

**IN THE COURT OF APPEALS  
ELEVENTH APPELLATE DISTRICT  
ASHTABULA COUNTY, OHIO**

STATE OF OHIO,	:	<b>O P I N I O N</b>
Plaintiff-Appellant,	:	
- VS -	:	<b>CASE NO. 2015-A-0006</b>
SHANNON L. SWANSON,	:	
Defendant-Appellee.	:	

Criminal Appeal from the Ashtabula County Court of Common Pleas, Case No. 2014 CR 705.

Judgment: Reversed and remanded.

*Nicholas A. Iarocci*, Ashtabula County Prosecutor, and *Shelley M. Pratt*, Assistant Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, OH 44047 (For Plaintiff-Appellant).

*Angelo F. Lonardo*, Yelski & Lonardo, 323 Lakeside Avenue West, Suite 450, Cleveland, OH 44113, and *Leonard G. Ambrose*, Ambrose Law Firm, 3702 Volkman Road, Erie, PA 16506 (For Defendant-Appellee).

DIANE V. GRENDELL, J.

{¶1} Plaintiff-appellant, the State of Ohio, appeals the January 22, 2015 Judgment Entry of the Ashtabula County Court of Common Pleas, dismissing a fifty-two-count Indictment against defendant-appellee, Shannon L. Swanson, charging her with various counts of Trafficking and Illegal Processing of Drug Documents. The issue before this court is whether a court may properly dismiss an indictment based on its

determination that the defendant's conduct did not constitute the crimes charged. For the following reasons, we reverse the decision of the lower court and remand this matter for further proceedings consistent with this opinion.

{¶2} On November 19, 2014, the Ashtabula County Grand Jury indicted Swanson on eighteen counts of Trafficking in Drugs, felonies of the fourth degree in violation of R.C. 2925.03(A)(2) and (C)(2)(c); seven counts of Trafficking in Drugs, felonies of the fifth degree in violation of R.C. 2925.03(A)(1) and (C)(2)(a); one count of Aggravated Trafficking in Drugs, a felony of the fourth degree in violation of R.C. 2925.03(A)(1) and (C)(1)(a); one count of Illegal Processing of Drug Documents, a felony of the fourth degree in violation of R.C. 2925.23(A) and (F)(1); and twenty-five counts of Illegal Processing of Drug Documents, felonies of the fifth degree in violation of R.C. 2925.23(A) and (F)(2).

{¶3} The charges were based on twenty-six instances in which Swanson, allegedly, “did knowingly sell or offer to sell \* \* \* a \* \* \* controlled substance, to wit: a prescription \* \* \* not acting in the usual course of her professional practice,” and “not in accordance with Chapters 3719 and 4731 of the Revised Code.”

{¶4} In each instance in which it was alleged that Swanson sold or offered to sell a controlled substance, it was further alleged that she “did knowingly make a false statement in [a] prescription \* \* \* required by Chapter 3719. or 4729. of the Revised Code.” This alleged conduct constituted the crime of Illegal Processing of Drug Documents.

{¶5} The controlled substances identified in the Indictment were: Ambien (Counts 1, 2, 3, 4, 5, 6, 15, 16, 17, 18, 21, 22, 43, 44, 49, 50), Phentermine (Counts 7,

8, 9, 10, 11, 12, 13, 14, 19, 20, 25, 26, 35, 36, 37, 38), Percocet (Counts 23, 24), Vicodin (Counts 27, 28, 33, 34, 39, 40), and Xanax (Counts 29, 30, 31, 32, 41, 42, 45, 46, 47, 48, 51, 52).

{¶6} On December 1, 2014, Swanson was arraigned and entered a plea of “not guilty” to the offenses as charged.

{¶7} On January 15, 2015, Swanson filed a Motion to Dismiss Indictment based upon Defects in the Institution of the Prosecution and in the Indictment relied upon in the herein Cause and Memorandum in Support. Swanson argued that the charges against her were “without foundation in fact”: “the grand jury was not informed the Defendant lacked the culpable *mens rea* to commit the serious offenses charged and never sold or offered to sell any controlled substances to anyone at anytime,” and “no evidence exists that the Defendant knowingly made false statements in writing prescriptions.”

{¶8} On January 20, 2015, a hearing was held on Swanson’s Motion to Dismiss Indictment.

{¶9} On January 22, 2015, the trial court issued a Judgment Entry, granting the Motion to Dismiss Indictment. In its Judgment, the court made the following findings:

Dr. Shannon Swanson is a physician who is employed at St. Joseph Emergency and Diagnostic Center located in Andover, Ohio. Dr. Swanson has also been employed as a physician at the Lake Erie Correctional Institution in Conneaut.

\* \* \*

All but two of the prescriptions were written for coworkers of the Defendant. The two prescriptions for Phentermine were written for daughters of a coworker who is an RN, as well as the RN herself. In her statement attached to the Defendant's motion, the coworker stated that she has had many doctors who have written prescriptions for her without conducting an evaluation or an examination of her, stating that it is a professional courtesy, and if the doctors know you and trust you, they will give you a prescription in good faith.

