because the question of whether Dr. Nucklos’ conduct fell within the conduct permitted by Chapters 3719, 4729, and 4731 of the Revised Code is essential to resolving whether or not Dr. Nucklos “knowingly” violated the statutes, that question is an essential element of the offenses charged, and may not be converted to an affirmative defense.

Dr. Nucklos was charged with ten counts of Trafficking in Drugs, in violation of Ohio Revised Code Sec. 2925.03, and ten counts of Illegal Processing of Drug Documents, in violation of Ohio Revised Code Sec. 2925.23(B).

In each and every count of the indictment, the grand jury charged that Dr. Nucklos’ conduct “was not in accordance with Chapters 3719, 4729, and 4731 of the Revised Code.”

Thus, the express language of the indictment allocates the burden of proof on this issue to the State, as the indictment charges that Dr. Nucklos’ conduct fell below the statutory requirements.

The burden is therefore on the State of Ohio to prove, beyond a reasonable doubt, that the conduct of any physician-defendant is not in accordance with the appropriate Chapters of the Ohio Revised Code before the physician may be convicted of a drug trafficking offense. See, Ohio Rev. Code, Sec. 2901.05(A) [“Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof for all elements of the offense is upon the prosecution.”].

In this case, the Court first required that the State of Ohio present evidence and carry its burden of proof:

“If you find that the defendant was not acting as a physician in the course of the bona fide treatment of a patient because he issued a prescription for some

reason or reasons other than a legitimate medical purpose, you must find that his conduct was not in accordance with Chapters 3719, 4729, and 4731 of the Ohio Revised Code.” See Judge’s Charge, Jury Trial, Tr. 1901.

But, the Court went on to recast that issue as an affirmative defense and to allocate the burden of proof on the issue to the defendant. See, Judge’s Charge, Jury Trial, TR: 1903, 1906.

In so doing, the trial court deprived Dr. Nucklos of a fair trial and due process of law. See Sixth and Fourteenth Amendments, US Const., Art. I, Sections 10 & 16, Ohio Const.

The Court has long held that the due process clause of the Sixth Amendment requires the government to prove each and every element of the offense beyond a reasonable doubt:

“Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” *In re Winship* 397 U.S. 358, at 364 (1970).

The State may not avoid its constitutional duty to prove its case beyond a reasonable doubt by simply recasting an element of the offense as an affirmative defense. *Mulaney v. Wilbur*, 421 US 684 (1981).

In order for an affirmative defense to constitutionally allocate the burden of proof to the defendant, it must require the proof of facts and circumstances that are distinct from the offense conduct. See, *United States v. Beasley*, 346 F.3d 930, 933, 935 (9th Cir. 2003); *United States v. Brown*, 367 F. 3d 549, 555, 556 (6th Cir. 2004).

It is black-letter law that the State must bear the burden of proof as to every element of the offense, and may not define an affirmative defense in such a way as to allow the State to avoid its burden of proof regarding those elements:

“It is axiomatic that the government must prove all elements of a crime beyond a reasonable doubt. See *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068,

25 L.Ed.2d 368 (1970). Furthermore, if an affirmative defense bears a necessary relationship to an element of the charged offense, the burden of proof does not shift to defendant. *Patterson v. New York*, 432 U.S. 197, 210-11, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977).” *United States v. Brown*, 367 F.3d 549, at 556 (6th Cir. 2004).

Here, the issue of whether or not Dr. Nucklos’ conduct comported with the requirements of Chapters 3719, 4729, and 4731 of the Ohio Revised Code was an essential element of the offenses charged.

Both Trafficking in Drugs and Illegal Processing of Drug Documents requires that the State prove that the defendant acted “knowingly.” *See*, Ohio Revised Code, Sections 2925.03 (A), 2925.23 (A).

“Knowing” conduct is conduct that occurs when the defendant “is aware that his conduct will probably cause a certain result or will probably be of a certain nature.” *See* Judge’s Charge, Jury Trial, Tr. 1900.

If the physician believes that his or her conduct is permissible under Chapters 3719, 4729, and 4731 of the Ohio Revised Code, then he or she cannot be said to have “knowingly” violated either the Drug Trafficking statute or the Illegal Processing of Drug Documents statute.

The question of whether Dr. Nucklos’ conduct comported with the requirements of Chapter 3719, 4729 and 4731 of the Revised Code “bears a necessary relationship to an element of the charged offense[s]”, and the burden of proof on that issue may not constitutionally be allocated to the defense. *Patterson v. New York*, 432 U.S. 197, at 210-211; *United States v. Brown*, 367 F.3d 549, at 556.

As to the charge of Trafficking in Drugs, the statute defining the offense exempts any physician who acts within the restrictions of Chapters 3719, 4729, and 4731 of the Ohio Revised Code from the operation of the statute. *See*, Ohio Revised Code, Sec. 2925.03 (B) (1).

Thus, in order to show that this prosecution was against a person subject to the statute, the State was required to prove “beyond a reasonable doubt” that the conduct it alleged violated the statute was not the conduct of “licensed health care professionals . . . whose conduct is in accordance with Chapters 3719, . . . 4729, . . . [or] 4731 . . . of the Revised Code.” *See* Ohio Revised Code, Sec. 2925.03 (B) (1).

