

**In the
Supreme Court of Ohio**

STATE OF OHIO,	:	Case No. 2007-0754
	:	
Plaintiff- Appellant	:	
	:	On Appeal from the
vs.	:	Clark County
	:	Court of Appeals
WILLIAM NUCKLOS, M.D.	:	2 nd Appellate District
	:	
Defendant-Appellee.	:	Court of Appeals Case
	:	No. 06-CA-23

MEMORANDUM OPPOSING MOTION FOR RECONSIDERATION

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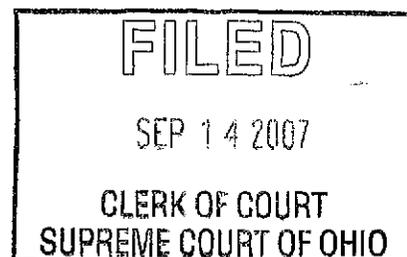


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MEMORANDUM OPPOSING MOTION FOR RECONSIDERATION

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

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

The Similar Act Evidence – in its original petition to this Court. The State claimed in its original petition to this Court 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. Thus did the State of Ohio take issue with the Second District's Opinion although that lower court opinion admitted some similar act evidence and excluded other similar act evidence, consistent with the strictures of Rule 404(B) and RC 2925.03(B)(1).

The Similar Act Evidence – in this subsequent petition seeking reconsideration. The State has now shifted the basis of its argument and argues that somehow the proposition of law as to similar act evidence should be dependent on whether the State has the burden of proof (beyond a reasonable doubt) to prove an element of the crime or whether the Defendant bears the burden of proof (a preponderance of the evidence) to assert an affirmative defense.

Unsurprisingly, the State of Ohio invokes no case law or statutory reference that supports this “innovative” theory at law when the “doctor's exception” that the State posits is involved; there is no legal authority for the posited “linkage” and thus this second effort to invoke this Court's discretionary jurisdiction should be denied.

II. The basis for Dr. Nucklos' opposition.

In compliance with Rule XI, Section 3 of the Rules of Practice of the Supreme Court of Ohio, we assert the following in this Memorandum Opposing the State's Motion for Reconsideration:

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

The State made this over-arching claim in its first petition to this Court:

"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.

The State re-phrases its claim in this motion for reconsideration:

"[The Prosecutor] will still indict a large number of cases to get in the 'other acts' evidence." See State Motion, at p.3, 1st incomplete par..

This shows a basic misapprehension of the standards by which "other act" evidence is admissible or not, no matter what the instruction to the jury.

In fact and truth, the Court of Appeals decision below 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 (challenged by the State in its invocation of this Court's discretionary authority).

It is the hundreds of other patients' files and the three *faux* pain patients that is the focus of the State's Motion that this Court re-consider.

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); this is not an issue that, by any stretch of the law, could be considered in the “public or general interest.”

2. 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

THE PRIOR "BAD ACT" EVIDENCE WAS INADMISSIBLE AND UNDULY PREJUDICED DEFENDANT BEFORE THE JURY AND, WHEN "BAD ACT" EVIDENCE IS ADMISSIBLE, IT IS DEPENDENT ON THE PURPOSE OF ITS ADMISSION AND ITS PREJUDICIAL EFFECT, NOT ITS RELATION TO JURY INSTRUCTIONS.

The State of Ohio appears to argue that the evidence of "other acts" should be admissible, in effect, because the State "needs" the evidence, rather than whether it is permissible as a matter of law to admit such evidence for the limited purposes allowed.

The State makes an extraordinary statement about the prosecution of physicians who prescribe pain medication; the State insists:

"It is impossible ... for a prosecutor disproving [a physician's] good faith to do so without the ability to present evidence showing that the prescription history of a particular patient was or was not part of a pattern of misconduct" (underscoring supplied). *See* Motion, p. 3, 2nd full par.

It is "impossible"? As a former federal prosecutor who has been practicing for thirty years, this statement must strike any experienced advocate as "remarkable."

As a hypothetical, suppose a physician said to a patient, "There's no need to take your vital signs. If you give me \$400 in cash, I'll write you a script for 100 percocets. It's of no matter to me whether you're in pain, just as long as you pay me."

There's nothing like that in this case, not among any of the patients who were the subject of the indictment. Not even close. But plainly such evidence would require no other "bad acts" – presuming there were any.

If the State had evidence of patients who more clearly demonstrated any misconduct by Dr. Nucklos, consistent with the charges they brought, then they should have charged those counts instead; we dispute that they have such evidence.

The State of Ohio goes so far as to suggest that it is making this argument to help Dr. Nucklos to obtain guidance on how to defend himself at the re-trial of this matter - if this Court decides the other pending proposition, to the State's satisfaction, that is, that the State need not prove that Dr. Nucklos was not acting in good faith when prescribing pain medication.

If Dr. Nucklos should indeed have to prove that he acted in good faith in the re-trial of this case, the State posits, that Dr. Nucklos "may need to show that the few examples indicted by the prosecutors are inadvertent mistakes." *See* Motion, p.3, 2nd full par.

It is always disconcerting when a worthy adversary is giving tutorials to the other side as to the instruction of the law they require from the high court – particularly when there have been filed opposing papers insisting that no such "guidance" is required or appropriate.

The "guidance" for the admission or exclusion of evidence, whether for the State or Dr. Nucklos, is driven by the provisions of Rule 404(B).

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). And that's the only reason that the State seeks to admit this other evidence.

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 the following federal 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 identity 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 this case.

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.

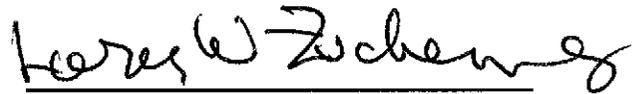
The State therefore set out to smear Dr. Nucklos with evidence of other bad acts that they hoped would destroy his character and credibility with the jury.

VI. CONCLUSION

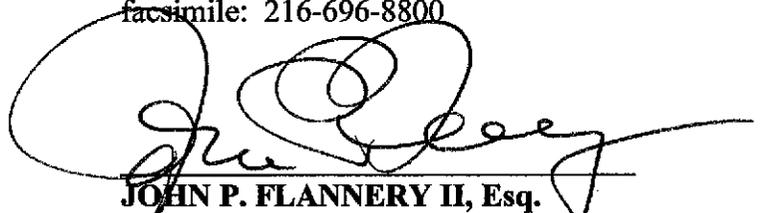
This Honorable Court, we respectfully request, should deny the State's Motion to Reconsider its decision not to hear Proposition 2 – on the question of similar act evidence - and thus uphold the Court of Appeals decision below on this issue.

Respectfully Submitted,

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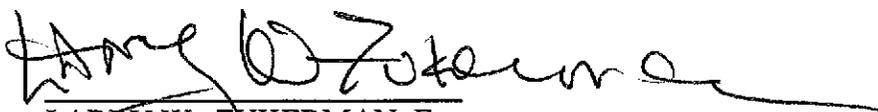
I hereby certify that service of a true copy of the foregoing Memorandum in Response was served by regular mail, postage prepaid, this 13th day of September, 2007, upon the following counsel:

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