Xanax, Percocet, and Vicodin were prescribed by the Defendant to an advanced EMT whom the Defendant had treated previously, and when he reported to St. Joseph's ER with chest pains, the Defendant was the physician on duty. The Defendant had the patient life flighted to University Hospitals where he wound up having double bypass surgery. When his previous physician retired, the EMT sought out the Defendant for pain medication and had been previously treated by his former doctor with Vicodin and Percocet, which is what the Defendant provided to him. The Defendant also provided him with Xanax for his anxiety.

\* \* \*

Most of the prescriptions written by the Defendant in the 52 count Indictment were for Ambien [for individuals who have

trouble sleeping] and Phentermine [a diet drug]. Defendant did not know at that time that Phentermine was a controlled substance and had only been recently instructed by her physician group to keep charts on anyone she treated or for whom she wrote prescriptions. The Defendant stated that technically, they weren't her patients, as she was treating them as friends, and she had no intent to harm anyone, but to help them. In her statement, the Defendant stated that she received nothing in exchange for the prescriptions.

{¶10} As legal authority to support the dismissal of the Indictment, the trial court cited the case of *State v. McCarthy*, 2d Dist. Montgomery No. 12123, 1991 Ohio App. LEXIS 4518 (Sept. 24, 1991), *aff'd*, 65 Ohio St.3d 589, 605 N.E.2d 911 (1992), in which a physician was convicted of, inter alia, Trafficking based on the physician's prescribing controlled substances "not in the course of bona fide medical treatment." The jury was instructed that, in determining whether the physician's conduct constituted "bona fide medical treatment," it should consider "whether the physician's conduct was in accordance with the standards of medical practice established by regulations set forth in \* \* \* R.C. Chapters 3719 and 4731." 65 Ohio St.3d at 593. The court of appeals reversed the convictions:

[T]he instruction allowed the jury to conclude that any deviation from the cited statutes and rules, no matter how slight, would have amounted to a lack of bona fide medical treatment sufficient \* \* \* to impose criminal liability. Clearly, evidence that

a physician has prescribed or dispenses controlled substances in a manner contrary to regulations enacted pursuant to R.C. Chapters 3719 and 4731 is evidence tending to establish a lack of bona fide treatment. In our view, however, a slight deviation from those regulations would not necessarily warrant the severe consequence of criminal liability, and that under [*State v. Sway*], 15 Ohio St.3d 112, 472 N.E.2d 1065 (1984)], the jury must consider the subjective state of mind of a physician charged with violating Chapter 2925.

1991 Ohio App. LEXIS 4518, at 12-13.

{¶11} On January 22, 2015, the State filed its Notice of Appeal. On appeal, the State raises the following assignments of error:

{¶12} “[1.] The trial court erred in granting appellee’s motion to dismiss where it required consideration of the general issue for trial.”

{¶13} “[2.] The trial court erred in granting appellee’s motion to dismiss where it determined that the state was unable to prove that appellee knowingly sold or offered to sell a controlled substance.”

{¶14} “[3.] The trial court abused its discretion in failing to grant the State’s oral motion for continuance.”

{¶15} “Prior to trial, any party may raise by motion any defense, objection, evidentiary issue, or request that is capable of determination without the trial of the general issue,” including the following issues which must be raised before trial:

“(1) Defenses and objections based on defects in the institution of the prosecution;  
(2) Defenses and objections based on defects in the indictment \* \* \*.” Crim.R. 12(C).

{¶16} “In criminal matters, a motion to dismiss can only raise matters that are ‘capable of determination without a trial of the general issue.’” *State v. Kolat*, 11th Dist. Lake No. 2001-L-117, 2002-Ohio-4699, ¶ 16; *State v. Brady*, 119 Ohio St.3d 375, 2008-Ohio-4493, 894 N.E.2d 671, ¶ 18 (“[b]ecause Brady’s pretrial motion to dismiss did not require a determination of the general issue for trial, Crim.R. 12(C) allowed the trial court to consider it”). “In conducting this pretrial review, courts may look to ‘evidence beyond the face of the indictment’” but “may not decide ‘what would be the general issue at trial.’” (Citations omitted.) *State v. Palmer*, 131 Ohio St.3d 278, 2012-Ohio-580, 964 N.E.2d 406, ¶ 22. “The general issue for trial in this context is whether the accused violated the law as set forth in the indictment.” *Id.* at ¶ 24.

{¶17} “If the allegations contained in the indictment constitute offenses under Ohio criminal law, it is premature to determine, in advance of trial, whether the state could satisfy its burden of proof with respect to those charges, and thus, a motion to dismiss must be denied.” *Kolat* at ¶ 16; *State v. Medinger*, 11th Dist. Portage No. 2011-P-0046, 2012-Ohio-982, ¶ 11 (“the trial court is limited to determining whether the language within the charging instrument alleges an offense”). Thus, a motion to dismiss based on a defect in the indictment “must not entail a determination of the sufficiency of the evidence to support the indictment because such a determination cannot properly be made until, at the earliest, the conclusion of the state’s case in chief and pursuant to a Crim.R. 29(A) motion.” *Kolat* at ¶ 16; *State v. Rode*, 11th Dist. Portage No. 2010-P-0015, 2011-Ohio-2455, ¶ 14.

