

STATE OF LOUISIANA

*

NO. 2017-KA-0823

VERSUS

*

COURT OF APPEAL

ROBERT IOVENITI

*

FOURTH CIRCUIT

*

STATE OF LOUISIANA

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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 517-479, SECTION "B"
Honorable Tracey Flemings-Davillier, Judge

* * * * *

Judge Rosemary Ledet

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(Court composed of Judge Edwin A. Lombard, Judge Rosemary Ledet, Judge
Paula A. Brown)

**LOMBARD, J., DISSENTS; LEDET, J., CONCURS IN PART AND
DISSENTS IN PART WITH REASONS; BROWN, J., DISSENTS IN PART
AND CONCURS IN PART WITH REASONS**

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AFFIRMED IN PART; REVERSED IN PART; AND REMANDED

FEBRUARY 7, 2018

In this criminal appeal, the State seeks review of the district court’s judgment granting the motion to quash filed by the defendant, Robert Ioveniti.¹ We affirm in part; reverse in part; and remand.

STATEMENT OF THE FACTS AND CASE

On August 4, 2013, Mr. Ioveniti returned to New Orleans, Louisiana from a cruise to Belize. While disembarking the cruise ship, a drug-sniffing canine alerted to Mr. Ioveniti’s crotch. Customs officers searched Mr. Ioveniti’s person and discovered 498 pills of Hydrocodone, 85 pills of Alprazolam, 9 pills of Clonazepam, 23 pills of Diazepam, 25 pills of Sildenafil, and 1.9 grams of marijuana.² As a result, New Orleans Police Department officers arrested Mr. Ioveniti for violating the Uniform Controlled Dangerous Substances Law, La. R.S. 40:961, *et seq.* (the “UCDSL”).

On September 17, 2013, the State filed a bill of information charging Mr. Ioveniti as follows:

- Count 1: Possession with the intent to distribute Hydrocodone, a felony violation of La. R.S. 40:967(A)(1);
- Count 2: Possession with the intent to distribute Alprazolam (also known as “Xanax”), a felony violation of La. R.S. 40:969(A)(1);
- Count 3: Possession of marijuana, a misdemeanor violation of La. R.S. 40:966(E)(1);³

¹ The record contains several iterations of the defendant’s surname—“Ioveniti,” “Iovenitti,” “Ioveneti,” and “Iovenetti.” For ease of discussion, we refer to the defendant as “Mr. Ioveniti,” the spelling in the caption.

² Apparently, Mr. Ioveniti was transporting these substances not in prescription bottles but instead taped to his person.

³ Since the filing of the bill of information in this case, La. R.S. 40:966(E)(1) has been redesignated as La. R.S. 40:966(C)(2)(a)-(c).

- Count 4: Possession of Clonazepam, a felony violation of La. R.S. 40:969(C)(2);
- Count 5: Possession of Diazepam (also known as “Valium”), a felony violation of La. R.S. 40:969(C)(2);
- Count 6: Possession of a Sildenafil (also known as “Viagra”), a felony violation of La. R.S. 40:1238.1.⁴

On February 11, 2014, Mr. Ioveniti moved to quash Counts 1, 2, and 6, alleging that he had valid prescriptions for Hydrocodone, Alprazolam, and Sildenafil. The State filed a written opposition, arguing that Mr. Ioveniti had produced no admissible evidence to support his motion. Following a hearing, the district court granted the motion and issued a written judgment. The State appealed.

On the State’s prior appeal, this court reasoned as follows:

The record fails to show that a contradictory hearing was held on Mr. Ioveniti’s motion to quash. La. C.Cr.P. art. 537 mandates that “[a]ll issues, whether of law or fact, that arise on a motion to quash shall be tried by the court without a jury.” (emphasis added). Louisiana jurisprudence has previously held that La. C.Cr.P. art. 537 mandates a contradictory hearing on motions to quash. *State in Interest of M.J.*, 14-0622, p. 15, fn. 10 (La. App. 4 Cir. 2/4/15), 160 So.3d 1040, 1049 (noting trial court erred in failing to hold a hearing on the merits of a motion to quash); *State v. Nguyen*, 14-639, p. 17 (La. App. 3 Cir. 11/5/14), 150 So.3d 562, 572 (granting a motion to quash without a hearing was improper); *State v. Sensat*, 07-425, p. 4 (La. App. 3 Cir. 11/7/07), 969 So.2d 1274, 1276 (State was entitled to a contradictory hearing on motion to quash); *State v. Stewart*, 02-0196 (La. App. 3 Cir. 10/2/02), 827 So.2d 1277, 1281-82 (art. 537 implicitly mandates a hearing); *State v. Lowry*, 00-107, p. 6 (La. App. 5 Cir. 6/27/00), 762 So.2d 1275, 1278 (citing art. 537 and remanding for hearing on motion to quash).

