

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STACY MAE LEMMERT-HAECK,

Defendant-Appellant.

UNPUBLISHED
December 16, 2010

No. 294308
Oakland Circuit Court
LC No. 2008-223468-FC

Before: SHAPIRO, P.J., and SAAD and KELLY, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of operating a vehicle while intoxicated, third offense.¹ She was sentenced to four years' probation with 153 days to be served in jail. Defendant appeals as of right. We affirm defendant's conviction, but remand for correction of the judgment of sentence.

I. BASIC FACTS

Defendant was arrested after driving her car into another vehicle. The responding officer noted that defendant was moving and talking slowly, that her speech was slurred, that she seemed "zoned out", and that she needed assistance in walking. Medication in a pill bottle in defendant's purse was determined to be alprazolam (Xanax). Moreover, an analysis of her blood revealed that she had taken phenobarbital (Luminal), alprazolam (Xanax), and chlorthalidone (Dixate) (Librium and/or Valium). The Xanax in her system was 314 nanograms, which was significantly greater than the therapeutic level of 25 to 102 nanograms.

At trial, defendant called Dr. Karl Ebner as an expert in pharmacology/toxicology. He testified that defendant was taking Omeprazole for irritable bowel syndrome, and that this drug would inhibit the excretion of the Xanax, thereby elevating the level in the body. He discovered

¹ The judgment of sentence misidentifies the basis for defendant's conviction as MCL 257.625(6)(d) when the actual basis for the conviction was MCL 257.625(1) and MCL 257.625(9)(c).

that defendant was taking this medication by reviewing medical records that she had provided to him. She confirmed that she was taking the medication on the morning of trial. Defendant had never provided the medical records that formed the basis of Dr. Ebner's testimony to the prosecution. The trial court granted the prosecution's motion to strike Dr. Ebner's testimony on the basis of a discovery violation.²

II. EXPERT TESTIMONY

Defendant argues that the trial court's decision to strike Dr. Ebner's testimony was an abuse of discretion. We disagree. We review a trial court's decision to exclude expert witness testimony for an abuse of discretion. *People v Steele*, 283 Mich App 472, 480; 769 NW2d 256 (2009). A trial court abuses its discretion when its decision falls "outside the range of principled outcomes." *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010), quoting *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008).

MCR 6.201(A)(3) provides:

(A) Mandatory Disclosure. In addition to disclosures required by provisions of law other than MCL 767.94a, a party upon request must provide all other parties:

* * *

(3) the curriculum vitae of an expert the party may call at trial and either a report by the expert or a written description of the substance of the proposed testimony of the expert, the expert's opinion, and the underlying basis of that opinion.

The court entered two pretrial orders requiring the disclosure of all expert reports or a description of the substance of the proposed expert testimony and the underlying basis for it as required under MCR 6.201(A)(3). In addition, the prosecutor filed a pretrial request for this information. However, defendant did not provide the underlying basis for Dr. Ebner's testimony because she did not want to divulge all of her medical records.³ In fact, defendant concedes in her brief on appeal that she had not complied with MCR 6.201(A)(3).

² The trial court gave other reasons for granting the motion to strike. The trial court was of the opinion that the evidence could not satisfy the requirements of MRE 703 and MRE 705. Moreover, the prosecutor argues on appeal that the evidence was irrelevant, asserting that the effect of the interaction between Omeprazole and the controlled substance would not provide the basis for a defense. Because we find that there was no abuse of discretion in granting the motion to strike based on the discovery violation, we decline to address these issues.

³ It appears that defendant and counsel may have had a misunderstanding about whether to produce her medical records. Defendant indicates that she opposed full disclosure but would not have opposed partial disclosure. Counsel indicated that defendant opposed all disclosure.

Defendant argues that the trial court abused its discretion in striking Dr. Ebner's testimony instead of seeking an alternative remedy. "If a party fails to comply with [MCR 6.201], the court, in its discretion, may ... grant a continuance, prohibit the party from introducing in evidence the material not disclosed, or enter such other order as it deems just under the circumstances." MCR 6.201(J). The trial court noted:

The only other possible remedy would be probably a multiple month adjournment of this trial in the middle of trial when we have an empaneled jury to allow the People to then do further investigation of . . . the multitude of doctors, the fifteen to twenty pills and the prescriptions and the analysis, re-evaluation by the People's experts, etcetera. That does not further the interest of justice, it absolutely undermines the effective administration of justice by allowing such consequence, and therefore, I will grant the People's motion to strike.

The trial court's concerns about the length of a potential adjournment in the middle of a jury trial were valid considering the number of pretrial and trial adjournments in this case. Given the failure of defendant to provide the requested discovery, coupled with the trial court's concerns regarding the effect of granting an adjournment, we find that granting the motion to strike was within the range of principled outcomes.

As previously noted, the judgment of sentence erroneously indicates that defendant's conviction was based on MCL 257.625(6)(d) when the correct citations are MCL 257.625(1) and MCL 257.625(9)(c). Accordingly, we remand for the ministerial action of correcting the judgment of sentence.

Affirmed and remanded for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ Douglas B. Shapiro
/s/ Henry William Saad
/s/ Kirsten Frank Kelly