{¶18} A ruling on a motion to dismiss is reviewed de novo. *In re J.P.*, 11th Dist. Geauga No. 2011-G-3023, 2012-Ohio-1451, ¶ 6; *State v. Wendel*, 11th Dist. Geauga No. 97-G-2116, 1999 Ohio App. LEXIS 6237, 5 (Dec. 23, 1999) (a motion to dismiss presents a question of law to which a de novo standard of review applies).

{¶19} In the present case, the trial court's dismissal of the Indictment improperly determined the general issues for trial and must be reversed. Although the Judgment does not precisely state the basis for dismissal, it is patent that the court considered whether the State's evidence was sufficient to support the charges.

{¶20} The Motion to Dismiss argued that Swanson "never sold or offered to sell any controlled substances" and the trial court found that she "received no compensation in any form for the prescriptions that she wrote." Whether Swanson's conduct is sufficient to constitute the act of selling is a general issue for trial. *Compare* R.C. 3719.01(AA) ("Sale' includes delivery, barter, exchange, transfer, or gift, or offer thereof").

{¶21} The Motion to Dismiss argued that Swanson lacked the requisite mens rea to be guilty of Trafficking, in that "licensed health professionals authorized to prescribe drugs" are not subject to prosecution when their "conduct is in accordance with Chapters 3719. \* \* \* [and] 4729. \* \* \* of the Revised Code." R.C. 2925.03(B)(1); *Sway*, 15 Ohio St.3d 112, 472 N.E.2d 1065, at syllabus ("[a] physician who unlawfully issues a prescription for a controlled substance 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"). The trial court cited case law for the proposition that the State may not merely rely on evidence that a physician violated the Revised Code in prescribing a drug, but must present some



evidence of the physician's subjective state of mind. Whether Swanson's conduct constituted the bona fide treatment of a patient is likewise a general issue for trial. The very authority cited by the lower court asserts that "***the jury***" – not the court – "must consider the subjective state of mind of a physician charged with violating Chapter 2925." (Emphasis added.) *McCarthy*, 1991 Ohio App. LEXIS 4518, at 13.

{¶22} By dismissing the Indictment at this stage of the proceedings, the trial court violated the express language of Criminal Rule 12 and usurped the jury's prerogative of determining the general issues for trial.

{¶23} The first assignment of error is with merit.

{¶24} The disposition of the first assignment of error renders moot the other assignments raised.

{¶25} For the foregoing reasons, the Judgment of the Ashtabula County Court of Common Pleas, dismissing the Indictment against Swanson, is reversed and this matter remanded for further proceedings consistent with this opinion. Costs to be taxed against the appellee.

THOMAS R. WRIGHT, J., concurs,

COLLEEN MARY O'TOOLE, J., concurs with a Concurring Opinion.

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{¶26} While the trial court has the authority to dismiss charges under Crim. R. 12(C), the record in this matter does not support dismissal. Appellee argues that the grand jury in this matter was materially misinformed as to the elements of the offense, particularly regarding the culpable *mens rea* required for a doctor to be charged with drug trafficking. This may be so, however, no copy of the grand jury transcript was presented to the trial court. Nor did appellee move the trial court for an order releasing the grand jury transcript despite particularized need as evidenced in this case. Without such transcript appellee is unable to meet her burden of proof to prevail on her Crim. R. 12(C) motion.

{¶27} This writer recognizes that the bar for releasing a grand jury transcript is very high. Disclosure of grand jury testimony is controlled by Crim.R. 6(E). *State v. Godfrey*, 181 Ohio App.3d 75, 2009-Ohio-547, ¶8, (3d Dist.), citing *State v. Greer*, 66 Ohio St.2d 139 (1981), paragraph one of the syllabus.

{¶28} “Grand jury proceedings are secret, and an accused is not entitled to inspect grand jury transcripts either before or during trial unless the ends of justice require it and there is a showing by the defense that a particularized need for disclosure exists which outweighs the need for secrecy.” *Greer* at paragraph two of the syllabus, citing *State v. Patterson*, 28 Ohio St.2d 181 (1971), paragraph three of the syllabus.

{¶29} To demonstrate a particularized need for the disclosure of grand jury testimony, a defendant must show that “it is probable that the failure to disclose the testimony will deprive the defendant of a fair adjudication of the allegations placed in issue by the witness’ trial testimony.” *Greer* at paragraph three of the syllabus. “Specifically, the trial court should determine whether the failure to disclose the

testimony will deny [the defendant] a fair trial or, in the alternative, whether [the defendant's] request for disclosure is a fishing expedition \* \* \*." *State v. Horger*, 170 Ohio App.3d 383, 2007-Ohio-665, ¶13 (5th Dist.).

{¶30} While appellee's extensive motion to dismiss presents arguments that might have prevailed, if she had moved for release of the grand jury transcript, the fact remains that she made no request. Appellee's failure to move for release of the transcript deprived the trial court of the very information it needed to grant her motion to dismiss. This writer would remand this case to the trial court to supplement the record with the grand jury transcript after the proper request has been made.