In this case, the trial court accepted the filing of Mr. Ioveniti’s motion to quash as well as the State’s brief in opposition to the motion. However, the October 9, 2015 proceeding does not constitute a contradictory hearing pursuant to La. C.Cr.P. art. 537. The State was not afforded an opportunity to address the merits or present argument

⁴ Since the filing of the bill of information in this case, La. R.S. 40:1238.1 has been redesignated as 40:1060.13.

relating to Mr. Ioveniti's motion to quash. Thus, the record fails to show that a contradictory hearing was held on the merits of the motion to quash. For this reason, we find the trial court erred.

State v. Ioveniti, 15-1356, pp. 2-3 (La. App. 4 Cir. 4/20/16), 194 So.3d 1144, 1145-46 ("*Ioveniti I*"). We therefore "order[ed] that the case be remanded for a contradictory hearing on the motion to quash pursuant to La. C.Cr.P. art. 537." *Id.*, 15-1356 at p. 3, 194 So.3d at 1146.

At the contradictory hearing on remand, which took place on March 28, 2017, Mr. Ioveniti called no witnesses; instead, he offered the following exhibits:

- Defense Exhibit 1,⁵ consisting of:
 - a one-page document purporting to be a copy of a prescription for Kodone (presumably, Hydrocodone) and Viagra and a prescription for Valium and Xanax, both allegedly written for Mr. Ioveniti by an unidentified physician (the "Prescriptions");⁶

⁵ Upon offering this exhibit, defense counsel stated:

To make sure the Record is absolutely clear this time, I want to offer, file, and introduce into evidence, first of all, the original prescription given to Mr. I[o]ven[iti] by the Pharmacist [sic] in Belize, and the affidavit of the Pharmacist, which we've submitted to the State, and which is already in the Court's Record. I'm offering, filing, and introducing those at this time.

Record, Volume II, 3/28/17 Transcript, pp. 1-2; *see also* Record, Volume I, p. 26 (Minute Entry for March 28, 2017, reflecting that Mr. Ioveniti offered as Defense "Exhibit 1" a prescription and an affidavit of a pharmacist).

⁶ Record, Volume I, p. 138 (the Prescriptions). After offering Defense Exhibit 1, defense counsel stated:

I would ask the Court to Quash the Bill of Information as far as the four prescriptions that were listed, those being the prescriptions for **Hydrocodone**, **Alprazolam**, **Diazepam**, and **[S]ildenafil**, and ask that the Bill of Information be Quashed as to those charges.

Record, Volume II, 3/28/17 Transcript, p. 4. Subsequently, the State argued:

Your Honor, if we look at the first prescription, the first thing that is listed on there appears to be **[K]odone**, that correlates with the receipt. The later parts of the prescription lists Q-ID, times 2 over 12. Your Honor, State's Exhibit 2 explains what each of these things mean. And I did have the opportunity to speak with a pharmacist. It indicates that the individual should take one pill every six hours, or four times a day, times two over twelve, means for two months.

* * *

- a two-page document, entitled “Affidavit of Pharmacist Authenticating Records of Prescription Medications He Dispensed,” purporting to have been signed by Raul Acevedo, allegedly a pharmacist with Free-Town Drug Store in Belize City, Belize, and purporting to authenticate the Prescriptions (the “Affidavit”);⁷ and
- Defense Exhibit 2: a one-page document, undated, purporting to be a letter from Mr. Acevedo to the district court setting forth the circumstances under which Mr. Acevedo allegedly dispensed a four-month supply of Kodone to Mr. Ioveniti on August 1, 2013, pursuant to “a prescription issued by a doctor [that Mr. Ioveniti] saw at K.H.M.H.[,] our local public hospital (the “Letter”).⁸

So, it’s four pills a day, times thirty days, gives you one hundred and twenty pills. Then the two over twelve indicates two months, which would put us at two hundred and forty pills. Even if you assume that the repeat two times, that still doesn’t put him at the limit of the number of pills that were found on his person. There’s nothing to establish that this was a later fill, but only that it was actually filled on this one individual time.