Therefore, when the trial court recast this issue as an affirmative defense, it deprived Dr. Nucklos of a fair trial and due process of law. *United States v. Brown*, 367 F.3d at 549; *Mulaney v. Wilbur*, 421 US 684; *In re Winship*, 397 US at 364; Sixth and Fourteenth Amendments, US Constitution; Article I, Sections 10 and 16, Ohio Const.

The additional obvious problem with these jury instructions was that they could only serve to confuse the jury.

The jury was told that it had to determine whether the State had proved, beyond a reasonable doubt, that Dr. Nucklos “was not acting as a physician in the course of the bona fide treatment of a patient because he issued a prescription for some reason or reasons other than a legitimate medical purpose” *See* Judge’s Charge, Jury Trial, Tr. 1901.

The Court then instructed the jury that it was Dr. Nucklos who had the burden of proof, by a preponderance of the evidence, to show that his conduct occurred while “he was a physician acting in the course of the bona fide treatment of patients” and that if Dr. Nucklos met that burden, he must be found not guilty. *See* Judge’s Charge, Jury Trial, Tr. 1903.

Plainly, the jury could easily become confused and simply follow the last instruction given, improperly allocating the burden of proof to Dr. Nucklos.

B. THE PRIOR “BAD ACT” EVIDENCE WAS INADMISSIBLE AND UNDULY PREJUDICED DEFENDANT BEFORE THE JURY.

Evid.R. 404(B) expressly provides that: “Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith” (emphasis supplied).

Evid.R. 404 makes the use of character evidence inadmissible, and thus evidence of other crimes, wrongs or acts must be construed against admissibility. *State v. Coleman*, 45 Ohio St. 3d 298, 544 N.E.2d 622 (1989).

Evid. R. 404(b) does, however, make “character evidence admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence or mistake or accident” (emphasis supplied). But the State could not satisfy this requirement.

In *State v. Schaim*, 65 Ohio St.3d 51, 600 N.E.2d 661(1992), the court discussed the underlying rationale for the limited admissibility of “other acts” evidence as follows:

“The admissibility of other acts evidence is carefully limited because of the substantial danger that the jury will convict the defendant solely because it assumes that the defendant has a propensity to commit criminal acts, or deserves punishment regardless of whether he or she committed the crime charged in the indictment. *See State v. Curry*, 43 Ohio St.2d 66, 68, 330 N.E.2d 720, 723 (1975). This danger is particularly high when the other acts are very similar to the charged offense, or of an inflammatory nature, * * *.” *Schaim*, 65 Ohio St.3d at 59.

As Evid. Rule 404(b) is a slightly modified version of Federal Evidence Rule 404, we may find federal authority instructive in this case.

In *United States v. Merriweather*, 78 F.2d 1070, 1073 (6th Cir. 1996), Circuit Judge Ryan set out to explain “the close and careful analysis trial courts should undertake before ruling on the admissibility of evidence of ‘other crimes, wrongs or acts under Federal Rule of Evidence

404(b).”

The Circuit Court instructs that, “upon objection by the defendant, the proponent of the evidence, usually the government, should be required to identify the specific purpose or purposes for which the government offers the evidence of ‘other crimes, wrongs or acts.’” *Id.*, at 1076.

Judge Ryan then recommends that, “[a]fter requiring the proponent to identify the specific purpose for which the evidence is offered, the [trial] court must determine whether the identified purpose, whether to prove motive or intent or identify some other purpose, is ‘material’; that is, whether it is ‘in issue’ in the case.” *Id.*, at 1076-1077.

And, “the court must then determine, before admitting the other acts evidence, whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice under Rule 403.” *Id.*, at 1077.

Plainly, the prejudice of admitting the prior bad acts outweighed the probative value. In addition, there was a “substantial danger” that the jury would and likely did convict Dr. Nucklos “solely” because it assumed, from such prior bad acts, that the Accused had a propensity to commit criminal acts, and that he deserved punishment, because of these bad acts.

In the trial of this case, the State offered an array of “other” bad acts, having nothing whatsoever to do with the three patients and the ten visits that were the exclusive subject matter of the twenty counts in the charging document.

The State’s purpose, in admitting these other bad acts, was, like a three-card Monty dealer, seeking to misdirect the attention of the jurors away from the insufficiency of the State’s evidence -- as to the counts actually charged in the Indictment, that is, away from the fact that Dr. Nucklos did not “knowingly” prescribe any controlled substance that he thought inapt -- any more than had the other physicians who prescribed pain medicine to these same patients.

The State told the jury in its summation that the entire case was about the “three individuals that are presented in the indictments.” Tr. 1802. But the State spent a paltry 102 pages of the trial, and a small fraction of its argument, on the testimony of Ms. Swyres, Mr. Briggs and Ms. Booth. Tr. 598-625, 629-658, and 1378-1430.

The State knew from the start that, if this case was tried only on the pertinent facts, and as “simply” as possible, then Dr. Nucklos would be acquitted.

The State therefore set out to smear Dr. Nucklos with evidence of other bad acts that they hoped would destroy his character and credibility with the jury.

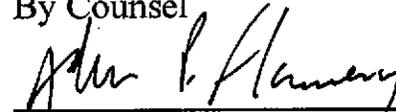
VI. CONCLUSION

This Court should deny review and thus uphold the Court of Appeals decision below.

Respectfully Submitted,

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I, John Hur, declare that I am not a party to the action, am over 18 years of age and my business address is: 354 South Spring St., Suite 610, Los Angeles, California 90013.

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