DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
July Term 2010

JEREMY KNIPP,
Appellant,
v.
STATE OF FLORIDA,
Appellee.

No. 4D09-2364

BRIAN KISER,
Appellant,
v.
STATE OF FLORIDA,
Appellee.

No. 4D09-2365

[December 22, 2010]

POLEN, J.

As they present identical legal issues, we have combined *Knipp v. State*, No. 4D09-2364, and *Kiser v. State*, No. 4D09-2365 for review.[1]

Appellant, Jeremy Knipp, appeals the trial court's order withholding adjudication on two counts of withholding information from a medical practitioner and sentencing him to three years probation. The State cross-appeals the trial court's order granting Knipp's motion to dismiss as to one count of trafficking in Oxycodone and one count of possession of Alprazolam.

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[1] To be clear, Knipp and Kiser were not co-defendants below. However, they were each charged with withholding information from a medical practitioner and trafficking in oxycodone (among other charges), based on nearly identical incidents. The defendants were represented by the same defense counsel and filed identical motions to dismiss. The trial court's ruling on the motions was also the same in each case, and the issues on appeal and cross-appeal are identical.

Appellant, Brian Kiser, appeals the trial court's order withholding adjudication as to one count of withholding information from a medical practitioner and sentencing him to three years probation. The State cross-appeals the trial court's order granting Kiser's motion to dismiss as to one count of trafficking in Oxycodone.

As to the charges of withholding information from a medical practitioner ("doctor shopping"), defense counsel and the State agreed to the following facts below, which are the same in each case. The defendant in each case obtained prescriptions from two different physicians in Broward County, and within thirty days from receiving the first prescription, obtained prescriptions for the same medicine from another physician in Broward County. There was no proof that either defendant affirmatively misled a physician or that any physician ever asked either defendant whether he had received a prescription from any other source within the thirty-day timeframe.

Based on the foregoing, defense counsel moved to dismiss the doctor shopping charges on the grounds that neither Knipp nor Kiser affirmatively withheld information regarding the fact they had each obtained a prescription within the previous thirty days. In other words, according to defense counsel, the statute prohibits withholding information from a medical practitioner but does not impose an affirmative duty on an individual to disclose to the practitioner that he has, in fact, obtained another similar prescription within the previous thirty days. In opposing the motion, the State argued that the statute does impose an affirmative duty on an individual to show the doctor that he is entitled to a prescription.

Knipp and Kiser were also charged with trafficking in Oxycodone because the amount of Oxycodone in each man's possession when he was confronted and searched by the police exceeded the legal limit set by the trafficking statute. In a motion to dismiss, defense counsel argued that the trafficking charges should be dismissed as to each defendant because both Knipp and Kiser possessed a valid prescription for Oxycodone which had been written by a licensed physician, and thus, came within the exclusion provided by section 499.03, Florida Statutes. The State responded that the charges should not be dismissed because where, as here, the prescriptions were obtained in violation of the doctor shopping statute, they are invalid and not within the exception of section 499.03.

The trial court granted in part and denied in part Knipp's and Kiser's motions to dismiss. As to the doctor shopping statute, the court

determined that "there exists no requirement that an individual first be asked about previous prescriptions in order to have violated section 893.13(7)(a)(8), Fla. Stat." Accordingly, the court denied the motion to dismiss the doctor shopping counts in each case. On the trafficking counts, the trial court granted the motion, having found at the hearing that each defendant possessed a valid prescription for the drugs in his possession. We affirm.

This court reviews de novo an order on a motion to dismiss. *See State v. Santiago*, 938 So. 2d 603, 605 (Fla. 4th DCA 2006). When a defendant files a motion to dismiss pursuant to rule 3.190(c)(4), the trial court may dismiss the Information if the undisputed facts do not establish a prima facie case of guilt. *State v. Shuler*, 988 So. 2d 1230 (Fla. 5th DCA 2008). "A motion to dismiss under subdivision (c)(4) of . . . rule [3.190] shall be denied if the state files a traverse that *with specificity* denies under oath the material fact or facts alleged in the motion to dismiss." *State v. Kalogeropolous,* 758 So. 2d 110, 111 (Fla. 2000) (emphasis in original).

Section 893.13(7)(a)8., Florida Statutes (2008), also known as the "doctor shopping" statute, provides that it is unlawful for any person:

> To withhold information from a practitioner from whom the person seeks to obtain a controlled substance or a prescription for a controlled substance that the person making the request has received a controlled substance or a prescription for a controlled substance of like therapeutic use from another practitioner within the previous 30 days.

§ 893.13(7)(a)8., Fla. Stat. (2008). The statute does not define the term "withhold."

It is undisputed that Knipp obtained prescriptions from two separate practitioners within three days of one another — one on November 3, 2008 and the next on November 6, 2008. Similarly, it is undisputed that Kiser obtained prescriptions from two separate practitioners within a two-day span — one on December 1, 2008 and another on December 2, 2008. Neither Knipp nor Kiser contended that they had not sought these prescriptions.

The sole issue below and on appeal is whether the statute requires an individual to *volunteer* information to the practitioner that he has received a prescription of like therapeutic use within the previous thirty days. Read in its entirety, the statute refers to an individual who "seeks to obtain a controlled substance or a prescription for a controlled

substance" and also uses the word "request." Whether an individual has actually withheld information in violation of the statute depends on whether s/he requested a controlled substance and failed to disclose the fact that s/he received a drug of like therapeutic use within the previous thirty days. In other words, the statute requires that an individual affirmatively requesting a substance provide information to the practitioner.

The appellants stake their claim of ambiguity in the statute on the word "withhold." The statute's use of the term "withholding" is not ambiguous. The meaning ascribed by most dictionaries is "to hold something back" or "to refrain from giving or granting"[2] to define "withhold." Whether one substitutes "hold back" or "refrain from giving" for "withhold," the statute unambiguously makes it a crime for a person seeking a prescription for a controlled substance not to inform the physician that the person has already obtained a prescription for the same or similar substance within the last thirty days. The statute does not qualify the withholding of information by requiring an affirmative request for such information.

Significantly, appellants do not contest that portion of the charge that *they had sought* the controlled substances. Instead their sworn affidavits emphasize the fact that the doctors they saw did not ask if they had obtained the same or a similar controlled substance within thirty days. Accordingly, based on the record before the trial court, we affirm the denial of the motion to dismiss as to the doctor shopping charges.

As to granting the motions to dismiss on the drug trafficking charges, we also affirm. The State agreed below that both Knipp and Kiser possessed a prescription issued by a licensed practitioner in the normal course of business. Where the State does not dispute these facts, the defendant has successfully raised the valid prescription defense. *See O'Hara v. State*, 964 So. 2d 839 (Fla. 2d DCA 2007). Therefore, the trial court did not err in granting appellants' respective motions to dismiss as to the drug trafficking charges.

Affirmed.

WARNER, J., concurs specially with opinion.
FARMER, J., concurs specially with opinion.

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[2] *See* http://www.onelook.com/?w=withhold&ls=a.

WARNER, J., concurring specially.

I concur in the majority opinion. To require a physician to ask about medications before the patient is required to reveal prior prescriptions not only has no statutory basis, but it would also encourage the unscrupulous doctor not to ask questions simply to fill prescriptions to increase the physician's income and business. With the increase of "pill mills" in South Florida, such conduct is not unthinkable. *See*, *e.g.*, *Deonarine v. State*, 967 So. 2d 333, 335 (Fla. 4th DCA 2007) (noting, in case where physician was found guilty of trafficking in controlled substances, that he prescribed drugs without obtaining the patient's medical history). We should not provide additional methods of skirting the law to those who would "doctor shop" to obtain controlled substances for both personal use and profit, whose overuse causes thousands of deaths each year.

FARMER, J., concurring specially.

I agree with the analysis and outcome. On the issue of *withholding*, I write to emphasize that section 893.13(7)(a)8. applies only when the defendant expressly sought — that is, asked the physician for — that specific drug. Under the facts presented to the trial court in this case, defendants admitted they asked for this specific substance. It is a fair reading of the term *withholding* — when applied in the circumstance of this case — to say: "if you ask for it specifically, you must not hold back your recent prescription history involving that drug in your request for it."

To my mind, it would be a different matter if the defendant had instead merely stated his complaints and symptoms to the physician and asked whether something could be prescribed. In that alternative scenario, I do not read this statute to require the patient to volunteer recent prescriptions.

Moreover I do not agree there is any burden placed on physicians to ask for current or recent medications. Physicians are not soldiers in the "war on drugs." But it is a fact of medical practice that multiple medications may interact with each other adversely. Hence physicians must at all times be aware of the possible effects of a new medication on the patient in light of his current meds. As I read the informed consent

laws in Florida,[3] physicians are already under a statutory burden to ask for that information from any patient for whom they would prescribe another medication.

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Appeals and cross-appeals from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Michele Towbin Singer, Judge; L.T. Case Nos. 08-21364 CF10A (Knipp) and 08-22904 CF10A (Kiser).

Howard Finkelstein, Public Defender, and Jason B. Blank, Assistant Public Defender, Fort Lauderdale, for appellants.

Bill McCollum, Attorney General, Tallahassee, and Laura Fisher, Assistant Attorney General, West Palm Beach, for appellee.

Not final until disposition of timely filed motion for rehearing.

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[3] *See* § 766.103(3)(a)2, Fla. Stat. (2010) (physician must furnish patient with sufficient pertinent information to give reasonable general understanding of substantial risks and hazards inherent in proposed treatment).