Your Honor, if you look at the other prescriptions, if you look at the **Viagra** that was tendered, the number fourteen indicates the number of pills that the prescription was for. Mr. Ioven[iti] received more than the fourteen pills listed on the prescription, rather he had twenty-five pills [i]n his possession.

Turning to the second prescription for the **Valium**, he is in compliance with that, as the prescription indicates for thirty pills.

For the **Xanax**, again, the explanation for the reading of the prescription would be two times a day. For two times a day for one month would be sixty pills, times two, would be seventy pills. The defendant was in possession of more than, I believe, eighty-five pills, which would put him over the limit for the prescription that he was in receipt of. So, Your Honor, even based off of the information provided by Defense Counsel, which the state objects to being admissible, he still was in excess of the prescription that was written for him, which the State still argues is invalid, based off of Belize’s own standards.

Record, Volume II, 3/28/17 Transcript, pp. 7-9.

⁷ Record, Volume I, pp. 168-69 (the Affidavit); *see also* Record, Volume I, p. 26 (Minute Entry for March 28, 2017).

⁸ Record, Volume I, pp. 196-97 (the Letter); Record, Volume I, p. 26 (Minute Entry for March 28, 2017, reflecting that Mr. Ioveniti offered the Letter as Defense “Exhibit 2”). Upon offering this exhibit, defense counsel stated:

We’d offer to the Court, and this has previously been placed in the Record, I’ll mark it Defense Exhibit 2, for Identification. This was a letter to the Court, from the Pharmacist, who described why he filled that prescription. He said that, Robert Ioven[iti] presented to him, on August 1, 2013, with a prescription from a doctor at the local Public Health Hospital, which [hospital, not doctor] he names, for a four month supply of Hydrocodone tablets to be taken every four to six hours. He had a diagnosis of injury with MRI’s and medical records, which he saw a local doctor there for. And the Pharmacist said he made the decision to fill the entire prescription.

The State offered the following exhibits:

- State’s Exhibit 1: a page from the Belize Drug Formulary and Therapeutics Manual, purporting to set forth the formal requirements of a prescription in Belize;⁹ and
- State’s Exhibit 2: a World Health Organization publication, entitled “Management of Drugs at Health Center Level,” purporting to set forth the formal requirements of prescriptions in foreign countries.¹⁰

Record, Volume II, 3/28/17 Transcript, p. 11; *see also* Record, Volume I, p. 72 (Minute Entry for May 20, 2015, stating that “[the] Defense provide[d] [the district] court with a copy of the letter from the pharmacist in Belize”); Record, Volume I, p. 194 (Defendant’s Supplemental Memorandum in Support of Motion to Quash, filed May 20, 2015, stating that “defendant Robert Ioven[iti] attached [t]hereto a letter from the dispensing pharmacist explaining the quantity of the medication and the prescribed dosage”).

⁹ Upon offering this exhibit, the prosecutor stated:

Your Honor, I’ve shown Defense Counsel, this this morning, but at this time I’m going to ask to offer, file, and introduce State’s Exhibit 1, being the Belize Drug Formulary and Therapeutics Manual, and ask to publish it to the Court.

* * *

Your Honor, this is the requirements, it’s my understanding, from Belize, for their rational prescription writing, as relates to a prescription that’s been presented, in this case, from Belize, and based on the information contained in this documentation, this is not a valid prescription in Belize.

* * *

Your Honor, I will just turn to, I believe it’s page number 85, the requirements for the prescription indicate[] not only the doctor’s signature, but also the name of the doctor.

Record, Volume II, 3/28/17 Transcript, p. 5; *see also* Record, Volume I, p. 26 (Minute Entry for March 28, 2017).

¹⁰ Upon offering this exhibit, the prosecutor stated:

Your Honor, I’ve also provided Defense Counsel the requirements from the World Health Organization, the Management of Drugs at Health Center Level.

* * *

[T]o substantiate, not only my argument, I’ve researched the requirements for a prescription abroad, so, at this time the State will offer, file, and introduce State’s Exhibit 2, to help the interpretation of the actual prescription, which has been presented by Defense Counsel as being valid.

Record, Volume II, 3/28/17 Transcript, pp. 6-7; *see also* Record, Volume I, p. 26 (Minute Entry for March 28, 2017).

At the conclusion of the hearing, the district court granted Mr. Ioveniti's motion, stating as follows:

The Court sees no difference in the information previously provided by the State [sic], that led to this Court's ruling on October 13, 2015. So, by that very nature the Court is ruling in the same manner in which it ruled on October 13, 2015.

The district court then read its previous written judgment into the record.

Subsequently, the district court issued another written judgment, again granting the motion to quash. This appeal followed.

On January 11, 2018, this court, on its own motion, ordered the district court to "supplement the record on appeal with all exhibits entered into evidence at the March 28, 2017 hearing on Mr. Ioveniti's motion to quash." In response, the district court provided this court with copies of the following documents:

- the Affidavit, marked for identification as "Exhibit 'A,' 2 pages";¹¹
- two pages of hand-written invoices, marked for identification as "Exhibit 'B,' 2 pages";¹² and
- a one-page document, not marked for identification, purporting to be a prescription for "Hidrocodone," Xanax, and Valium.¹³

The district court provided no documents marked for identification as Defense Exhibits 1 or 2; nor did the district court provide either of the State's exhibits.

DISCUSSION

The existence of a valid prescription is an affirmative defense to prosecution for certain violations of the UCDSL. *See* La. R.S. 40:967(C); La. R.S. 40:968(C); La. R.S. 40:969(C); La. R.S. 40:970(C). The affirmative defense must be asserted before trial in a motion to quash. *See* La. R.S. 40:991(C); La. C.Cr.P. 532(10). The

¹¹ *See also* Record, Volume I, pp. 162-63.

¹² *See also* Record, Volume I, pp. 164, 166, 192.

¹³ *See also* Record, Volume I, pp. 167, 193.

motion presents a mixed question of law and fact. *See State v. Tran*, 12-1219, p. 2, n. 3 (La. App. 4 Cir. 4/24/13), 115 So.3d 672, 673. Thus, the motion requires a contradictory hearing. La. C.Cr.P. art. 537; *Ioveniti I*, 15-1356 at pp. 2-3, 194 So.3d at 1146 (observing that “La. C.Cr.P. art. 537 mandates a contradictory hearing on motions to quash” and collecting cases).

At such a hearing, the defendant bears the burden of producing evidence sufficient to prove the factual allegation in his motion—the existence of a valid prescription. *See* La. R.S. 40:991 (providing that “[a]n individual who claims possession of a valid prescription for any controlled dangerous substance as a defense to a violation of the provisions of the [UCDSL] shall have the obligation to produce sufficient proof of a valid prescription to the appropriate prosecuting office.”). The Code of Evidence is fully applicable at the hearing; and the defendant’s evidence, to be considered, must be admissible. *State v. Rainey*, 14-0523, p. 5 (La. App. 4 Cir. 9/17/14), 150 So.3d 370, 373 (observing that “rulings on motions to quash based on La. Code Crim. Proc. art. 532(10), which require factual determinations by the trial court, also require application of the rules of evidence”).

A district court’s ruling on a motion to quash under La. C.Cr.P. art. 532(10) is reviewed under an abuse of discretion standard. *State v. Rainey*, 14-0523, p. 1 (La. App. 4 Cir. 9/17/14), 150 So.3d 370, 371 (citing *State v. Tran*, 12-1219, p. 2 (La. App. 4 Cir. 4/24/13), 115 So.3d 672, 673; *State v. Williams*, 12-0110, p. 2 (La. App. 4 Cir. 10/10/12), 101 So.3d 533, 534).

For the reasons separately assigned, a majority of the panel affirms as to Count 6; a majority of the panel reverses the judgment of the district court as to Counts 1 and 2 and remands.

DECREE

The judgment of the district court granting Mr. Ioveniti's motion to quash as to Count 6 is affirmed; the judgment of the district court granting Mr. Ioveniti's motion to quash as to Counts 1 and 2 is reversed; and the case is remanded.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED